APPEAL NO. 08-4585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Relators-Appellants

v.

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

Respondents-Appellees

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

BRIEF OF APPELLANTS

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vs.	:	
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	
Respondents-Appellees.	:	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Dana Skaggs and Kyle Fannin make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No

/s/ John W. Zeiger — Dated: November 20, 2008

John W. Zeiger (0010707)
Lead Counsel for Relators-Appellants

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STATEMENT REGARDING ORAL ARGUMENT

This appeal necessarily raises, in the first instance, the significant constitutional issue of the District Court's improper expansion of federal court subject-matter jurisdiction. Relators, who are all Ohio residents, sought a remedy available under the Ohio Constitution, against Ohio Respondents for violations of an Ohio election statute. It was filed before the Ohio Supreme Court. Although no federal claim was advanced, the Ohio Secretary of State removed it to the District Court. The District Court refused to remand this case, holding that somehow this action implicated a prior Consent Order (cited by the Secretary of State in defense) and this supported federal subject-matter jurisdiction. Such a result was squarely rejected by this Court in City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007).

The second issue, which involves the interpretation of Ohio's elections laws as applied to provisional ballots, is likewise substantial and, given that Ohio has yet to certify its election results, of great time sensitivity. Literally, the eligibility of votes potentially impacting the final election results remains in limbo.

While these important issues are certainly deserving of the attention of an oral argument, the time constraints imposed here make time of the essence, and thus, it is respectfully submitted that this appeal be resolved on the parties' written submissions.

I. JURISDICTIONAL STATEMENT

As set forth herein, the District Court lacked subject matter jurisdiction over the removed action. Nonetheless, on the basis of its erroneous assumption of jurisdiction, on November 20, 2008, the District Court granted summary judgment to Secretary Brunner and entered a final judgment. As a result, such order was a final order in a civil case, and the Court has jurisdiction to consider this appeal under 28 U.S.C. § 1291. In addition, because a final order has been entered, the Court has jurisdiction to consider the District Court's denial of Relators' motion to remand. City of Warren v. City of Detroit, 495 F.3d 282, 286 (6th Cir. 2007). Relators filed their notice of appeal on November 20, 2008.

II. STATEMENT OF ISSUES PRESENTED

1. Whether the District Court erred in concluding that the Franklin County Board of Elections, as the party ultimately responsible for evaluating and counting provisional ballots, is merely a nominal party, whose consent is not required for removal of a state court action to federal court.

2. Whether the District Court erred in concluding that the Franklin County Board of Elections' consent to removal was unnecessary, because it had not yet received service of process at the time of removal, even though the Board had entered an appearance in the Ohio Supreme Court action, and even though the Secretary of State, herself, had not yet received service of process at the time of removal.

3. Whether the District Court erred in granting the Secretary of State's motion to realign the Franklin County Board of Elections as a Relator where the Board was the subject of Relators' request for interim injunctive relief and where the Board has ultimate responsibility for evaluating and counting provisional ballots.

4. Whether the District Court erred in concluding that Relators' Complaint, which asserts only state-law claims for Mandamus relief against a state official, pursuant to express Ohio statutory provisions and which expressly disavows any federal claims, nonetheless asserts federal claims for relief.

5. Whether the District Court erred in concluding that consent orders entered in another case, to which Relators were not parties, create federal question jurisdiction in a removed action.

6. Whether the District Court erred in concluding that state law claims that purportedly implicate federal consent orders entered in another proceeding necessarily give rise to federal question jurisdiction.

7. Whether the District Court had subject matter jurisdiction, in a Mandamus action under the Ohio constitution, to interpret the meaning of Ohio statutes.

8. Whether the District Court erred in failing to strictly apply the terms of Ohio Revised Code § 3505.183(B)(1) (ADD-12), which was promulgated by the Ohio General Assembly pursuant to 42 U.S.C. § 15482(a)(4) (ADD-1).

9. Whether the District Court erred in failing to apply or erroneously applying the applicable canons of statutory construction in interpreting Section 3505.183(B)(1) of the Ohio Revised Code.

10. Whether the District Court erred in concluding that federal consent orders, to which Relators were not parties, somehow trump the plain, unambiguous language of Ohio statutes.

III. STATEMENT OF THE CASE

Relators Dana Skaggs and Kyle Fannin ("Relators") filed this Original action in mandamus on November 13, 2008 in the Ohio Supreme Court. Ohio Secretary of State Jennifer Brunner ("Secretary Brunner") and the Franklin County Board of Elections (the "Board") were named as Respondents. [Rec. Entry 3.]

Pursuant to Chapter 2731 of the Ohio Revised Code, Relators sought a writ of mandamus compelling, among other things: (1) Secretary Brunner to correct her erroneous instruction to the Board, based on an erroneous interpretation of Section 3505.183(B)(1)(a) of the Ohio Revised Code, and compelling her to advise the county Boards of Elections that any Provisional Ballot Application cast in the November 4, 2008 election must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted; and (2) compelling Secretary Brunner and the Board to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation required by R.C. 3505.183(B)(1)(a). [Id.] Relators also sought ancillary injunctive relief to preclude the opening of provisional ballot application envelopes pending a resolution of the merits of their claims. [Rec. Entry 5 (motion).] On November 13, 2008, the Franklin County Prosecutor's Office entered an appearance in the Ohio Supreme Court action, on behalf of the Board. [Rec. Entry 11, Exhibit A to Motion to Remand.]

On November 14, 2008, Secretary Brunner, without obtaining the consent of the Board, removed the action to the U.S. District Court for the Southern District of Ohio. [Rec. Entry 2 (notice of removal).] Relators promptly objected to the District Court's exercise of jurisdiction, and Relators, as well as the Board, filed

respective motions to remand the action to the Ohio Supreme Court on November 14, 2008. [Rec. Entries 11 and 12.] Also on November 14, 2008, Secretary Brunner filed a motion to realign the Board as a Relator, in light of its refusal to consent to removal. [Rec. Entry 15.]

On November 17, 2008, the District Court granted Secretary Brunner's motion to realign the Board as a Respondent, and determined that the District Court had subject matter jurisdiction to retain the removed action. [Rec. Entry 20 (order).] Thereafter, the parties agreed to submit cross motions for summary judgment, which they did on November 18, 2008. [Rec. Entries 31, 34, 37 (summary judgment motions).] In addition, after the District Court indicated it would rule on the cross motions by 5:00 p.m. Thursday, November 20, the parties agreed that no provisional ballot applications would be opened prior to 9 a.m. on Friday, November 21, 2008. Thus, Relators' motion for interim injunctive relief was withdrawn.

Finally, on November 20, 2008, the District Court issued its decision granting Secretary Brunner's Motion for Summary Judgment, and denying the Motions for Summary Judgment filed by Relators and the Board. Relators immediately filed their Notice of Appeal on November 20, 2008.

IV. STATEMENT OF FACTS

A. The November 4, 2008 Election And The Provisional Voting Process.

Unofficial returns from the November 4, 2008 election (the "Election") indicate that Republican Steve Stivers leads Democrat Mary Jo Kilroy by nearly 400 votes in the election for the 15th Congressional District seat; Democrat Nancy Garland leads Republican Jim McGregor by 783 votes in the 20th House District race; and, Democrat Marian Harris is 40 votes ahead of Republican Brad Lewis in the 19th House District (the "Undecided Races"). [Rec. Entry 3, p. 20, Affidavit of Matthew M. Damschroder ¶ 2 (hereinafter, "Damschroder Aff'd").] The outcome of each of these three elections may be determined by the provisional ballots the Board is now reviewing for eligibility but which have not yet been counted. [Id.] More than 27,000 provisional ballots were cast in Franklin County in the Election. [Id. at ¶ 3.]

Pursuant to Section 3505.181 of the Ohio Revised Code [ADD-3], a voter may cast a provisional ballot if his or her name does not appear in the poll list; he or she fails to provide required identification at the polling place on the day of the Election; the voter previously requested an absentee ballot; and for other specified reasons. [See also id.] If the voter wishes to cast a provisional ballot, he or she is provided a Provisional Ballot Application prepared by the county Board of Elections and a ballot. [Id. at ¶ 4; a sample application was attached as Exhibit A

to the Damschroder Aff'd.] The Provisional Ballot Application specifically requires that the voter provide her name, signature, and verifying identification information or, alternatively, requires her to sign the identification verification affirmation required by R.C. 3505.18(A)(4). The Application is printed on an envelope into which the voter inserts his or her provisional ballot. [Rec. Entry 3, p. 20, Damschroder Aff'd ¶ 4.] The voter then seals the envelope. [Id.]

B. The Provisional Ballot Verification And Counting Process.

Upon receiving the sealed provisional ballot applications, a county Board of Elections is required to use the voter-provided information on the Application to determine the voter's eligibility to cast a provisional ballot. [Damschroder Aff'd at ¶ 5.] Such information is then cross-checked against the information of the Board of Elections, and of other county Boards of Elections, to determine the eligibility of the provisional ballot voter. [Id.] If, upon completing its review, the Board of Elections determines that a provisional ballot voter is eligible to vote, the envelope on which the Provisional Ballot Application is printed is opened and the ballot is removed. [Id. at ¶ 6.]

To maintain secrecy, the Board of Elections then separates the Provisional Ballot Application from the ballot it contains and commingles the ballot with all other provisional ballots cast in the Election. [Id.] Thus, once the Provisional Ballot Application envelope is opened, it is impossible to determine the votes of

any particular provisional voter, making an after-the-fact assessment of the appropriateness of the Board of Elections' determination as to the eligibility of any particular provisional ballot voter impossible. [Id.] Thus, consistent with the Board of Elections' statutory mandate, disputes regarding the eligibility of Provisional Ballot Applications must be resolved before the Provisional Ballot Applications are opened and the enclosed ballots are separated from the Application envelopes. See Ohio Rev. Code § 3503.183(D) ("No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county ….").

C. Initial Processing Reveals Significant Flaws In A Number Of Franklin County Provisional Ballot Applications.

Initial processing by the Franklin County Board of Elections suggests that the majority of the Provisional Ballot Applications have been submitted by Franklin County voters who are eligible under the applicable statutes. [Rec. Entry 3, p. 20, Damschroder Aff'd ¶ 8.] Such processing also suggests, however, that a number of the Provisional Ballot Applications are fatally flawed because the voter who tendered the provisional ballot is either not properly registered to vote or voted in an incorrect precinct. [Id.] As a result, the eligibility of a high percentage of provisional voters is clear. [Id. at ¶ 9.]

Nonetheless, a dispute has arisen regarding the eligibility, under the Ohio election statutes, of certain categories of provisional ballots. These include, *inter*

alia, Provisional Ballot Applications on which the voter failed to provide *both* his or her name and her signature in the appropriate place. [Id. at ¶ 10.] The Franklin County Provisional Ballot Application clearly indicates, in capital letters, underscored, and in bold type: the provisional ballot voter is directed to "CLEARLY PRINT NAME-**(REQUIRED)**" and provide the "VOTER'S SIGNATURE-**(REQUIRED)**." [See Rec. Entry 3, p. 20, Damschroder Aff'd ¶ 10.] Despite the clarity of this language, approximately 3-4 percent of the Franklin County Provisional Ballot Applications lack either the name or signature, or both, that is specifically required by the Application. [Rec. Entry 3, p. 20, Damschroder Aff'd ¶ 10.]

D. The Secretary Of State's Pre-Election Direction, Consistent With The Applicable Statutory Language.

On March 31, 2008, Brian Shinn, Assistant General Counsel to Secretary of State Jennifer Brunner, responded to a series of questions from the Franklin County Board of Elections regarding procedures for counting provisional ballots. [Id. at ¶ 11, Rec. Entry 3, p. 32, Exh. B to Damschroder Aff'd (e-mail).] In response to a question regarding a voter's failure to provide both her name *and* signature on a provisional ballot application, Shinn advised:

> 5) Voter did not print his or her name on column 1 but signed the provisional ballot affirmation statement. The ballot cannot be counted unless the voter's name appears somewhere on the provisional ballot affirmation envelope written by the voter or a poll

> worker. Name AND signature are required by R.C. 3505.183(B)(1)(a) as stated above.
>
> [Emphasis in original.]

Shinn's March 31, 2008 instruction that a voter's failure to provide both her "Name AND signature" was consistent with the Secretary of State's pre-Election interpretation of the *plain and unambiguous language* of Section 3505.183(B)(1)(a) of the Ohio Revised Code. In fact, Section 3505.183(B)(1)(a) could not be clearer:

> . . . the following information *shall be included* in the written affirmation [on the Provisional Ballot Application] *in order for the provisional ballot to be eligible to be counted*:
>
> (a) The individual's *name and signature*;

Consistent with this unambiguous statutory language and the pre-election e-mail instruction of March 31, 2008 from Secretary Brunner's office, the Prosecuting Attorney's Office of Franklin County has advised the Franklin County Board of Elections that Ohio statutes require that the provisional ballot voter must provide both her name and her signature to be eligible to have her Provisional Ballot Application opened and her ballot counted. [Rec. Entry 3, p. 20, Damschroder Aff'd ¶ 13; Rec. Entry 3-2, p. 1, Exh. D to Damschroder Aff'd (e-mail chain containing correspondence with Prosecutor's office).] The Franklin County Board of Elections was prepared to follow the pre-Election instructions of the Secretary of State and to disqualify as fatally flawed all provisional ballots that

did not comply with Mr. Shinn's conclusion that "Name AND signature are required by R.C. 3505.183(B)(1)(a). . . ." [Damschroder Aff'd at ¶ 14.]

E. The Secretary Of State's Post-Election Change Of Course At The Prompting Of A Political Campaign Attorney.

On Monday, November 10, after the Franklin County Board of Elections had released its initial tallies showing that Democrat Mary Jo Kilroy trailed Republican Steve Stivers by nearly 400 votes for the 15th Congressional District seat, Bob DeRose, a lawyer for the Kilroy Committee, challenged the determination of the Secretary of State that R.C. 3505.181(B)(1)(a) mandates that a Provisional Ballot Application is ineligible to be counted unless it contains both the name *and* the signature of the provisional ballot voter**.** [Rec. Entry 3-2, p. 1, Exh. D to Damschroder Aff'd (e-mail chain containing DeRose e-mail).] In his e-mail, which was copied to, among others, attorney Shinn, DeRose went so far as to assert that a provisional ballot must be counted even if it lacks both the printed name *and* the signature of the provisional ballot voter. [Id.]

Later that same day, Shinn responded, reversing his prior instruction of March 31, 2008 that both the "Name AND signature are required by R.C. 3505.183(B)(1)(a) . . . ." [Rec. Entry 3, p. 20, Damschroder Aff'd ¶ 16.] Rather, in response to the DeRose request, Shinn directed that the Board of Elections deem eligible Provisional Ballot Applications that do not contain "the voter's name anywhere on the provisional ballot envelope" as long as "your board can determine

from the information provided by checking addresses and the digitized signature in your VR database that the person is registered to vote, voted in the correct precinct and that the person was not required to provide additional information/id within 10 days. . . ." [Rec. Entry 3-2, p. 1, Exh. D to Damschroder Aff'd (e-mail chain containing Shinn's November 10 e-mail).] Shinn went so far as to indicate that if a voter's signature is found on the provisional ballot envelope, "but not necessarily in the correct place[s]" (i.e., it is not set forth as the provisional ballot voter's execution of the written affirmation expressly required by R.C. 3505.181(B)(2)), then "the provisional ballot can be counted." [Id.] In a subsequent e-mail sent November 12, 2008, Shinn confirmed that the Secretary of State agreed with his change of course, and concurred with and adopted his November 10, 2008 direction to the Franklin County Board of Elections. [Damschroder Aff'd at ¶ 17; Exh. D to Damschroder Aff'd (e-mail chain containing Shinn's November 12, 2008 e-mail).]

As stated on the record before the District Court during oral argument, the Board, during its November 13, 2008 meeting, ultimately reached a number of tie votes as to whether certain types of flawed provisional ballots would be counted: (1) those where the voter executed the affirmation statement required under Section 3505.181(B)(2) of the Revised Code, but did not provide his or her printed name; (2) those where the voter provided his or her printed name but did not

execute the affirmation by signature; (3) those where the voter executed the application in the wrong place (i.e., not in the required affirmation); and (4) those where the voter failed to provide the necessary voter identification information and/or identification affirmation. Pursuant to Ohio Revised Code § 3501.11(X), Secretary Brunner will cast the tie-breaking vote.

F. Relators' Actual Claims.

In this action, Relators sought a writ of mandamus, under the *Ohio Constitution*, compelling Secretary Brunner to correct her office's post-election, erroneous instruction to the Board to count provisional ballots even where the provisional voter did not comply with the voter's obligations, under *the Ohio Revised Code*, in completing the Provisional Ballot Application. As Relators note in the opening paragraph of the Complaint, *"[n]o federal law claims are asserted,"* and, thus, Relators' Complaint has nothing to do with federal law. [Rec. Entry 3, p. 4, Complaint (emphasis added).]

Rather, Relators' request for relief turns on the application of the plain language of Ohio Revised Code Section 3505.183(B)(1), quoted above, which instructs the Ohio Boards of Elections, in *mandatory* terms, that both the "name and signature" of a provisional voter must be included in the written affirmation submitted by the elector "*in order for the provisional ballot to be eligible to be counted.*"

V. SUMMARY OF ARGUMENT

Congress made "conspicuously" clear in 42 U.S.C. § 15482(a)(4) that "the issue of whether a provisional ballot will be counted as a valid ballot" is left "to the States." Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6th Cir. 2004). Indeed, the Ohio General Assembly has prescribed specific mandatory requirements for determining the eligibility of a provisional ballot.

To remedy Secretary Brunner's violation of those mandatory requirements established by the Ohio General Assembly, Relators, who are all Ohio residents, sought a remedy available under the Ohio Constitution, against Ohio Respondents for violations of an Ohio election statute. Although no federal claim was advanced, Secretary Brunner removed it to the District Court. The District Court refused to remand this case, holding that somehow this action implicated a prior Consent Order and this supported federal subject-matter jurisdiction. Such a result contradicts this Court's decision in City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007).

Thus, this appeal necessarily raises, in the first instance, the significant constitutional issue of the District Court's expansion of federal court subject-matter jurisdiction, which is, of course, specifically circumscribed under Article III of the Constitution. It is clear, we respectfully submit, that the District Court improvidently extended its jurisdiction to address a state law dispute. That subject-

matter jurisdiction is lacking is clear in multiple respects. From a procedural standpoint, the District Court allowed the removal to stand even though all Respondents had not "consented" to the removal, thus violating the "rule of unanimity," which recognizes that a defendant's notice of removal is ineffective unless *all defendants have been properly joined in the notice*. Harper v. AutoAlliance Intern., Inc., 392 F.3d 195, 201 (6th Cir. 2004).

The removal was also substantively defective. No federal subject-matter jurisdiction existed. No federal claim was asserted, and under the well-pleaded complaint rule, this is dispositive. Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006) (ADD-15). Secretary Brunner's defenses do not serve as a basis for removal. Nor does the District Court's prior Consent Order in an unrelated case, as made clear by this Court in City of Warren, 495 F.3d 282.

Nevertheless, even if the District Court's jurisdiction could somehow be constitutionally extended to permit resolution of state law issues among non-diverse parties, the District Court effectively rewrote the Ohio Election laws. Specifically, the mandatory eligibility requirements of Section 3505.183(B)(1) of the Ohio Revised Code, which are designed to prevent voter fraud, have been effectively eliminated. This judicial rewrite is in violation of multiple cannons of statutory construction. As this Court has stated, *"the judiciary's job is to enforce the law [that the legislature] enacted, not to write a different one that judges think*

superior." Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005) (emphasis added).

VI. STANDARD OF REVIEW

All issues presented in this appeal are subject to *de novo* review. First, "[t]his court reviews denials of motions to remand to state court de novo, … and examines 'whether the case was properly removed to federal court in the first place ….'" City of Warren v. City of Detroit, 495 F.3d 282, 286 (6th Cir. 2007). Second, the Court reviews "a district court's decision regarding subject matter jurisdiction de novo." Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 759 (6th Cir. 2000). Finally, a district court's decision granting summary judgment is reviewed *de novo*. 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485, 490 (6th Cir. 2008).

VII. ARGUMENT

A. The District Court Lacked Jurisdiction To Retain The Removed Action.

> "Federal courts are courts of *limited jurisdiction*. They possess only that power authorized by Constitution and statute, … which is not to be expanded by judicial decree, …. *It is to be presumed that a cause lies outside this limited jurisdiction*, … and the burden of establishing the contrary rests upon the party asserting jurisdiction, …."
>
> [Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994) (emphasis added).]

The District Court has turned this bedrock principle of federal jurisprudence on its head.[1] Indeed, this case is no different than that remanded for lack of jurisdiction by this Court in Tennessee ex rel. Crotteau v. Chattanooga Women's Clinic, 1992 WL 107025, *2 (6th Cir. May 18, 1992) (ADD-25):

> [Relators'] complaint alleges a purely state cause of action. State law is invoked to complain about the failure of state authorities to [apply] a state statute. The [Relators] are a group of [Ohio] citizens, purporting to act in the name of the state of [Ohio]. … [T]hose whose actions are complained of [is an Ohio] 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, or treaties of the United States. . . . However, the [Relators'] complaint makes no reference to any federal statute or cause of action.

Yet, in denying Relators' motion to remand the case to the Ohio Supreme Court, the District Court determined that it had subject matter jurisdiction solely on the basis of consent orders cited by Secretary Brunner as a defense and entered between unrelated parties in *another action* and Secretary Brunner. The import of

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[1] Any doubts with respect to the effectiveness of removal should be resolved in favor of remand to state court. See Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 (6th Cir. 1999) ("[S]tatutes conferring removal jurisdiction are to be construed strictly because removal jurisdiction encroaches on a state court's jurisdiction. Thus, in the interest of comity and federalism, federal jurisdiction should be exercised only when it is clearly established, and any ambiguity regarding the scope of § 1446(b) should be resolved in favor of remand to the state courts.").

this ruling is (1) that the consent orders established a new rule of law with respect to Ohio provisional ballots; and (2) as a result of the consent orders, the District Court will forever more serve as the sole arbiter of any disputes relating to provisional ballots under Ohio law, including all disputes where an application of this new rule of law is required.

Fortunately, precedent from both the Supreme Court and this Circuit holds otherwise. There is no subject-matter jurisdiction supporting the removal of a dispute premised upon the plain meaning of an unambiguous *Ohio statute*.

1. The "Rule Of Unanimity" Bars Removal.

The District Court's acceptance of removal jurisdiction fails to get past the threshold bar imposed by the "rule of unanimity," which recognizes that a defendant's notice of removal is ineffective unless *all defendants have been properly joined in the notice*. See, e.g., Harper v. AutoAlliance Intern., Inc., 392 F.3d 195, 201 (6th Cir. 2004). The Board, which had entered an appearance as a Respondent in the Ohio Supreme Court action, refused to consent to removal. Thus, the Secretary of State's notice of removal, on its face, was defective for failure to comply with the rule of unanimity.

To circumvent this settled rule, the District Court determined: (1) that the Board was merely a nominal party, purportedly with no interest in the actual litigation; and (2) that the Board was not served with process and, thus, its consent

to removal was unnecessary. The District Court also decided to realign the Board as a Relator because, according to the District Court, the Board's interests (albeit nominal) were more appropriately aligned with Relators. But the rule of unanimity cannot be so easily disregarded and, as set forth below, none of these purported justifications for circumventing the rule applies on the specific circumstances of this case.

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

First, as the Southern District itself has recognized, for purposes of the rule of unanimity, a party is not merely "nominal" where it has a "demonstrated interest in the outcome of the case." See Local Union No. 172 Int'l Ass'n of Bridge, Structural Ornamental and Reinforcing Ironworkers v. P.J. Dick Inc., 253 F. Supp. 2d 1022, 1027 (S.D. Ohio 2003). There is little doubt that the Board, as the party ultimately responsible for reviewing and evaluating the Provisional Ballot Applications at issue in this case, has a demonstrated interest in the outcome thereof. Indeed, the Board is absolutely necessary with respect to Relators' request for ancillary injunctive relief, which, if granted, would impact the Board's ability to open the Provisional Ballot Application envelopes.

The fact that Secretary Brunner will cast the tie-breaking votes does not change the fact that the ultimate decision, with respect to the disputed provisional ballots, remains *the Board's* and that it is the Board which determines the timing of

opening of the Provisional Ballot Application envelopes. Thus, the Board, as the ultimate decision-making body, has a "demonstrated interest in the outcome of the case," and under no conceivable meaning of the word could it be considered a "nominal" party in this case.

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

Second, the fact that the Board had not yet received official service of process from the Ohio Supreme Court at the time of removal does not provide a basis for disregarding the rule of unanimity where, as here, the Board entered an appearance in the action. Indeed, a party's entry of appearance as defendant in the action to be removed invokes the rule of unanimity—even absent actual service of process—and, thus, such party's consent is required for effective removal. See First Independence Bank v. Trendventures, L.L.C., 2008 WL 253045, *6 (E.D. Mich. 2008) ("Because *[one of multiple defendants] has appeared in this action with respect to First Independence Bank's Original Complaint, the non-service exception does not apply.")* (emphasis added) (ADD-28). As another court expressly stated, "[t]he entry of appearance and the subsequent failure to petition for removal on the part of Lloyd's *would require that the cause be remanded even though the original service was not good.*" Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co., 220 F. Supp. 222, 227 (D. Mo. 1963).

It is unremarkable that the Board had not received service of process in the Ohio Supreme Court action at the time of removal given that, pursuant to Ohio Supreme Court Rule X, Section 4(A), service of process was to be completed by certified mail. Presumably, Secretary Brunner—whose office is literally blocks from the office of the Board—had, likewise, not yet received such process at the time of removal (i.e., the day after the filing of the action). The District Court's rule would permit one defendant that has not received service to remove without the consent of another defendant in a similar position, even though the latter has entered an appearance in the case. Such a rule would not only create a race to remove, but it would eviscerate the protections afforded all defendants by the rule of unanimity.

The case law discussed above precludes such an absurd result. Having entered an appearance in the Supreme Court action, the Board cannot now be excluded from the removal process. Rather, its consent was necessary for effective removal. In the absence of such consent, the case must be remanded.

c. No Basis For Realignment Of The Parties Existed.

Third, the District Court's decision to realign the Board with Relators, solely as a means of defeating the rule of unanimity, was improper. As courts have recognized, realignment of a defendant is improper where the defendant sought to be realigned has "some adverse" interests with the plaintiff. This is particularly

true where a defendant seeks realignment of another defendant only to avoid the rule of unanimity. See, e.g., Arnold v. Drake, 1993 WL 255140, *4 (E.D. La. June 28, 1993) (rejecting realignment, in rule of unanimity context, because the defendant sought to be realigned as plaintiff had "some adverse interests" with the plaintiff) (ADD-37). The mere fact that a defendant shares the plaintiff's "desire to return to State court jurisdiction" does not justify realignment. Folts v. City of Richmond, 480 F. Supp. 621, 624 (E.D. Va. 1979).

Secretary Brunner offered no evidence in support of her Motion for Realignment in this case. Instead, the District Court based its realignment decision on: (1) the fact that Matthew Damschroder, the Board's Deputy Director, executed a purely factual affidavit that is most pertinent to Relators' request for interim injunctive relief; and (2) the fact that the Franklin County Prosecutor's office, as the Board's *statutory counsel*, sent an e-mail to the Board (attached to the Damschroder affidavit) that disagreed with Secretary Brunner's interpretation of a plain and unambiguous Ohio statute.

On the basis of these two items, the District Court determined that the Board's interest—which, ironically, the Court otherwise found to be "nominal"—was adverse to the Secretary of State and more appropriately aligned with Relators. Such a determination ignored the fact that the Board is the party ultimately charged with evaluating and counting the ballots and provisional ballot applications at issue

in this case. It also ignored that, because of the Board's tie votes with respect to the Ohio statutory issues presented in this lawsuit, Secretary Brunner's tie-breaking vote ultimately will dictate *the Board's decision*. Ohio Rev. Code § 3501.11(X). As a result of this tie-breaking procedure, the position of both the Board and Secretary Brunner will presumably be the *same*. Because Relators and the Board have adverse interests in this case, realignment was improper.

2. The District Court Lacked Subject Matter Jurisdiction To Consider Relators' State Law Claims.

a. Federal Jurisdiction Is To Be Measured By The Well-Pleaded Complaint.

Unanimity is just the first consideration. Even if all Respondents had consented, the removal was still defective inasmuch as no federal jurisdiction existed. On its face, Relators' Complaint asserts only *state law* mandamus claims, arising under the Ohio Constitution, that seek to compel a *state* official to instruct county boards of election consistent with the plain and unambiguous language of an *Ohio* statute. Such relief is directly authorized under Ohio law, and Relators' cause of action has been expressly recognized by the Ohio Supreme Court. State ex rel. Colvin v. Brunner, 2008-Ohio-5041, ¶ 20 (2008) ("[I]f the secretary of state 'has, under the law, misdirected the members of the boards of elections as to their duties, *the matter may be corrected through the remedy of mandamus*.'").

It is well settled that the nature of a party's claims, for purposes of removal jurisdiction, is to be determined from the face of the plaintiff's well-pleaded complaint. Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006). Thus, a plaintiff may avoid federal jurisdiction by pleading only state law claims. And any federal issues that a defendant might raise cannot confer removal jurisdiction on a federal court:

> Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. … Federal courts examine the well-pleaded allegations of the complaint for a federal question on its face, *and ignore potential defenses*, *id.*, 'including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.' …. *Since a plaintiff is the master of his complaint, … where a choice is made to assert only a state law claim, the general rule prohibits recharacterizing it as a federal claim.* …. Federal jurisdiction can therefore generally be avoided by relying exclusively on state law. ....
>
> [Valinski, 197 Fed. Appx. at 406 (emphasis added).][2]

[2] Absolute preemption provides a basis for removal *only* in four, specific statutory instances: Section 301 of the Labor Management Relations Act; Section 502(a)(1)(B) of ERISA; Section 85 and 86 of the National Bank Act; and Section 301(a) of the Copyright Act. Allied Erecting and Dismantling Co., Inc. v. Ohio Central R.R., Inc., 2006 WL 2933950, *4 (N.D. Ohio Oct. 12, 2006) (citing AmSouth Bank v. Dale, 386 F.3d 763, 776 (6th Cir. 2004)) (ADD-41). None of these specific statutes are, obviously, at issue here.

In short, "[w]hether a case is one arising under [federal law] … must be determined from what necessarily appears in *the plaintiff's statement of his own claim* in the bill or declaration …." Tennessee ex rel. Crotteau v. Chattanooga Women's Clinic, 1992 WL 107025, *2 (6th Cir. May 18, 1992) (emphasis added) (citation omitted). "By unimpeachable authority, 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. (quoting Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)). See also Beard v. Aurora Loan Services, LLC, 2006 WL 1350286, *3 (S.D. Tex. May 17, 2006) ("Plaintiff expressly disclaims any rights and causes of action under any federal law …. This language clearly shows that Plaintiff elected to proceed in state court on the exclusive basis of state law. Thus, under the well-pleaded complaint rule, there is no federal question jurisdiction.") (ADD-46).

b. No Prior Consent Order Was Implicated.

The District Court purported to rely on the "artful pleading" exception to the "well pleaded complaint" rule in holding that Relators' complaint really arose under federal law. But as this Court has previously held, this exception to the general rule is inapposite where, as here, there is no finding that "federal law completely preempts a plaintiff's state-law claims …." City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007). See also Terrebonne Homecare, Inc. v.

SMA Health Plan, Inc., 271 F.3d 186, 188 (5th Cir. 2001) ("The artful pleading doctrine is a narrow exception to the well-pleaded complaint rule, and it prevents a plaintiff from defeating removal by failing to plead necessary federal questions. … The artful pleading doctrine does not apply, however, unless federal law completely preempts the field.").

The District Court cannot contend that its consent orders completely preempt Ohio's law regarding the counting of provisional ballots—a right *expressly reserved to the states under 42 U.S.C. § 15482(a)(4)*. Just as in City of Warren, "[a]s there is no allegation that [Relators'] claims are identical to federal claims, or are completely preempted by federal law, the artful-pleading doctrine does not apply. Therefore, [Relators'] claims do not arise under federal law." City of Warren, 495 F.3d at 287.

Thus, the District Court attempted to fashion a brand new exception to the well-pleaded complaint rule, concluding that because Relators' express state statutory claims relate to provisional ballots, such claims necessarily implicate prior consent orders and, as a result, federal question jurisdiction is automatically created. This is wrong. These consent orders were entered in consolidated actions involving, *inter alia*, the Northeast Ohio Coalition for the Homeless, a homeless advocacy group, the Ohio Republican Party, and the Ohio Secretary of State. Relators were not parties to such actions or to the consent orders entered therein.

The first consent order at issue, entered by the District Court on October 27, 2008, provided only, in pertinent part, that "provisional 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." [Rec. Entry No. 3, October 27, 2008 Consent Order, at 2 (Exhibit B to Notice of Removal).] The second consent order at issue, entered on October 24, 2008, addressed certain issues with respect to provisional ballots, and resulted in the issuance of Secretary Brunner's Directive 2008-101, which is cited, merely as background information, in Relators' complaint.

By definition, a consent order is simply a private settlement between the parties to the dispute, and it cannot be enforced against non-parties to such order. Indeed, as this Court noted in City of Warren:

> Although a consent judgment is enforceable by the court, the source of the court's authority to require the parties to act is the parties' acquiescence, not rules of law. … Therefore, 'parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement.
>
> [City of Warren, 495 F.3d at 287 (emphasis added).]

More fundamentally, the mere fact that an Ohio statute might implicate issues addressed in a consent order does not provide a basis for federal

jurisdiction.[3] That is, the mere existence of a federal consent order does not supersede the plain and unambiguous language of a state statute, and it does not serve as a magic talisman that allows a district court to obtain federal question jurisdiction over purely state law claims.

Once again, City of Warren, 495 F.3d 282, is directly on point. In that case, the Court held that a district court lacked subject matter jurisdiction over a removed action, where the sole basis for removal was the defendant's contention that the plaintiff's well pleaded state law contract and statutory claims threatened the "integrity" of prior consent orders to which the plaintiff was not a party. In holding that federal question jurisdiction could not be premised on the consent orders, this Court noted that "[a]lthough a consent order is enforceable by the court, the source of the court's authority to require the parties to act is the parties' acquiescence, not rules of law." Id. at 287. Thus, even if somehow implicated by the plaintiff's state law claims, the prior consent orders did not create federal

[3] Taken to its logical conclusion, the District Court's position would create federal jurisdiction over any claim asserted pursuant to an Ohio statute, if the statutory issues presented are in any way related to any federal consent orders ever issued, regardless of whether the party asserting such claims was a party to the orders at issue.

jurisdiction, because such orders "lack[ed] the power to *supersede … the Michigan statute*" at issue. Id.[4]

The same is clearly true here. Relators' well-pleaded Complaint expressly states that no issues of federal law are asserted. Rather, the Complaint is expressly limited to state law claims for mandamus relief, which seek enforcement of Secretary Brunner's duties under *a plain and unambiguous Ohio statute*. The consent orders entered in a case to which Relators were not a party did not vest the

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[4] The District Court further relied on EBI-Detroit, Inc. v. City of Detroit, 279 Fed. Appx. 340 (6th Cir. 2008) (ADD-54), for the proposition that a consent order could provide a basis for federal question jurisdiction. But, the District Court's conclusion stretches the EBI holding well beyond its limited boundaries. Indeed, in that case, the Court recognized the existence of a federal question only where the plaintiff's well-pleaded complaint *expressly asserted* a claim against the Mayor of Detroit for abuse of discretion in his capacity as a "Special Administrator" appointed pursuant to a federal consent order. Id. at 346. In other words, as the Court recognized, a federal question was presented because the Complaint expressly alleged that "Kilpatrick broke federal law by exceeding his powers as Special Administrator, and it is this substantive legal allegation that creates jurisdiction." Id. Thus, EBI does not stand for the proposition that any state law claim that arguably touches on the same topic as a federal consent order raises a federal question. Rather, it merely stands for the unremarkable proposition that a complaint that *expressly alleges a violation of federal law* may be removed to federal court.

Although Relators referenced Secretary Brunner's Directive 2008-101 in their Complaint, a plain reading reveals that they did so only to provide background information with respect to her statutory interpretations. Unlike in EBI, no claim is asserted that Secretary Brunner somehow violated the Directive, or that she abused her discretion pursuant to the Court order. As such, EBI, which addressed an express claim for violation of a federal consent order, simply does not support the strained and expansive reading given to it by the District Court.

District Court with subject matter jurisdiction in this case. Rather, the District Court lacked subject matter jurisdiction to hear these state law claims, and the case should be remanded to the Ohio Supreme Court.

B. Relators Are Entitled To Mandamus Relief.[5]

For all of the reasons set forth above, the District Court lacked subject matter jurisdiction to consider the removed action. Based on its erroneous assumption of jurisdiction, however, the District Court proceeded to determine the merits of Relators' claims. In doing so, it failed to apply the plain, unambiguous language of Section 3505.183(B)(1) of the Ohio Revised Code and the settled rules of statutory construction that should have controlled its analysis. In failing to correct Secretary Brunner's misdirection to the Board, the District Court reached a conclusion that is contrary to settled Ohio law.

1. Section 3505.183(B)(1) Is Mandatory, And Its Terms Must Be Strictly Applied.

At the outset, that the instant action may impact a federal congressional race is of no relevance, as Congress made "conspicuously" clear in 42 U.S.C. § 15482(a)(4) that "the issue of whether a provisional ballot will be counted as a valid ballot" is left "to the States." Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 577 (6th Cir. 2004). Consistent with this law, the Ohio

[5] Because the remedy of mandamus, in this context, appears to be available only under Ohio law, Relators have sought whatever remedy is appropriate under federal law to address Secretary Brunner's failure to comply with Ohio law.

General Assembly has set forth specific requirements for determining "whether a provisional ballot will be counted as a valid ballot." Specifically, Section 3505.183(B)(1), which is applicable to county boards of elections, provides:

> *To determine whether a provisional ballot is valid and entitled to be counted* … [t]he 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. … [T]he 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*;
>
> * * *
>
> (2) In addition to the information *required to be included* in an affirmation under division (B)(1) of this section …
>
> * * *
>
> (3) *If*, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that *all of the following apply, the provisional ballot envelope shall be opened, and* the ballot shall be *placed in a ballot box to be counted*:
>
> * * *
>
> (c) *The individual provided all* of the information required under division (B)(1) of this section in the affirmation that *the individual executed* at the time the individual cast the provisional ballot.
>
> [Ohio Rev. Code § 3505.183 (emphasis added).]

On their face, these statutory terms: (1) impose a mandatory obligation on county boards of election to ***reject*** a provisional ballot application where the voter failed include ***both*** his or her ***written name and signature*** on the required affirmation; and (2) clearly indicate that it is the ***voter's*** obligation to provide this required information on the provisional ballot application.

These mandatory obligations, apparent from the face of the statute, must be strictly applied under Ohio law. As explained by the Ohio Supreme Court, it is a "settled rule" that "election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is." State ex. rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008).[6] See also State ex rel. Evergreen Co. v. Board of Elections of Franklin County, 48 Ohio St. 2d 29, 31 (1976) ("It is a basic principle of law that … election statutes are mandatory and must be strictly complied with.").

Here, substantial compliance is insufficient. Where the legislature uses terms such as "shall contain" or "shall include," such terms are ***mandatory*** and, pursuant to the general rule, must be strictly applied:

> R.C. 3509.03 specifies that although an absentee-ballot application need not be in any particular form, it "***shall contain***" certain items, including a "statement that the

[6] Secretary Brunner conceded during oral argument there was no dispute that Section 3505.183(B)(1) of the Ohio Revised Code contained ***mandatory*** language that, under Ohio Supreme Court precedent, must be ***strictly*** applied. In her summary judgment briefing, Secretary Brunner completely revised her position.

> person requesting the ballots is a qualified elector." R.C. 3509.03(G). *"[T]he settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is."* … R.C. 3509.03 demands strict compliance insofar as absentee-ballot applications *must contain* the specified information.
>
> [Myles, 2008-Ohio-5097, ¶ 18 (emphasis added).]

See also State ex rel. Esch v. Lake County Board of Elections, 61 Ohio St. 3d 595, 596 (1991) (election statute with "shall contain" language set forth mandatory requirements, to be strictly applied).

Where an elections statute contains this mandatory language, the rule of strict construction also precludes the need to resort to public policy considerations. Rather, Secretary Brunner is obligated to apply the statute's "plain language," and no deference whatsoever is due her interpretations, irrespective of whether such guidance is embodied in a directive, email, manual, etc. See, e.g., State ex rel. Stokes v. Brunner, 2008-Ohio-5392, ¶ 29 (Oct. 16, 2008) ("[W]e need not defer to the secretary of state's interpretation because it … fails to apply the plain language" of the statute.); Myles, 2008-Ohio-5097, ¶ 26 (same).

Accordingly, the language of Section 3505.183(B)(1) is mandatory, and it expressly recognizes the *voter's* obligation to include both his or her name and signature on the provisional ballot application affirmation. In the absence of *any*

of these mandatory items, the Board of Elections is *required* to reject the provisional ballot. This statutory language could not be clearer, and when *strictly applied*, it is dispositive of Relators' claims in this case.

2. R.C. 3505.181(B)(2) Cannot Eviscerate The Provisions Of R.C. 3505.183(B)(1) That Unequivocally And *Mandatorily* Prohibit Respondents From Opening And Counting Provisional Ballot Applications Lacking Both The Name *And* Signature Of The Voter.

a. No Poll Worker Duty Arises Under The Plain Language Of R.C. 3505.181(B)(2).

Before the District Court, Secretary Brunner conceded the obvious: R.C. 3505.183(B)(1) makes it mandatory that a provisional voter provide both "[t]he individual's name and address" "in order for the provisional ballot to be eligible to be counted. . . ." The Secretary nonetheless sought to circumvent this flat prohibition against counting incomplete provisional ballots by arguing that R.C. 3505.181(B)(2) creates a duty on poll workers to confirm the completeness of the application before signing it themselves. The Secretary based her claim on an otherwise unremarkable procedural provision:

> An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:
>
> * * *
>
> (2) 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 that 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.

Of course, nothing in the plain language of this statute imposes a duty on a poll worker to verify or otherwise check to ensure that a provisional ballot voter has fulfilled his or her obligations in completing the provisional ballot application affirmation. Indeed, the express wording of the statute doesn't even require the poll worker to provide a verification. Yet Secretary Brunner's requested re-write would result in the following newly minted legislation:

> 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, who shall ensure that the voter correctly writes his or her name on and executes the affirmation in the appropriate place, …

But that is not what the statute says. And, as the Sixth Circuit has recognized, the Court's duty is "to enforce the law . . . enacted, not to write a different one." Rittenhouse, 404 F.3d at 397.

b. This Court Can Not Construe R.C. 3505.181(B)(2) To Impose An Implied Duty On Ohio's Poll Workers That The Legislature Did Not Expressly Impose.

Nor, in an effort to turn every provisional vote defect into a so-called "poll worker error," may some "implied" duty be imposed upon poll workers to check,

or to become the guarantor of, every provisional ballot application.[7] Such a contention runs headlong into multiple hornbook propositions of statutory construction.

i. Hornbook Proposition No. 1: Absent A Constitutional Infirmity, A Statute Is To Be Enforced According To Its Plain Terms.

R.C. 3505.181(B)(1) may not be extended by implication beyond the clear import of the words it contains. See, e.g., United States v. Stewart, 311 U.S. 60 (1940). That is because it is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. Lake County v. Rollins, 130 U.S. 662, 670, 671 **(**1889**)**.

Thus, courts may not delete words used or insert words not used in a statute. Columbia Gas Transmission Corp. v. Levin, 117 Ohio St. 3d 122, 125 (2008). Indeed, a proffered statutory construction must be rejected where such construction could have been conveyed by "very simple and concise language," which the

[7] We note that Secretary Brunner offered no evidence (nor was there any) that the defective provisional ballots (a) were the product of poll worker error; (b) were caused by any event or person other than the voter's failure to comply with the statutory requirements; or (c) that any excuse or explanation exists for the voter's non-compliance. Instead, she offers nothing but speculation and conjecture, both of which do not, under Rule 56, substitute for the evidence she failed to offer. See, e.g., Highland Capital, Inc. v. Franklin Nat'l Bank, 350 F.3d 558, 568 (6th Cir. 2003).

legislature did not employ. See State, ex rel. Darby v. Hadaway, 113 Ohio St. 658 (1925). That is, if it "would have been simple" for the legislature to use certain, clear language, and if the legislature chose not to, it must have "had some different meaning in mind." State, ex rel. Pickrel v. Industrial Commission, 1988 WL 35809, *2 (10th Dist. March 24, 1988) (ADD-68)

Here, R.C. 3505.181(B)(2) does not impose *any* duty on a poll worker. Rather, it merely says a voter must cast a provisional ballot "*before* an election official" at the polling place. (Emphasis added.) The statute prescribes conduct by a voter; it does not mandate conduct of a poll worker. As such, R.C. 3505.181(B)(2) can not be extended by implication beyond the clear import of its words as the Secretary seeks.

ii. Hornbook Proposition No. 2: When Specific Language Is Used In A Related Statutory Provision, Its Omission In Another Provision Is Deemed Intentional.

Further, it is equally well settled that where the legislature uses specific language in one statutory provision, its failure to use the same language in another provision must be deemed intentional. As the Supreme Court has stated:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. … "The short answer is that Congress did not write the statute that way."

[Russello v. U.S., 464 U.S. 16, 23 (1983) (emphasis added).]

See also City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) ("'it is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another'").[8] Ohio courts have applied this same canon of construction. Thus, where the General Assembly uses clear language in one portion of a statute or act, but excludes it from another, "it must be assumed that [the exclusion] was so intended by the law-making body." State v. Johnson, 97 N.E.2d 54, 55 (2d Dist. 1950). See also O'Toole v. Denihan, 118 Ohio St. 3d 374, 383-84 (2008) ("[i]f the legislature had wanted agencies to immediately cross-report to law enforcement, it could have explicitly so stated, just as it did" in a related provision).

Here, when the Ohio legislature seeks to create mandatory obligations, it knows how to do so, as reflected in its use of terms such as "shall" and "require" in instructing county boards of election as to their duties under Section 3505.183(B)(1). In fact, the legislature expressly utilized such mandatory language in identifying poll worker duties in *other portions of Section 3505.181*. In Section 3505.181(B)(6), for example, the legislature expressly imposed certain

[8] Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197-98 (6th Cir. 1983) ("[i]t is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent").

obligations on poll workers as they relate to voter identification requirements, which are distinct from the affirmation required of the voter in Section 3505.181(B)(2). In doing so, the legislature used the same mandatory language found in Section 3505.183(B)(1):

> If, at the time that an individual casts a provisional ballot, the individual provides identification in the form of a current and valid photo identification, a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address, or provides the last four digits of the individual's social security number, or executes an affirmation that the elector does not have any of those forms of identification or the last four digits of the individual's social security number because the individual does not have a social security number, or declines to execute such an affirmation, *the appropriate local election official* ***shall*** *record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section.* If the individual declines to execute such an affirmation, *the appropriate local election official* ***shall*** *record the individual's name* and include that information with the transmission of the ballot under division (B)(3) of this section.
>
> [Section 3505.181(B)(6) (emphasis added).]

This express language, contained in another part of Section 3505.181, clearly reveals that when the legislature seeks to impose mandatory duties on poll workers, with respect to provisional ballots, it knows how to do so. *However, It did not use such language in Section 3505.181(B)(2).* And, thus, the legislature did not intend to impose a duty on poll workers to make sure that voters correctly complete the provisional ballot affirmation required thereunder.[9]

iii. Hornbook Proposition No. 3: Statutory Provisions Are to Be Construed So As To Avoid An Irreconcilable Conflict.

It has been long the rule in Ohio that "[w]here under one possible construction [such as that the Secretary proposes] two statutes would appear to be irreconcilable, but under another possible construction they would not, the construction will be adopted which harmonizes the statutes and gives effect to each." Franklin Township v. Village of Marble Cliff, 4 Ohio App. 3d 213, 217 (10th Dist. 1982). Accord: Benjamin v. Ernst & Young, LLP, 2007 WL 2325812, *4-5 (10th Dist. Aug. 16, 2007) (ADD-70) (citing Franklin Township and adopting

[9] These same basic principles of statutory construction also defeat any argument that the "substantial compliance" language contained in Section 3505.182 of the Ohio Revised Code (ADD-8), which relates only to the form of the provisional ballot application, should also apply to Section 3505.183(B)(1). Clearly, under the canons of construction discussed above, the substantial compliance language in one statute cannot be read into Section 3505.183(B)(1), which contains *mandatory* language, as expressly recognized by the Ohio Supreme Court. Had the legislature intended to include a substantial compliance element in Section 3505.183(B)(1), it knew how to do so.

construction of R.C. §3903.04 in a manner which "also allows R.C. Chapter 2743 to be fully effective"). This maxim of statutory interpretation is equally applicable to the construction of Ohio's Election Laws. See Zweber v. Montgomery County Board of Elections, 2002 WL 857857, *3 (ADD-75) (2d Dist. April 25, 2002) ("A well-recognized principle of statutory construction requires us to construe two seemingly conflicting statutes, when possible, to give effect to both. … In accordance with these principles, the trial court properly construed R.C. 3501.01(F) and R.C. 3517.01(A) in the only way that avoids an irreconcilable conflict and gives effect to both provisions as written.").

Here, a construction of R.C. 3505.181(B)(2) that, on the basis of "poll worker error", would require the counting of all provisional ballots, *even where the voter fails to complete the required affirmation information*, would make R.C. 3505.181(B)(2) directly irreconcilable with the mandatory language of R.C. 3505.183(B)(1)(a). In other words, a construction of Section 3505.181(B)(2) that requires the counting of provisional ballots even where the affirmation does not contain *a name and signature* would directly conflict with Section 3505.183(B)(1)(a), which provides, unequivocally, that *no such ballots are to be counted*. As such, the Court is bound to construe R.C. 3505.181 to avoid the irreconcilable conflict the District Court's construction would create.

iv. Hornbook Proposition No. 4: Even If A Duty Could Be Implied Under R.C. 3505.181 That A Poll Worker Is To Review A Provisional Voter's Application, The Special Provisions Of R.C. 3505.183(B) Control Over The More General Provisions Of R.C. 3505.181.

Finally, the law is clear that a specific provision prevails over a general provision. Here, both R.C. 3505.183(B)(1)(1) and 3505.181(B)(1) were adopted as part of the same legislation. [2006 H.B. 3.] The General Assembly established "procedures" for casting provisional ballots in R.C. 3505.181 and established the rules for counting—and rejecting—provisional ballots in R.C. 3505.183. When it comes to determining eligibility for a provisional ballot to be *counted*, R.C. 3505.183 is applicable—and 3505.181's procedures for casting a provisional ballot are not. In short, R.C. 3505.181 is a special statute that contains specific mandatory requirements that the General Assembly imposes on the eligibility of any provisional ballot to be counted, while R.C. 3505.181 imposes no such specific mandatory obligations. As such, R.C. 3505.183 is the more specific and controlling statute.

Thus, even if a duty could be implied on poll workers under R.C. 3505.181 to assure the completion of every provisional ballot, defective provisional ballots missing the voter's name *and* signature still would not be eligible to be counted. As in Andrianos v. Community Traction Co., 155 Ohio St. 47, syllabus ¶1 (1951), the specific provision mandating the eligibility of provisional ballots to be counted

"is controlling over a [more] general statutory provision" such as R.C. 3505.181 that "might otherwise be applicable." See also Exemption of Real Property From Taxation v. County of Franklin, 167 Ohio St. 256, 261 (1958) ("a special statutory provision which relates to the specific subject matter involved in litigation [here R.C. 3505.183] is controlling over a general statutory provision [here R.C. 3505.181] which might otherwise be applicable").

VIII. CONCLUSION

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

In the alternative, should the Court find jurisdiction present, it should reverse the District Court's order granting Secretary Brunner's motion for summary judgment, and order the District Court to grant Relators' motion for summary judgment as to all claims. The Court should further issue a writ of mandamus or such other relief: (1) compelling Ohio Secretary of State Jennifer Brunner to correct her office's erroneous instruction to the Franklin County Board of Elections, based on an erroneous interpretation of Section 3505.183(B)(1)(a) of the Ohio Revised Code, and compelling her to advise the county boards of elections

that any Provisional Ballot Application cast in the November 4, 2008 election must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted; and (2) compelling the Secretary of State and the Franklin County Board of Election to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation required by Section 3505.183(B)(1)(a).

RESPECTFULLY SUBMITTED this 20th day of November, 2008.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B), in that it contains 10,706 words, according to the word processing program. This brief was created and formatted using MS Word 2003 and is in 14-point, Times New Roman Font.

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

CERTIFICATE OF SERVICE

I certify that on November 20, 2008, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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

859-001:189275

ADDENDUM

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U.S. Code collection

§ 15482. Provisional voting and voting information requirements

(a) Provisional voting requirements

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) 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—

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5)

(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

States described in section 1973gg–2 (b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

(b) Voting information requirements

(1) Public posting on election day

The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office.

(2) Voting information defined

In this section, the term "voting information" means—

(A) a sample version of the ballot that will be used for that election;

(B) information regarding the date of the election and the hours during which polling places will be open;

(C) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

(D) instructions for mail-in registrants and first-time voters under section 15483 (b) of this title;

(E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and

(F) general information on Federal and State laws regarding prohibitions on acts of fraud and misrepresentation.

(c) Voters who vote after the polls close

Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a) of this section. Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

(d) Effective date for provisional voting and voting information

Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2004.

3505.181 Eligibility to cast provisional ballot - procedure.

(A) All of the following individuals shall be permitted to cast a provisional ballot at an election:

(1) An individual who declares that the individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote;

(2) An individual who has a social security number and provides to the election officials the last four digits of the individual's social security number as permitted by division (A)(2) of section 3505.18 of the Revised Code;

(3) An individual who has but is unable to provide to the election officials any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code and who has a social security number but is unable to provide the last four digits of the individual's social security number as permitted under division (A)(2) of that section;

(4) An individual who does not have any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code, who cannot provide the last four digits of the individual's social security number under division (A)(2) of that section because the individual does not have a social security number, and who has executed an affirmation as permitted under division (A)(4) of that section;

(5) An individual whose name in the poll list or signature pollbook has been marked under section 3509.09 or 3511.13 of the Revised Code as having requested an absent voter's ballot or an armed service absent voter's ballot for that election and who appears to vote at the polling place;

(6) An individual whose notification of registration has been returned undelivered to the board of elections and whose name in the official registration list and in the poll list or signature pollbook has been marked under division (C)(2) of section 3503.19 of the Revised Code;

(7) An individual who is challenged under section 3505.20 of the Revised Code and the election officials determine that the person is ineligible to vote or are unable to determine the person's eligibility to vote;

(8) An individual whose application or challenge hearing has been postponed until after the day of the election under division (D)(1) of section 3503.24 of the Revised Code;

(9) An individual who changes the individual's name and remains within the precinct, moves from one precinct to another within a county, moves from one precinct to another and changes the individual's name, or moves from one county to another within the state, and completes and signs the required forms and statements under division (B) or (C) of section 3503.16 of the Revised Code;

(10) An individual whose signature, in the opinion of the precinct officers under section 3505.22 of the Revised Code, is not that of the person who signed that name in the registration forms;

(11) An individual who is challenged under section 3513.20 of the Revised Code who refuses to make the statement required under that section, who a majority of the precinct officials find lacks any of the qualifications to make the individual a qualified elector, or who a majority of the precinct officials find is not

affiliated with or a member of the political party whose ballot the individual desires to vote;

(12) An individual who does not have any of the forms of identification required under division (A)(1) of section 3505.18 of the Revised Code, who cannot provide the last four digits of the individual's social security number under division (A)(2) of that section because the person does not have a social security number, and who declines to execute an affirmation as permitted under division (A)(4) of that section;

(13) An individual who has but declines to provide to the precinct election officials any of the forms of identification required under division (A)(1) of section 3501.18 of the Revised Code or who has a social security number but declines to provide to the precinct election officials the last four digits of the individual's social security number.

(B) An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) 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.

(3) An election official at the polling place shall transmit the ballot cast by the individual, the voter information contained in the written affirmation executed by the individual under division (B)(2) of this section, or the individual's name if the individual declines to execute such an affirmation to an appropriate local election official for verification under division (B)(4) of this section.

(4) If the appropriate local election official to whom the ballot or voter or address information is transmitted under division (B)(3) of this section determines that the individual is eligible to vote, the individual's provisional ballot shall be counted as a vote in that election.

(5)(a) At the time that an individual casts a provisional ballot, the appropriate local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under division (B)(5)(b) of this section whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(b) The appropriate state or local election official shall establish a free access system, in the form of a toll-free telephone number, that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted. The free access system established under this division also shall provide to an individual whose provisional ballot was not counted information explaining how that individual may contact the board of elections to register to vote or to resolve problems with the individual's voter registration.

The appropriate state or local election official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under this division. Access to information about an individual ballot shall be restricted to the individual who cast the ballot.

(6) If, at the time that an individual casts a provisional ballot, the individual provides identification in the form of a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address, or provides the last four digits of the individual's social security number, or executes an affirmation that the elector does not have any of those forms of identification or the last four digits of the individual's social security number because the individual does not have a social security number, or declines to execute such an affirmation, the appropriate local election official shall record the type of identification provided, the social security number information, the fact that the affirmation was executed, or the fact that the individual declined to execute such an affirmation and include that information with the transmission of the ballot or voter or address information under division (B)(3) of this section. If the individual declines to execute such an affirmation, the appropriate local election official shall record the individual's name and include that information with the transmission of the ballot under division (B)(3) of this section.

(7) If an individual casts a provisional ballot pursuant to division (A)(3), (7), (8), (12), or (13) of this section, the election official shall indicate, on the provisional ballot verification statement required under section 3505.182 of the Revised Code, that the individual is required to provide additional information to the board of elections or that an application or challenge hearing has been postponed with respect to the individual, such that additional information is required for the board of elections to determine the eligibility of the individual who cast the provisional ballot.

(8) During the ten days after the day of an election, an individual who casts a provisional ballot pursuant to division (A)(3), (7), (12), or (13) of this section shall appear at the office of the board of elections and provide to the board any additional information necessary to determine the eligibility of the individual who cast the provisional ballot.

(a) For a provisional ballot cast pursuant to division (A)(3), (12), or (13) of this section to be eligible to be counted, the individual who cast that ballot, within ten days after the day of the election, shall do any of the following:

(i) Provide to the board of elections proof of the individual's identity in the form of a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the individual's name and current address;

(ii) Provide to the board of elections the last four digits of the individual's social security number;

(iii) In the case of a provisional ballot executed pursuant to division (A)(12) of this section, execute an affirmation as permitted under division (A)(4) of section 3505.18 of the Revised Code.

(b) For a provisional ballot cast pursuant to division (A)(7) of this section to be eligible to be counted, the individual who cast that ballot, within ten days after the day of that election, shall provide to the board of elections any identification or other documentation required to be provided by the applicable challenge questions asked of that individual under section 3505.20 of the Revised Code.

(C)(1) If an individual declares that the individual is eligible to vote in a jurisdiction other than the jurisdiction in which the individual desires to vote, or if, upon review of the precinct voting location guide using the residential street address provided by the individual, an election official at the polling place at which the individual desires to vote determines that the individual is not eligible to vote in that jurisdiction, the election official shall direct the individual to the polling place for the jurisdiction in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location but the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.

(2) If the individual refuses to travel to the polling place for the correct jurisdiction or to the office of the board of elections to cast a ballot, the individual shall be permitted to vote a provisional ballot at that jurisdiction in accordance with division (B) of this section. If any of the following apply, the provisional ballot cast by that individual shall not be opened or counted:

(a) The individual is not properly registered in that jurisdiction.

(b) The individual is not eligible to vote in that election in that jurisdiction.

(c) The individual's eligibility to vote in that jurisdiction in that election cannot be established upon examination of the records on file with the board of elections.

(D) The appropriate local election official shall cause voting information to be publicly posted at each polling place on the day of each election.

(E) As used in this section and sections 3505.182 and 3505.183 of the Revised Code:

(1) "Jurisdiction" means the precinct in which a person is a legally qualified elector.

(2) "Precinct voting location guide" means either of the following:

(a) An electronic or paper record that lists the correct jurisdiction and polling place for either each specific residential street address in the county or the range of residential street addresses located in each neighborhood block in the county;

(b) Any other method that a board of elections creates that allows a precinct election official or any elector who is at a polling place in that county to determine the correct jurisdiction and polling place of any qualified elector who resides in the county.

(3) "Voting information" means all of the following:

(a) A sample version of the ballot that will be used for that election;

(b) Information regarding the date of the election and the hours during which polling places will be open;

(c) Instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

(d) Instructions for mail-in registrants and first-time voters under applicable federal and state laws;

(e) General information on voting rights under applicable federal and state laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated;

(f) General information on federal and state laws regarding prohibitions against acts of fraud and misrepresentation.

Effective Date: 05-02-2006; 2008 HB562 09-22-2008

3505.182 Provisional ballot affirmation -- verification.

Each individual who casts a provisional ballot under section 3505.181 of the Revised Code shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be substantially as follows:

"Provisional Ballot Affirmation

STATE OF OHIO

I, ... (Name of provisional voter), solemnly swear or affirm that I am a registered voter in the jurisdiction in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

I understand that, if the above-provided information is not fully completed and correct, if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the board of elections determines that I have already voted in this election, my provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.

.....

(Signature of Voter)

.....

(Voter's date of birth)

The last four digits of the voter's social security number

.....

(To be provided if the voter is unable to provide a current and valid photo identification, a military identification , or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the voter's name and current address but is able to provide these last four digits)

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

Additional Information For Determining Ballot Validity

(May be completed at voter's discretion)

Voter's current address:

.....

Voter's former address if photo identification does not contain voter's current address

Voter's driver's license number or, if not provided above, the last four digits of voter's social security number

.....

(Please circle number type)

(Voter may attach a copy of any of the following for identification purposes: a current and valid photo identification, a military identification , or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the voter's name and current address.)

Reason for voting provisional ballot (Check one):

..... Requested, but did not receive, absent voter's ballot

..... Other

Verification Statement

(To be completed by election official)

The Provisional Ballot Affirmation printed above was subscribed and affirmed before me this ..... day of ..... (Month), ... (Year).

(If applicable, the election official must check the following true statement concerning additional information needed to determine the eligibility of the provisional voter.)

..... The provisional voter is required to provide additional information to the board of elections.

..... An application or challenge hearing regarding this voter has been postponed until after the election.

(The election official must check the following true statement concerning identification provided by the provisional voter, if any.)

..... The provisional voter provided a current and valid photo identification.

..... The provisional voter provided a current valid photo identification, other than a driver's license or a state identification card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.

..... The provisional voter provided a military identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address.

..... The provisional voter provided the last four digits of the voter's social security number.

..... The provisional voter is not able to provide a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does have one of these forms of identification. The provisional voter must provide one of the foregoing items of identification to the board of elections within ten days after the election.

..... The provisional voter is not able to provide a current and valid photo identification, a military identification , or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address but does have one of these forms of identification. Additionally, the provisional voter does have a social security number but is not able to provide the last four digits of the voter's social security number before voting. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

..... The provisional voter does not have a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or a social security number, but has executed an affirmation.

..... The provisional voter does not have a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or a social security number, and has declined to execute an affirmation.

..... The provisional voter declined to provide a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, or the last four digits of the voter's social security number but does have one of these forms of identification or a social security number. The provisional voter must provide one of the foregoing items of identification or the last four digits of the voter's social security number to the board of elections within ten days after the election.

(Signature of Election Official)"

In addition to any information required to be included on the written affirmation, an individual casting a provisional ballot may provide additional information to the election official to assist the board of elections in determining the individual's eligibility to vote in that election, including the date and location at which the individual registered to vote, if known.

If the individual declines to execute the affirmation, an appropriate local election official shall comply with division (B)(6) of section 3505.181 of the Revised Code.

Effective Date: 05-02-2006; 2008 HB562 09-22-2008

3505.183 Testing and counting of provisional ballots - rejection.

(A) When the ballot boxes are delivered to the board of elections from the precincts, the board shall separate the provisional ballot envelopes from the rest of the ballots. Teams of employees of the board consisting of one member of each major political party shall place the sealed provisional ballot envelopes in a secure location within the office of the board. The sealed provisional ballot envelopes shall remain in that secure location until the validity of those ballots is determined under division (B) of this section. While the provisional ballot is stored in that secure location, and prior to the counting of the provisional ballots, if the board receives information regarding the validity of a specific provisional ballot under division (B) of this section, the board may note, on the sealed provisional ballot envelope for that ballot, whether the ballot is valid and entitled to be counted.

(B)(1) 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;

(b) A statement that the individual is a registered voter in the jurisdiction in which the provisional ballot is being voted;

(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

(2) In addition to the information required to be included in an affirmation under division (B)(1) of this section, in determining whether a provisional ballot is valid and entitled to be counted, the board also shall examine any additional information for determining ballot validity provided by the provisional voter on the affirmation, provided by the provisional voter to an election official under section 3505.182 of the Revised Code, or provided to the board of elections during the ten days after the day of the election under division (B)(8) of section 3505.181 of the Revised Code, to assist the board in determining the individual's eligibility to vote.

(3) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that all of the following apply, the provisional ballot envelope shall be opened, and the ballot shall be placed in a ballot box to be counted:

(a) The individual named on the affirmation is properly registered to vote.

(b) The individual named on the affirmation is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot.

(c) The individual provided all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.

(d) If applicable, the individual provided any additional information required under division (B)(8) of section 3505.181 of the Revised Code within ten days after the day of the election.

(e) If applicable, the hearing conducted under division (B) of section 3503.24 of the Revised Code after the day of the election resulted in the individual's inclusion in the official registration list.

(4)(a) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board determines that any of the following applies, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

(i) The individual named on the affirmation is not qualified or is not properly registered to vote.

(ii) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot.

(iii) The individual did not provide all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.

(iv) The individual has already cast a ballot for the election in which the individual cast the provisional ballot.

(v) If applicable, the individual did not provide any additional information required under division (B)(8) of section 3505.181 of the Revised Code within ten days after the day of the election.

(vi) If applicable, the hearing conducted under division (B) of section 3503.24 of the Revised Code after the day of the election did not result in the individual's inclusion in the official registration list.

(vii) The individual failed to provide a current and valid photo identification, a military identification , a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections under section 3501.19 of the Revised Code or a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, with the voter's name and current address, or the last four digits of the individual's social security number or to execute an affirmation under division (A) of section 3505.18 or division (B) of section 3505.181 of the Revised Code.

(b) If, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section, the board is unable to determine either of the following, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

(i) Whether the individual named on the affirmation is qualified or properly registered to vote;

(ii) Whether the individual named on the affirmation is eligible to cast a ballot in the precinct or for the election in which the individual cast the provisional ballot.

(C)(1) For each provisional ballot rejected under division (B)(4) of this section, the board shall record the

name of the provisional voter who cast the ballot, the identification number of the provisional ballot envelope, the names of the election officials who determined the validity of that ballot, the date and time that the determination was made, and the reason that the ballot was not counted.

(2) Provisional ballots that are rejected under division (B)(4) of this section shall not be counted but shall be preserved in their provisional ballot envelopes unopened until the time provided by section 3505.31 of the Revised Code for the destruction of all other ballots used at the election for which ballots were provided, at which time they shall be destroyed.

(D) Provisional ballots that the board determines are eligible to be counted under division (B)(3) of this section shall be counted in the same manner as provided for other ballots under section 3505.27 of the Revised Code. No provisional ballots shall be counted in a particular county until the board determines the eligibility to be counted of all provisional ballots cast in that county under division (B) of this section for that election. Observers, as provided in section 3505.21 of the Revised Code, may be present at all times that the board is determining the eligibility of provisional ballots to be counted and counting those provisional ballots determined to be eligible. No person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot.

(E)(1) Except as otherwise provided in division (E)(2) of this section, nothing in this section shall prevent a board of elections from examining provisional ballot affirmations and additional information under divisions (B)(1) and (2) of this section to determine the eligibility of provisional ballots to be counted during the ten days after the day of an election.

(2) A board of elections shall not examine the provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section of any provisional ballot for which an election official has indicated under division (B)(7) of section 3505.181 of the Revised Code that additional information is required for the board of elections to determine the eligibility of the individual who cast that provisional ballot until the individual provides any information required under division (B)(8) of section 3505.181 of the Revised Code, until any hearing required to be conducted under section 3503.24 of the Revised Code with regard to the provisional voter is held, or until the eleventh day after the day of the election, whichever is earlier.

Effective Date: 05-02-2006; 2008 HB562 09-22-2008

Westlaw

197 Fed.Appx. 403 Page 1
197 Fed.Appx. 403, 2006 WL 2220979 (C.A.6 (Mich.)), 180 L.R.R.M. (BNA) 2464, 2006 Fed.App. 0558N
(Not Selected for publication in the Federal Reporter)
(Cite as: 197 Fed.Appx. 403, 2006 WL 2220979 (C.A.6 (Mich.)))

C

2006 FED. APP. 0558NThis case was not selected for publication in the Federal Reporter.

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. Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals, Sixth Circuit.

Keith **VALINSKI** and Nancy **Valinski**, Plaintiffs-Appellants,

v.

DETROIT EDISON, Defendant-Appellee.

No. 04-1308.

Aug. 4, 2006.

Background: Employee injured while performing electrical maintenance sued his employer, asserting a claim under the Michigan Worker's Disability Compensation Act's intentional tort exception. Employer removed the action from state court. The United States District Court for the Eastern District of Michigan granted summary judgment for the employer, and the employee appealed.

Holding: The Court of Appeals, David L. Bunning, District Judge for the Eastern District of Kentucky, sitting by designation, held that the employee's claim was not preempted by the Labor Management Relations Act (LMRA).

Vacated, reversed and remanded.

West Headnotes

[1] Federal Courts 170B ⇐31

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk31 k. Waiver or Consent. Most Cited Cases

Parties cannot consent to subject matter jurisdiction, nor can they waive it. 28 U.S.C.A. §§ 1331, 1332.

[2] Labor and Employment 231H ⇐2757

231H Labor and Employment
231HXVII Employer's Liability to Employees
231HXVII(A) In General
231HXVII(A)1 Nature and Scope of Employer's Duty
231Hk2757 k. Preemption. Most Cited Cases

States 360 ⇐18.46

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.46 k. In General. Most Cited Cases

Resolution of an employee's state law intentional tort claim against his employer in connection with injuries sustained while performing electrical maintenance would not require the interpretation of a collective bargaining agreement (CBA), and thus, was not preempted by the Labor Management Relations Act (LMRA); to prevail, the employee had to prove that the employer had actual knowledge that the injury was certain to occur and willfully disregarded that knowledge, and the CBA's general discussion of safety conditions did not bring the claim within the realm of preemption. Labor-Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

***403** On Appeal from the United States District Court for the Eastern District of Michigan.

Before: MOORE, SUTTON, Circuit Judges; and

BUNNING, District Judge. [FN*]

FN* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designa- tion.

OPINION

DAVID L. BUNNING, District Judge.
1 This is an appeal from the district court's award of summary judgment dismissing Plaintiff-Appellant's intentional tort claim against his employer, Defendant-Appellee. The primary focus of the parties' appellate briefs was the soundness of the district court's ruling on the intentional tort claim. This Court's focus, however, is subject matter jurisdiction, which is lacking. Since the district court and this Court are without authority to consider the merits of the case, the district court's decision on the merits must be ***404 vacated, and this matter remanded to the Michigan state court from which it was removed.

I. BACKGROUND

Defendant-Appellee Detroit Edison and its parent company, DTE Energy Company, operate power plants in the state of Michigan.[FN1] On October 10, 1998, Detroit Edison's employee, Plaintiff-Appellant Keith Valinski, was severely injured while performing electrical maintenance.[FN2] Valinski had been assigned to help with an "outage," during which repairs, maintenance, and refueling are performed on a power plant. Plaintiff had been loaned from the Monroe, Michigan power plant where he was typically stationed to assist with this maintenance outage at another Monroe, Michigan plant. At the time of the accident, Valinski had been working for Detroit Edison for twenty-eight years, the past twelve as an electrician.

FN1. DTE Energy Company was also a named Defendant in the Complaint, but later dismissed by the trial court.

FN2. Valinski's wife, Nancy Valinski, is also a Plaintiff and has also appealed to this Court. As Nancy Valinski asserts a derivative claim for loss of consortium only, further reference to Plaintiff in this opinion refers to the primary claim of Keith Valinski.

Valinski was assigned to do electrical maintenance at one of the plant's Motor Control Centers, which houses box-like stacked electrical control units known as buckets. Plaintiff's task was to open each bucket door, move the dial switch back and forth, lubricate the switch if needed, and file a slight notch in the door's sliding latch mechanism. The Motor Control Center was labeled "normally de-energized"; however, it was energized at the time this work was performed by Valinski, who worked without insulated tools or protective gear. In the course of performing this maintenance work, Plaintiff saw a string hanging from a fuse clip and, mistakenly believing that the equipment was de-energized, attempted to remove the string with a screwdriver. An explosion and fire ensured, and Plaintiff was severely burned. Defendant was later cited for a number of "serious" violations of the Michigan Occupational Safety and Health Act ("MIOSHA").

Because Plaintiff sustained work-related injuries, he received benefits pursuant to Michigan's Worker's Disability Compensation Act of 1969 (the "Act"). *See*Mich. Comp. Laws § 418.101, *et seq.* He also filed this lawsuit in the Wayne County, Michigan, Circuit Court, seeking additional compensation from Detroit Edison under the Act's intentional tort exception. *See id.* § 418.131(1). Detroit Edison removed the case to the United States District Court for the Eastern District of Michigan.

Shortly after removal, the district judge ordered Defendant to show cause why the case should not be dismissed for lack of subject matter jurisdiction.

Detroit Edison filed a brief in support of removal, submitting it removed the action because the Labor Management Relations Act of 1947, 29 U.S.C. § 141, *et seq.* (the "LMRA"), preempts Plaintiff's state-law claim, thereby providing federal question subject matter jurisdiction. That is, at the time of the accident, Plaintiff was a member of the Trades Local Union No. 223 of the Utility Workers Union of America, AFL-CIO (the "Union"). His employment was subject to the provisions of a collective bargaining agreement ("CBA") between the Union and Detroit Edison. Defendant offered that because the conditions of Valinski's employment were covered by a CBA, and the interpretation of that CBA ***405** is governed by the LMRA, Valinski's lawsuit actually presented a federal question, not a state-law claim. The district court agreed that the LMRA completely preempted Plaintiff's intentional tort claim, and so concluded it had subject matter jurisdiction, and that Defendant's removal was therefore proper.

****2** Following discovery, Defendant moved for summary judgment, arguing Plaintiff had failed to establish the necessary elements of an intentional tort workplace claim required by Michigan law. The district court found that Plaintiff had failed to state a cognizable claim under the intentional tort exception of the Act, and therefore granted summary judgment in favor of Detroit Edison. Valinski timely appealed that ruling to this Court.

II. DISCUSSION

A. Subject Matter Jurisdiction

Authority for a federal court to adjudicate an action is limited by the powers bestowed upon it by the United States Constitution and by statute. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The primary jurisdictional statutes are 28 U.S.C. § 1331, which confers jurisdiction where the claim arises under federal law, and 28 U.S.C. § 1332, which confers jurisdiction where the claim is between parties of diverse citizenship. In this case, Defendant's removal was predicated upon federal question jurisdiction in that Plaintiff's claims purportedly arose under § 301 of the LMRA, rather than Michigan law.

"The existence of subject matter jurisdiction may be raised at any time, by any party, or even *sua sponte* by the court itself." *In re Lewis,* 398 F.3d 735, 739 (6th Cir.2005). In this case, although Valinski did not challenge the district court's authority to hear the case, the district court raised the issue *sua sponte.*[FN3] "The first and fundamental question presented by every case brought to the federal courts is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue." *Douglas v. E.G. Baldwin & Assocs., Inc.,* 150 F.3d 604, 606-07 (6th Cir.1998)(citing *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)). Thus, "[q]uite aside from whether the parties raise jurisdictional issues themselves-or even attempt to consent or agree to federal jurisdiction-federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction." *Id.* at 607.

> FN3. Plaintiff did, however, ultimately formally protest federal jurisdiction over his claim in his supplemental brief filed with this Court post-oral argument.

Appellate courts review district court decisions regarding subject matter jurisdiction de novo. *See Kenosha v. Bruno,* 412 U.S. 507, 512, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Martin v. Assoc. Truck Lines, Inc.,* 801 F.2d 246, 248 (6th Cir.1986). Federal courts have an "independent obligation to ensure that subject matter jurisdiction exists." *Olden v. LaFarge Corp.,* 383 F.3d 495, 498 (6th Cir.2004). "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934). Thus, this Court must

raise the issue of jurisdiction, even where the parties have not, if it finds that there was no subject matter jurisdiction for the district court to decide the case. *Kenosha,* 412 U.S. at 512, 93 S.Ct. 2222.

[1] At oral argument, both sides pointed out that jurisdiction was not identified ***406** in the issues on appeal. Defendant pointed out that Plaintiff implicitly agreed to subject matter jurisdiction in the lower court by not seeking remand or responding to the supplemental authority submitted by Defendant in response to the trial court's show cause order. However, parties cannot consent to subject matter jurisdiction, nor can they waive it. *Mitchell,* 293 U.S. at 244, 55 S.Ct. 162; *Alongi v. Ford Motor Co.,* 386 F.3d 716, 728 (6th Cir.2004). For the Court to exercise jurisdiction because the parties stipulate the case falls under the LMRA and thereby raises a federal question would impermissibly have parties, rather than courts, deciding the substantive scope of jurisdiction. Accordingly, the Court turns to an examination of whether Plaintiff's cause of action raises a federal claim.

B. Complete Preemption as Providing Federal Question Subject Matter Jurisdiction

****3** [2] "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). To be removable based upon federal question jurisdiction, generally the complaint must affirmatively allege a federal claim. *Beneficial Nat. Bank v. Anderson,* 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). Federal courts examine the well-pleaded allegations of the complaint for a federal question on its face, and ignore potential defenses, *id.,*"including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar,* 482 U.S. at 393, 107 S.Ct. 2425. Since a plaintiff is the master of his complaint, *AmSouth Bank v. Dale,* 386 F.3d 763, 776 (6th Cir.2004), where a choice is made to assert only a state law claim, the general rule prohibits recharacterizing it as a federal claim. *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). Federal jurisdiction can therefore generally be avoided by relying exclusively on state law. *Smolarek v. Chrysler Corp.,* 879 F.2d 1326, 1329 (6th Cir.1989)(en banc).

The face of Valinski's complaint relies exclusively upon Michigan law. However, one limited exception to this general rule is "when a federal statute wholly displaced the state-law cause of action through complete pre-emption." *Beneficial Nat. Bank,* 539 U.S. at 8, 123 S.Ct. 2058.This narrow exception to the well-pleaded complaint rule, otherwise known as the "complete preemption" doctrine, occurs where "Congress [has] so completely preempt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life,* 481 U.S. at 63-64. The theory behind the doctrine is that "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar,* 482 U.S. at 393, 107 S.Ct. 2425 (quoting *Metro. Life,* 481 U.S. at 65, 107 S.Ct. 1542). "[T]he congressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through creation of a parallel federal cause of action that would 'convert' a state cause of action into the federal action for purposes of the well-pleaded complaint rule." *Strong v. Telectronics Pacing Sys., Inc.,* 78 F.3d 256, 260 (6th Cir.1996). When Congress has indicated an intent to so completely occupy the field, any ostensibly state law claim is in fact a federal claim for purposes of arising-under jurisdiction. ***407***Beneficial Nat. Bank,* 539 U.S. at 9, 123 S.Ct. 2058."[A]ny claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar,* 482 U.S. at 393, 107 S.Ct. 2425; *see also Franchise Tax Bd. of Cal. v.*

Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 24, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (noting that "if a federal cause of action completely pre-empts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law").

C. Complete Preemption and the LMRA

**4 As the party invoking removal, and since the face of Plaintiff's well-pleaded complaint does not state a federal claim, Detroit Edison carries the burden of establishing Plaintiff's cause of action is completely preempted. To do so, it relies upon the LMRA. Section 301 of the LMRA is one of but a few statutes under which the Supreme Court has recognized complete preemption. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-11, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) (citing *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962)); *Avco Corp. v. Aero Lodge No. 735, Int'l Assoc. of Machinists & Aerospace Workers*, 390 U.S. 557, 559-61, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957)). That is, the complete preemption of state law claims by § 301 serves as the federal claim that would ordinarily appear on the face of the well-pleaded complaint. As this Court has noted, § 301 has an unusually powerful preemptive force over a claim for relief sought exclusively under state law. *Alongi v. Ford Motor Co.*, 386 F.3d at 723-24.

Section 301 of the LMRA provides that "[s]uits for a violation of contracts between an employer and a labor organization representing employees ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a). The statute serves to preempt state-law claims for what are in actuality suits for violation of contracts between an employer and a labor organization. *Caterpillar*, 482 U.S. at 394, 107 S.Ct. 2425.

In *Local 174, Teamsters v. Lucas Flour Co.*, the Supreme Court determined that Congress' intent in enacting this section was for federal labor law to uniformly prevail over inconsistent state law. Preemption under § 301 ensures the uniform interpretation of CBAs, as was Congress' intent. 369 U.S. 95, 103-04, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). Through its enactment, Congress "authorize[d] federal courts to fashion a body of federal law for the enforcement of ... collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 451, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).[FN4]

> FN4. State courts have concurrent jurisdiction over § 301 claims, but must of course apply federal law. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962).

The Supreme Court in *Avco Corp. v. Machinists* found that a suit filed in state court alleging state-law claims to enjoin a strike was properly removed to federal court based upon the complete preemption of § 301, which served to displace the state ***408** cause of action for violation of the CBA. 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). As the High Court later expounded,

In *Avco Corp. v. Machinists*, the Court of Appeals decided that "[s]tate law does not exist as an independent source of private rights to enforce collective bargaining contracts." 376 F.2d 337, 340 (6th Cir.1967), *aff'd*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126..... In affirming, we held that, when "[t]he heart of the [state-law] complaint [is] a ... clause in the collective bargaining agreement," *id.* at 558, 88 S.Ct. 1235... that complaint arises under federal law: "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding

the fact that state law would provide a cause of action in the absence of § 301." *Franchise Tax Board, supra,* 463 U.S. at 23, 103 S.Ct. 2841....

****5** *Caterpillar,* 482 U.S. at 394, 107 S.Ct. 2425. "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Id.* (quoting *Elec. Workers v. Hechler,* 481 U.S. 851, 859 n. 3, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987)).

D. Does the LMRA Preempt Plaintiff's Intentional Tort Claim?

Authority to adjudicate the case before us requires this Court to determine whether Valinski's intentional tort claim is preempted by the LMRA. As noted by the district judge in her order upholding removal, the general governing principle in assessing preemption in the LMRA context dictates that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers,* 471 U.S. at 220, 105 S.Ct. 1904.In examining this question, the district court ultimately found that since "resolution of Plaintiffs' claims will require the presiding court to interpret the parties' duties under the collective bargaining agreement, ... this case must be treated as a § 301 claim and that jurisdiction is therefore proper." [FN5] However, our *de novo* examination leads us to a different conclusion.

> FN5. Despite this March 8, 2002, finding, the district court's later order granting summary judgment under the intentional tort exception expressly noted the court "declines to decide the much closer question of whether his claim is preempted by the LMRA."The district court adjudicated the motion utilizing solely Michigan law, even though upon initially concluding there was complete preemption, "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat. Bank.,* 539 U.S. at 8, 123 S.Ct. 2058.

Since preemption under the LMRA is directed to development of consistent and uniform federal common law over CBAs, logically the initial decisions focused upon alleged state law breach of contract claims where the contract allegedly breached was the CBA. Such claims were completely preempted. *See Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962).

Preemption under § 301 has been expanded to include state-law tort claims as well. In *Allis-Chalmers v. Lueck,* 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) the Supreme Court held that § 301 preempted a state-law tort claim for bad ***409** faith in handling plaintiff's disability claims. This determination turned on the fact that the alleged bad faith was in handling obligations under a contract for disability benefits included in the employees' CBA. Because the parameters of the CBA's insurance claim payment requirement and whether it included an implied duty of good faith were matters of federal contract interpretation, the Court ruled that the state tort action was preempted. *Id.* at 215, 105 S.Ct. 1904. Preemption was required because the "parties' agreement as to the manner in which a benefit claim would be handled [would] necessarily [have been] relevant to any allegation that the claim was handled in a dilatory manner." *Id.* at 218, 105 S.Ct. 1904. The Court's holding was bolstered by its conclusion that this result "preserves the central role of arbitration in our 'system of industrial self-government.' " *Id.* at 219, 105 S.Ct. 1904 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)).

Several years later, in *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 108 S.Ct. 1877,

100 L.Ed.2d 410 (1988) the Supreme Court's attention was directed to a state-law retaliatory discharge claim for the employee's pursuit of benefits under the Illinois workers' compensation system. There, the employee was discharged for filing an allegedly false worker's compensation claim, and then filed a grievance pursuant to the CBA, which protected employees from discharge except for just cause. *Id.* at 401, 108 S.Ct. 1877. While the arbitration was pending, the employee filed a civil suit, claiming that she was discharged for asserting her rights under the state worker's compensation laws. *Id.* at 402, 108 S.Ct. 1877. Both the proof of and the defense to such a retaliatory discharge claim turned on purely factual questions regarding the conduct of the employee and the motivation of the employer. The Court found that the retaliation claim was independent and therefore not preempted by § 301 because resolution of the state-law claim did not require construing the CBA. *Id.* at 407, 108 S.Ct. 1877.

****6** In so holding, the *Lingle* Court noted that it had earlier emphasized that preemption " 'should not be lightly inferred [in cases involving state laws creating labor standards], since the establishment of labor standards falls within the traditional police power of the State.' " *Id.* at 412, 108 S.Ct. 1877 (quoting *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987)). The Court found "nothing novel" in "recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements," and explained that because the decision allows "interpretation of collective-bargaining agreements [to] remain[ ] firmly in the arbitral realm," the policy of fostering uniformity in the meaning of CBAs is undisturbed. *Id.* at 410-11, 108 S.Ct. 1877.

Indeed, merely consulting a CBA in the course of adjudicating state law claims is not enough. *Livadas v. Bradshaw,* 512 U.S. 107, 124, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994). *Allis-Chalmers* clarified that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301...." *Allis-Chalmers,* 471 U.S. at 211, 105 S.Ct. 1904 and that "it would be inconsistent with congressional intent under [section 301] to preempt state rules that ... establish rights and obligations, independent of a labor contract." *Id.* at 212, 105 S.Ct. 1904. The Supreme Court emphasized the narrowness of its decision, stating that the "scope of the pre-emptive effect of federal labor-contract law remains to be fleshed ***410** out on a case-by-case basis." *Id.* at 220, 105 S.Ct. 1904.

The analysis should be directed to "whether the [state-law cause of action] confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state-law] claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers,* 471 U.S. at 213, 105 S.Ct. 1904. Non-negotiable state-law rights are ascertained by examining "the legal character of the claim, as independent of rights under the collective bargaining agreement." *Id.* As long as federal law is the basis for interpreting CBAs, states may still provide workers with substantive rights that do not depend upon an interpretation of the CBA for their adjudication. *Lingle,* 486 U.S. at 409, 108 S.Ct. 1877. "[E]ven if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 409-10, 108 S.Ct. 1877.

This Supreme Court precedent has evolved within this circuit in the application of a two-part test.

First, courts must determine whether resolving the state-law claim would require interpretation of the terms of the collective bargaining agreement. If so, the claim is preempted. Second, courts must ascertain whether the rights claimed by the plaintiff were created by the collective bargaining agreement, or

instead by state law.... If the rights were created by the collective bargaining agreement, the claim is preempted. In short, if a state-law claim fails *either* of these two requirements, it is preempted by § 301.

**7 *Mattis v. Massman,* 355 F.3d 902, 906 (6th Cir.2004)(interpreting *DeCoe v. General Motors Corp.,* 32 F.3d 212, 216-17 (6th Cir.1994)). Where a plaintiff's state-law claims cannot be directly connected to the terms of the CBA, they are not preempted. *Compare O'Shea v. The Detroit News,* 887 F.2d 683, 687 (6th Cir.1989)(state law constructive discharge and intentional infliction of emotional distress claims not preempted because claims were "independent of any alleged violation of the contract" and state law age discrimination claim not preempted because "Michigan employees have the right not to be discriminated against ... without regard to the [CBA]'s language about employee's rights") and *Smolarek v. Chrysler Corp.,* 879 F.2d 1326 (6th Cir.1989)(en banc)(disability discrimination claim not preempted even where employer's defense would rely on the CBA because plaintiff's claim was independent of the CBA) *with Terwilliger v. Greyhound Lines, Inc.,* 882 F.2d 1033 (6th Cir.1989)(plaintiff employee's state-law claim against employer for fraud in executing the grievance procedure preempted because adjudicating the claim directly connected with the employer's adherence to the CBA) and *DeCoe v. General Motors Corp.,* 32 F.3d 212 (6th Cir.1994)(defamation claim by employee accused of sexual harassment required consideration of CBA's detailed sexual harassment policy and required proof of an unprivileged publication, which necessarily implicated examining the CBA, and so was preempted).

Here, addressing Valinski's intentional tort claim does not require interpretation of the terms of the CBA between the Union and Detroit Edison. Valinski's state-law tort action turns on questions of fact. Specifically, because there is no direct**411 proof of Detroit Edison's intent to injure, under Michigan law Valinski must prove intent by providing circumstantial evidence that: (1) his employer had actual knowledge, (2) that an injury was certain to occur, and (3) that his employer willfully disregarded that knowledge. *See Travis v. Dreis & Krump Mfg. Co.,* 453 Mich. 149, 551 N.W.2d 132, 145-46 (1996). To prevail, Detroit Edison must rebut any showing that Valinski makes on these three elements. *Id.*

Detroit Edison fails to point to any specific provisions of the CBA that the court would be required to interpret to resolve these questions of fact. In its supplemental filing on the issue of subject matter jurisdiction, Defendant submits that Plaintiff has sought to avoid the preemption of § 301 by artfully pleading around those matters that would necessitate interpretation of the CBA to resolve the essence of Plaintiff's claim; namely, job assignment, training, safety and dispute resolution all provided for by the CBA. But despite Defendant's protests, interpreting these provisions of the CBA is unnecessary for Plaintiff to pursue an intentional tort claim.

The CBA states that "[s]hould any disagreement arise between any employee ... covered by this Agreement and the Company, it shall be deemed a grievance," and provides procedures for how a grievance should be filed and how it should proceed to arbitration. However, such a broad grievance provision in the CBA in *Lingle* did not preempt the employee's state tort claim. *See Lingle,* 486 U.S. at 401-02, 108 S.Ct. 1877.

**8 The CBA also addresses obligations related to workplace safety conditions:

The Company and Union will cooperate in placing in effect and maintaining safety rules and practices. These safety rules and practices and the OSHA and MIOSHA law governing health and safety shall be complied with by the Company, the employees, and the Union.... As safe and comfortable working conditions as practicable under conditions existing at the time will be maintained. The Company is committed to and will continue to furnish properly fitting safety clothing and equipment as customarily furnished.

But as the Court found in *Lingle,* even if a grievance filed by the Plaintiff for violation of the CBA's safety provisions would involve consideration of the same facts as Plaintiff's state tort suit, this has no bearing on the independence of the state claim for preemption purposes unless the resolution of the state claim requires interpretation of the CBA. The workplace safety conditions identified above are irrelevant to consideration of whether the Defendant actually knew that an injury was certain to occur and willfully disregarded this knowledge.

Finally, the CBA contains provisions relating to training advisory groups, to the placement of incapacitated employees, and to a long-term disability benefits plan. Aside from referencing these provisions generally, Defendant points to no particular connection between these specific terms of the CBA and the necessity for their interpretation in order to adjudicate Plaintiff's state-law intentional tort claim.

Thus, the CBA's general discussion of safety conditions is insufficient to bring this claim within the realm of preemption under the LMRA where resolution of the claim does not turn on any consideration of the terms of the CBA. *See Lingle,* 486 U.S. at 409-10, 108 S.Ct. 1877. The right being asserted by Plaintiff in this case is created by state law, not the CBA. In *Allis-Chalmers,* the Supreme Court explained that "state-law rights and obligations that do not exist independently of private agreements,*412 and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." 471 U.S. at 213, 105 S.Ct. 1904. The Court applied this principle in *United Steelworkers of America v. Rawson,* where it found that a wrongful death suit against a union based on its negligent safety inspections was preempted because the union's duty to perform inspections arose from the CBA and not from the general duty of reasonable care owed by everyone. 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990). Michigan law specifically exempts intentional torts from the exclusive remedy under its Worker's Compensation Disability Act, *see*Mich. Comp. Laws § 418.131, and the CBA at issue mentions nothing about Detroit Edison's liability to its employees for intentional torts. "It would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Lingle,* 486 U.S. at 410 n. 10, 108 S.Ct. 1877 (quoting *Caterpillar,* 482 U.S. at 394-95, 107 S.Ct. 2425). Moreover, because resolution of the claim does not require any reference to the terms of the CBA, the goal of uniformity in CBA interpretation will not be upset by allowing Plaintiff's state-law claim to go forward.

III. CONCLUSION

**9 Federal courts must have subject matter jurisdiction to hear the cases that come before them. As the Supreme Court only earlier this term again emphasized, "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should.... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Marshall v. Marshall,* ---U.S. ----, 126 S.Ct. 1735, 1741, 164 L.Ed.2d 480 (2006)(quoting *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)).

In this case, Plaintiff's state law cause of action was not preempted by the LMRA, and so there is no basis for federal jurisdiction. Therefore, the district court's award of summary judgment is hereby VACATED. Its March 8, 2002, order as to subject matter jurisdiction is hereby REVERSED and this matter REMANDED to the district court for further proceedings consistent with this opinion.

C.A.6 (Mich.),2006.
Valinski v. Detroit Edison
197 Fed.Appx. 403, 2006 WL 2220979 (C.A.6 (Mich.)), 180 L.R.R.M. (BNA) 2464, 2006 Fed.App. 0558N

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963 F.2d 373
963 F.2d 373, 1992 WL 107205 (C.A.6 (Tenn.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 963 F.2d 373, 1992 WL 107205 (C.A.6 (Tenn.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

STATE of Tennessee, ex rel. Richard D. CROTTEAU, et al., Plaintiffs-Appellants,

v.

CHATTANOOGA WOMEN'S CLINIC, Defendant-Appellee.

No. 91-5662.

May 18, 1992.

On Appeal from the United States District Court for the Eastern District of Tennessee; 90-00423, Leon Jordan, J.
E.D.Tenn.

DISMISSED AND REMANDED.

Before DAVID A. NELSON and BOGGS, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

BOGGS, Circuit Judge.

*1 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,[FN1] as relators in the name of the State of 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.

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 the name of the State of Ten-

nessee. 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 a federal defense under ERISA.

***2** 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, 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).

> FN1. 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.

C.A.6 (Tenn.),1992.
State of Tenn., ex rel. Crotteau v. Chattanooga Women's Clinic
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(Cite as: 2008 WL 253045 (E.D.Mich.))

C

Only the Westlaw citation is currently available.

United States District Court, E.D. Michigan, Southern Division.

FIRST INDEPENDENCE BANK, Plaintiff,

v.

TRENDVENTURES, L.L.C., et al., Defendants.

Civil Action No. 07-CV-14462.

Jan. 30, 2008.

Douglas Young, James D. Wilson, Wilson Young, Detroit, MI, for Plaintiff.

Eric D. Scheible, Frasco Caponigro, Bloomfield Hills, MI, for Intervenor Plaintiff.

Scott R. Murphy, Barnes & Thornburg, Gordon J. Toering, Warner, Norcross, Grand Rapids, MI, for Intervenor Defendants.

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

BERNARD A. FRIEDMAN, Chief Judge.

*1 This matter is presently before the Court on First Independence 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.[FN1] In its Complaint, First Independence Bank named three parties as defendants: (1) Trendventures, LLC d/b/a U.S. Bankcard, a California limited liability company ("Trendventures, LLC of California"); (2) Process America, Inc.; and (3) Carl Smith ("Smith").[FN2] 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 ¶ 4.) The state court dismissed Process America, Inc. from this action on December 15, 2006. (*See* Notice of Removal at ¶ 4.) In its Notice of Removal, Bank of America states that Process America, Inc. was "improperly named in the lawsuit." (*See id.* at ¶ 12 n. 2 .)

> FN1. The Original Complaint is attached as Exhibit A to Bank of America's Notice of Removal.
>
> FN2. 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 In-

tervening Plaintiff.[FN3]First Independence Bank is a principal member of VISA, U.S.A., Inc. and MasterCard International, Inc. (*See* Original Compl. at ¶ 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 ¶ 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 ¶ 11.)Under the agreement, Trendventures, LLC of California agreed to become a registered independent sales organization of First Independence Bank. (*See id.* at ¶ 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 ¶ 13.)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.*)

> FN3. Eurofly's role in this litigation is explained in more detail below.

*2 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 [FN4] account rather than into an account at First Independence Bank. (*See id.* at ¶ 14.)First Independence Bank states that, at that time, the allegedly unauthorized Bank of America account contained $3.7 million. (*See id.*)

> FN4. 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 ¶¶ 15, 18, 20.)Soon thereafter, 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 ¶ 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.[FN5]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.)

> FN5. 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 ¶ 46.)

B. *The 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 ¶¶ 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 U.S. Bankcard ("Trendventures, Inc."); (2) Trendventures, LLC, d/b/a U.S. Bankcard, a Virginia limited liability company ("Trendventures, LLC of Virginia"); (3) and Bank of America. [FN6]

> FN6. 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 "absolutely no affiliation with Carl Smith."(*See* Notice of Removal at ¶¶ 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 ¶ 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 ¶ 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 ¶ 20.)Eurofly accuses Bank of America of allowing USBC and Smith to establish and maintain these accounts without first verifying whether Smith was authorized to do so. (*See id.* at ¶ 21.)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 ¶¶ 39-40.)

***3** 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 ¶¶ 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.[FN7]Six counts are directed at USBC, Smith, and First Independence Bank, only.[FN8]The remaining seven counts are directed at Bank of America and First Independence Bank, only.[FN9]

> FN7. 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 of Action; Count XII: Quantum Meruit / Unjust Enrichment / Constructive Trust; Count XIII: Negligence; Count XXI: Declaratory Judgment; and Count XXII: Injunctive Relief.

FN8. 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.

FN9. 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.[FN10]

FN10. First Independence Bank mainly argues that Bank of America should have obtained its consent prior 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 ¶ 28.) Exhibit D, referenced above, contains the Affidavit of Laura Kane, a paralegal at Barnes & Thornburg, LLP, Bank of 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 ¶ 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) (citing *Wilson v. United States Dep't of Agric., Food, & Nutrition Servs.,* 584 F.2d 137, 142 (6th Cir.1978)).*See*

MOORE'S FEDERAL PRACTICE at ¶ 107.06 ("all doubts are resolved in favor of remand") (footnote omitted). Erring on the side of remand is a sound policy:

> ***4** [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 ¶ 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))."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 ¶ 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 that party in ... claims in intervention.

Id. at ¶ 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.

***5** *Id.* at 107.11[1][b][v] (footnote 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 ¶ 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 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 independent claim as defined by 28 U.S.C. § 1441(c).

Klein v. Manor Healthcare Corp., 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.

***6** 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 WL 91786, at *3 n. 8. 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 In-

dependence 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 with the rule of unanimity.[FN11]

> FN11. 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 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 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 ¶ 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 (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 ¶ 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 ¶ 107.11[1][c] (citing *Russell Corp. v. Am. Home Assurance Co.,* 264 F.3d 1040, 1050 (11th Cir.2001) (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,

> *7 [t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the 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 gener-

al 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 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.

E.D.Mich.,2008.
First Independence Bank v. Trendventures, L.L.C.
Slip Copy, 2008 WL 253045 (E.D.Mich.)

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Not Reported in F.Supp., 1993 WL 255140 (E.D.La.)
(Cite as: 1993 WL 255140 (E.D.La.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

Charles ARNOLD, et al.

v.

Sphere DRAKE, et al.

Civ. A. No. 93-1546.

June 28, 1993.

MINUTE ENTRY

HEEBE, DISTRICT JUDGE.

*1 This cause came on for hearing on a previous day on the motion of plaintiffs, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc. and Marine Towing, Inc., to remand, and on the motion of defendants, Schade and Company, Inc., Eric Schade and Alfred Schade, to remand.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of plaintiffs, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc. and Marine Towing, Inc., to remand, and the motion of defendants, Schade and Company, Inc., Eric Schade and Alfred Schade, to remand, be, and the same are hereby GRANTED.

REASONS

The procedural history of this case is long and complicated, but is an important part of the Court's decision on the motions to remand. Therefore, the Court will summarize that history before discussing the substance of the motions.

STATE COURT ACTION: On April 7, 1992, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc. (hereinafter "Marine Towing") commenced suit against defendants, Sphere Drake Insurance plc (hereinafter "Sphere Drake"), Schade & Company, Inc., Eric Schade, Alfred Schade (hereinafter collectively "Schade") and ABC Insurance Co., in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. Marine Towing sought a declaration that the policy of Protection and Indemnity Insurance (hereinafter "P & I policy") issued by Sphere Drake to Marine Towing provided coverage for the loss of the M/V ST. JUDE, and the death of four crewmen, in the Mississippi River on March 14, 1992. Marine Towing requested coverage under Sphere Drake policy wording SD 350, Class 1, which specifically includes an arbitration clause. Marine Towing also sought to recover damages and statutory penalties for the refusal of Sphere Drake to honor its obligations under the policy.

Schade procured the Sphere Drake insurance policy on behalf of Marine Towing. In the event that the Court determined that there was no coverage under the insurance policy, Marine Towing contended that Schade was liable for failure to exercise the standard of care expected of a reasonably prudent insurance broker in the procurement, placement and brokering of insurance policies, and for breach of its contractual obligations as a broker.

CIVIL ACTION NO. 92-1509: On May 1, 1992, purportedly in compliance with The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter "the Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997, codified as 9 U.S.C. §§ 201, *et seq.*, Sphere Drake unilaterally filed a Notice of Removal of the state court action. The Notice of Removal did not join the other de-

fendants to the state court proceeding, Schade & Company, Inc., Eric Schade, Alfred Schade (hereinafter collectively "Schade"), and the ABC Insurance Company. After removal, the case was docketed in this Court as Civil Action No. 92-1509, under the caption "Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc. v. Sphere Drake Insurance PLC, Schade & Company, Inc., Eric Schade, Alfred Schade, and ABC Insurance Company" (hereinafter the "Removal Action"). Sphere Drake then filed a motion in the Removal Action to compel arbitration.

*2 *CIVIL ACTION NO. 92-1509 REMANDED:* In part because Sphere Drake failed to join all state court defendants in its Notice of Removal, as required by 9 U.S.C. § 205 and 28 U.S.C. § 1441(a), Marine Towing and Schade both moved to remand the Removal Action to state court. In an order dated November 18, 1992, this Court granted both plaintiffs' and defendants' motions to remand on the grounds that Schade, a defendant in the case, refused to consent to Sphere Drake's removal of the case. In an order dated November 19, 1992, this Court stated that Sphere Drake's motion to compel arbitration in Civil Action 92-1509 had been rendered moot by this Court's decision on the motions to remand.

CIVIL ACTION NO. 92-2058: On June 16, 1992, Sphere Drake filed a petition to compel arbitration and for stay of litigation and commenced another proceeding, Civil Action No. 92-2058. Sphere Drake's petition to compel arbitration in C/A No. 92-2058 seeks no additional relief beyond that sought in its motion to compel arbitration filed in Civil Action No. 92-1509. Defendants filed a motion to dismiss Sphere Drake's petition to compel arbitration and for stay of litigation, contending that this Court lacked subject matter jurisdiction and that the petition failed to state a cause of action.

In a minute entry dated December 28, 1992, this Court denied defendants' motion to dismiss Sphere Drake's petition to compel arbitration and for stay of litigation. Sphere Drake immediately filed a motion for order granting plaintiff's petition to compel arbitration and to stay litigation.

Marine Towing filed an answer to Sphere Drake's petition for order to compel arbitration and for stay of litigation. Marine Towing also filed a cross-motion for summary judgment. This Court granted Sphere Drake's motion for order granting plaintiff's petition to compel arbitration and to stay all federal and state litigation as between Marine Towing and Sphere Drake only. This Court denied Marine Towing's cross-motion for summary judgment.

STATE ACTION: On March 31, 1993, Schade filed a cross-claim against Sphere Drake in the remanded action.

CIVIL ACTION NO. 93-1546: Sphere Drake removed the state case again on May 7, 1993 pursuant to 28 U.S.C. § 1446(b). Marine Towing and Schade each filed a motion to remand. Those motions to remand are currently before the Court.

Schade argues that once a case has been remanded to state court, the district court is divested of jurisdiction and the matter cannot be appealed. New Orleans Public Service, Inc. v. Majoue, 802 F.2d 166, 167 (5th Cir.1986); Soley v. First Nat. Bank of Commerce, 923 F.2d 406 (5th Cir.1991); 28 U.S.C. § 1447(d). Schade argues that this second removal constitutes an improper attempt to seek review of this Court's remand order.

Sphere Drake argues that it is not appealing the Court's November 1992 order remanding the case. Rather, this removal constitutes a separate attempt to remove the case.

*3 This Court finds that Sphere Drake is not appealing this Court's remand order dated November 19, 1992. Rather, Sphere Drake is attempting to remove the case for a second time, contending that it has legitimate grounds to do so.

A second petition for removal can be filed, but only

if subsequent events make the case removable. Employers Insurance of Wausau v. Certain Underwriters at Lloyd's, 787 F.Supp. 165, 169 (W.D.Wis.1992), *citing* Central Georgia Railway v. Riegel Textile Corp., 426 F.2d 935 (5th Cir.1970); 28 U.S.C. § 1446(b). Marine Towing argues that there was no such change in circumstances.

Sphere Drake contends that there has been a change in circumstances since the November 1992 remand, which cured the procedural defect that resulted in remand. Sphere Drake refers to Schade's cross-claim against Sphere Drake, which was filed on March 31, 1993. Sphere Drake contends that, in that cross-claim, Schade asserted Marine Towing's rights against Sphere Drake. Sphere Drake insists that, in filing that cross-claim, Schade was acting as Marine Towing's agent in a flagrant and improper attempt to circumvent this Court's order in C/A No. 92-2058 staying litigation and compelling arbitration of Marine Towing's claims against Sphere Drake. Sphere Drake contends that the allegations in the cross-claim reveal that Schade shares the plaintiffs' interests. Therefore, Sphere Drake argues, Schade must be realigned as a party plaintiff.

Sphere Drake maintains that the requirement that all defendants consent to the removal can be cured by realignment of the parties. Pennell v. Collector of Revenue, 703 F.Supp. 823, 824-25 (W.D.Mo.1989), *citing* 14 Wright, Miller & Cooper, Fed.Prac. & Procedure § 3731 (1987). Therefore, once Schade is realigned, then Schade's consent is not necessary and there is no reason to remand.

Realignment of the parties is determined by the "principal purpose of the suit and the primary and controlling matter in dispute." Lowe v. Ingalls Shipbuilding, Division of Litton Systems, Inc., 723 F.2d 1173, 1177-78 (5th Cir.1984), *quoting* Indemnity Insurance Co. of North America v. The First National Bank at Winter Park, Florida, 351 F.2d 519, 522 (5th Cir.1965). The test is whether the parties with the same "ultimate interests" in the outcome of the action are on the same side. *Lowe,* 723 F.2d at 1178,*quoting*Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3607 at 639. In *Lowe,* the court realigned one of the defendants as a plaintiff, finding that there was no dispute between that defendant and the plaintiffs, in that they had resolved their differences prior to the time suit was filed. *Id.,* 723 F.2d at 1178.

Sphere Drake contends that the principal purpose of Marine Towing's suit is to compel Sphere Drake to provide marine P & I insurance coverage for the sinking of the M/V ST. JUDE. Marine Towing's state court petition seeks a judgment declaring that Sphere Drake owes Marine Towing P & I insurance coverage and precluding Sphere Drake from denying coverage for claims arising out of the loss of the M/V ST. JUDE. Marine Towing also alleges an alternative cause of action against Schade, but Sphere Drake contends that Schade faces liability only if Marine Towing's coverage action against Sphere Drake fails. Sphere Drake argues that Schade's cross-claim seeks the same relief that Marine Towing sought from Sphere Drake.

***4** Several district court cases in the Fifth Circuit have involved the issue of whether a certain defendant should be realigned as a plaintiff, so that removal can be accomplished without that party's consent. Scott v. Communications Services, Inc., 762 F.Supp. 147 (S.D.Tex.1991); Carlton v. Withers, 609 F.Supp. 146 (M.D.La.1985); Aynesworth v. Beech Aircraft Corp., 604 F.Supp. 630 (W.D.Tex.1985). *Carlton* is most helpful in resolving this case.

In *Carlton,* plaintiff sued several defendants to recover damages resulting from an automobile accident. *Id.,* 609 F.Supp. at 147. Dr. Withers, who had provided medical services to plaintiff after the accident, filed a petition to intervene to recover the cost of those medical services. *Id.* Plaintiff then filed an answer, an amended answer, and a counterclaim against Dr. Withers. *Id.* Dr. Withers then tried to remove the counterclaim, claiming diversity of citizenship. *Id.* The court was faced with the issue of whether Dr. Withers could be classified as a de-

fendant, since only a properly aligned defendant may remove a case. *Id.* at 148,*citing* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). The court found that Dr. Withers had no interest adverse to the plaintiff's; rather, he was only seeking through the intervention to secure a priority for his claim to any money awarded to the plaintiff. *Id.* at 149-150.

This Court finds, after reading Marine Towing's original petition filed in state court and Schade's cross-claim, also filed in state court, that Schade and Marine Towing have some adverse interests in this suit. While both plaintiffs and Schade seek to establish Sphere Drake's liability for the loss of the vessel and the four crewmen, plaintiffs also seek to establish Schade's liability. In their petition, plaintiffs allege that Schade failed to exercise the standard of care expected of a reasonably prudent insurance broker and that Schade breached its contractual obligations as a broker. Plaintiffs' attempt to establish Schade's liability is obviously adverse to Schade's interests. Therefore, under *Lowe* and *Carlton*, this Court holds that Schade should not be realigned as a plaintiff in this case.

Schade requests that attorney's fees and costs be ordered to Schade for improper removal. Schade cites 28 U.S.C. § 1447(c), which states that a court may order the payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal.

This Court finds that Sphere Drake set forth legitimate arguments regarding a change in circumstances warranting removal. The Court thus finds that Sphere Drake's removal was made in good faith. Therefore, this Court declines to award attorney's fees and costs.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of plaintiffs, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc. and Marine Towing, Inc., to remand, and the motion of defendants, Schade and Company, Inc., Eric Schade and Alfred Schade, to remand, be, and the same are hereby GRANTED.

E.D.La.,1993.
Arnold v. Sphere Drake
Not Reported in F.Supp., 1993 WL 255140 (E.D.La.)

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Only the Westlaw citation is currently available.

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

ALLIED ERECTING AND DISMANTLING CO., INC., Plaintiff,

v.

OHIO CENTRAL RAILROAD, INC., et al., Defendants.

No. 4:06CV509.

Oct. 12, 2006.

Christopher R. Opalinski, F. Timothy Grieco, Eckert, Seamans, Cherin & Mellott, Pittsburgh, PA, Jay M. Skolnick, Sr., Robert S. Hartford, Jr., Nadler, Nadler & Burdman, Youngstown, OH, for Plaintiff.

C. Scott Lanz, Manchester, Bennett, Powers & Ullman, Youngstown, OH, for Defendants.

MEMORANDUM OPINION AND ORDER

PETER C. ECONOMUS, District Judge.

*1 This matter is before the Court upon plaintiffs, Allied Erecting and Dismantling Company, Inc. and Allied Industrial Development's, motion to remand (Dkt.# 15) and brief in support (Dkt.# 16). Also before the Court are defendants, Ohio Central Railroad, Inc., *et al.'s,* memorandum in opposition to plaintiffs' motion to remand (Dkt.# 18) and plaintiffs' reply brief in support of motion to remand (Dkt.# 19). For the reasons discussed below, the motion to remand is **GRANTED.**

I. FACTUAL BACKGROUND

The Plaintiffs, Allied Erecting and Dismantling Company, Inc. and Allied Industrial Development, ("Plaintiffs"), own property situated at 2100 Poland Avenue, Youngstown, Mahoning County, Ohio. (Dkt.# 1). Defendants Ohio Central, *et al.,* ("Defendants"), are purportedly the successors in interest to various easements assigned by the Plaintiffs. A brief review of this case is necessary.

On May 6, 1993, Plaintiffs entered into an easement agreement ("LTV Easement Agreement") with LTV Steel Company, Inc., ("LTV"), granting LTV a perpetual, nonexclusive railroad easement. (Dkt. # 1, First Amended Compl. ¶ 10). The LTV Easement Agreement authorized LTV to "operate, use, maintain, repair, restore, replace, and abandon (at LTV's sole cost and expense) the railroad tracks and related equipment" for the intended purpose of running rail cars on certain tracks located on Plaintiffs' property. (Dkt. # 1, First Amended Compl. ¶ 11). LTV conveyed all of its right, title and interest in the LTV Easement Agreement to Defendants. (Dkt. # 1, First Amended Compl. ¶ 12).[FN1]

> FN1. Defendant The Ohio Central Railroad System is an unincorporated and unregistered association of ten railroads that operate throughout East Central Ohio, Northeastern Ohio, and Pittsburgh, Pennsylvania. (Dkt. # 1, First Amended Compl. ¶ 3). Plaintiffs' amended complaint also names as defendants the Ohio & Pennsylvania Railroad Company, the Warren & Trumbull Railroad Company, Youngstown & Austintown Railroad, Inc., the Youngstown Belt Railroad Company, and the Mahoning Valley Railway Company included among the ten railroads within the Ohio Central Railroad System. (Dkt. # 1, First Amended Compl. ¶¶ 5-9).

On September 17, 1993, Plaintiffs granted, *inter alia,* a perpetual non-exclusive easement ("PLE Easement Agreement") to Pittsburgh Lake Erie Properties, Inc. ("PLE"). (Dkt. # 1, First Amended Compl. ¶ 13). Defendants are assignees and/or successors-in-interest of certain limited railroad easement rights arising from the PLE Easement Agreement. (Dkt. # 1, First Amended Compl. ¶ 14).

On January 17, 2006, Plaintiffs filed a complaint

for monetary damages and declaratory as well as injunctive relief in the Mahoning County Court of Common Pleas. On February 6, 2006, Plaintiffs filed their First Amended Complaint, alleging misuse, abuse, overburdening of nonexclusive railroad easements, ("Count One"); unreasonable use of easements, ("Count Two"); unjust enrichment and deprivation of property, ("Count Three"); and trespass ("Count Four"). (Dkt. # 1, First Amended Compl.).

In Count One, Plaintiffs aver that Defendants have "continually held, stored, and/or otherwise impermissibly stopped rail cars on various rail lines" on Plaintiffs' property. (Dkt. # 1, First Amended Compl. ¶ 22). Plaintiffs contend that Defendants' "misuse, abuse, and overburdening of the easement rights" have caused "significant adverse impacts on [Plaintiffs'] ability to utilize its own rail lines, as well as to its operations and its intended development plans for the property." (Dkt. # 1, First Amended Compl. ¶ 22). In Count Two of their amended complaint, Plaintiffs contend that Defendants have "unreasonably held, stored and/or otherwise impermissibly stopped rail cars on the railroad tracks on the [Plaintiffs'] property in violation of the LTV Easement Agreement and the [PLE] Easement Agreement." (Dkt. # 1, First Amended Compl. ¶ 26). Plaintiffs' further allege, in Count Three, that Defendants have stopped and/or stored rail cars on the Plaintiff's property, thus damaging Plaintiff's property and depriving Plaintiff of the "beneficial use and enjoyment of its own property."(Dkt. # 1, First Amended Compl. ¶¶ 30-31). Finally, Count Four of the complaint alleges that Defendants have "continually entered upon the [Plaintiffs' property] for the purpose of holding, storing and/or impermissibly stopping rail cars on rail lines ... including rail lines over which it has no easement rights" as well as storing "hazardous, toxic and/or regulated substances and materials" on the property, thus constituting a trespass on the property. (Dkt. # 1, First Amended Compl. ¶¶ 35-36).

*2 Defendants removed this action to this Court, contending that Plaintiffs' claims are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C § 10101, *et seq.* Plaintiffs thereafter filed the instant motion to remand. In their motion, Plaintiffs argue that remand is proper because (1) no federal question appears on the fact of the well-pleaded complaint; (2) Defendants have not established that the ICCTA completely preempts Plaintiffs' state law claims; and (3) this Court lacks removal jurisdiction over the determination of the preemptive effect of Section 10501(b) of the ICCTA.

II. LAW AND ANALYSIS

"The district courts of the United States ... are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.' " *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S.Ct. 2611, 2616-17, 162 L.Ed.2d 502 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). The removal statutes evince the intent of Congress to grant "a limited class of state-court defendants" the right to a federal forum. *Martin v. Franklin Capital Corp.*, 126 S.Ct. 704, 711, 163 L.Ed.2d 547 (2005). In this vein, the removal statues are to be narrowly construed. *See First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456 (6th Cir.2002). Indeed, the district court must remand a case if at any time prior to final judgment it appears that the case was removed improvidently and without jurisdiction. See 28 U.S.C. § 1447(c). Remand from district court to state court is appropriate in two instances: (1) the absence of subject matter jurisdiction; or (2) a defect in the removal procedures. See *Page v. City of Southfield*, 45 F.3d 128, 131 (6th Cir.1995).

Defendants may remove an action to federal court pursuant to 28 U.S.C. § 1441 if the plaintiff's "well-pleaded complaint" presents a federal question, such as a federal cause of action, or demonstrates a diversity of citizenship between the parties. See 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). In the in-

stant mater, Defendants must demonstrate that this Court maintains original or diversity jurisdiction over the Complaint in order to prevent a remand of the action to the state forum. See *Wilson v. Republic Iron & Steel Co.,* 257 U.S. 92, 97-98 (1921) (establishing that the party seeking removal bears the burden of demonstrating its right thereto); *Rogers v. Wal-Mart Stores, Inc.,* 230 F.3d 868, 871 (6th Cir.2000) (same). In order to satisfy this burden, Defendant invokes federal question jurisdiction, alleging that Section 10501(b) of the ICCTA preempts the Plaintiffs' claims. (Dkt. # 1, Notice of Removal).

Preemption by ICCTA

Defendants contend that the ICCTA preempts Plaintiffs' common law claims because "in enacting the ICCTA, Congress intended to occupy completely the field of state economic regulation of railroads."(Dkt. # 1, Notice of Removal ¶ 3) (citations omitted). Defendants specifically state that all of the claims in the amended complaint arise from their use of rail lines in connection with their interstate railroad operations, and are based on the alleged misuse of railroad and property rights. (Dkt.# 18).

***3** The section of the ICCTA assigning jurisdiction over the regulation of rail transportation to the Surface Transportation Board is 49 U.S.C. § 10501(b). That section provides:

(b) The jurisdiction of the Board over-

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intend to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

The preemptive force of the ICCTA is subject to dispute among the federal courts; some have broadly construed its application. See *City of Auburn v. United States,* 154 F.3d 1025, 1029-103 (9th Cir.1998); *Wis. Cent. LTD. v. City of Marshfield,* 160 F.Supp.2d 1009, 1013 (W.D.Wis.2000). This Court has stated that the "ICCTA also evidences the intent of Congress to preempt the field in which state law previously operated with respect to railroads." *Columbiana County Port Auth. V. Boardman Twp. Park Dist.,* 154 F.Supp.2d 1165, 1180 (N.D.OH 2001)(emphasis added). Others courts have curtailed its force. *See Iowa, Chi. & E. R.R. v. Wash. County,* 584 F.3d 557, 561 (8th Cir.2004); *Fla. E. Coast R.R. Co. v. City of West Palm Beach,* 266 F.3d 1324, 1331 (11th Cir.2001); *Pejepscot Industrial Park, Inc., v. Maine Central Railroad,* 297 F.Supp.2d 326, 333 (D. Maine 2003).

For its part, the Surface Transportation Board ("STB") [FN2] has stated that "we do not believe that all state and local regulations that affect railroads are necessarily preempted by 49 U.S.C. § 10501(b). Rather, we believe that state and local regulation is permissible when it does not interfere with interstate rail operations." *Township of Woodbridge v. Consolidated Rail Corp.,* STB Dkt. No. 42053, 2000 WL 1771044 at 3; see also *Maumee & W. R.R. Corp. and RMW Ventures, LLC,* STB Dkt. No. 34354, 2004 WL 395835 at 1, (finding "Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property.").

FN2. The STB is the administrative body that governs railroad operations.

Indeed, it has been held that "a rail carrier that voluntarily enters into an otherwise valid and enforceable agreement cannot use the preemptive effect of section 10501(b) to shield it from its own commitments."*Pejepscot,* 297 at 333.This is particularly true where the enforcement of the agreement does not unreasonably interfere with interstate commerce. *Id.*

Plaintiffs argue that because their common law claims arise out of "voluntary contractual obligations bargained for in an arms-length transaction," the ICCTA does not preempt their claims. In their reply memorandum, Plaintiffs state that, rather than seeking to restrict Defendants' use of rail lines and interstate railroad operations, they instead "take[ ] issue with only a specific localized act: [Defendants'] impermissible misuse and abuse of an express easement." (Dkt.# 19). In short, Plaintiffs seek to refrain Defendants from parking and storing rail cars on its rail lines in violation of the terms of the LTV and PLE Easement Agreements.

***4** Defendants argue that the ICCTA's preemption clause applies to claims brought by property owners based on the alleged misuse of rails. In asserting that Plaintiffs' claims will directly impact or interfere with Defendants' railroad operations, Defendants attempt to construe Plaintiffs' state law claims as "clearly federal in nature," contending that said claims "seek judicial regulation of [Defendants'] use of rail lines." (Dkt.# 18). However, aside from these conclusory statements, Defendants have not demonstrated to this Court that the enforcement of the LTV and PLE Easement Agreements would impermissibly interfere with interstate rail operations. See *Woodbridge,* STB Dkt. No. 42053, 2000 WL 1771044 at *3, ("[V]oluntary agreements must be seen as reflecting [defendant's] own determination and admission that the agreements would not unreasonably interfere interstate commerce.").

Removal Jurisdiction

The Court need not resolve this dispute, however, as removal was inappropriate in this case.[FN3]It is well-settled that "[r]emoval and preemption are two distinct concepts. The fact that a defendant might ultimately prove that a plaintiff's claims are preempted ... does not establish that they are removable to federal court." *Warner v. Ford Motor Co.,* 46 F.3d 531, 535 (6th Cir.1995)(quoting *Caterpillar,* 482 U.S. at 398)(internal quotations omitted).

> FN3. This Court has previously determined that where removal was improper in a case involving claims which may be preempted, the district court should remand to the state to determine the preemption issue. *See Railroad Ventures, Inc. v. Columbiana County Port Authority,* Case No. 4:02CV1080;*see also Caterpillar,* 482 U.S. at 2433 n. 3, ("We intimate no view on the merits of this or any of the pre-emption arguments discussed above. These are questions that must be addressed in the first instance by the state court in which respondents filed their claims.")

"[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar,* 482 U.S. at 393 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 2 (1983)). In most cases, federal preemption is "ordinarily a federal defense to the plaintiff's suit." *Warner,* 46 F.3d at 533. As such, "it does not appear on the face of a well-pleaded complaint, and, therefore does not authorize removal to federal court."*Id.*

There are instances where Congress intends the preemptive force of a statute to be so extraordinary that it completely preempts an area of state law, "any claim purportedly on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc.,* 482 U.S. at 393.

Nevertheless, Courts have very narrowly construed the applicability of complete preemption. The United States Court of Appeals for the Sixth Circuit has noted that only four statutes evince Congressional intent to completely preempt a field: § 301 of the LMRA; § 502(a)(1)(B) of ERISA; § § 85 and 86 of the National Bank Act; and § 301(a) of the Copyright Act. *See AmSouth Bank v. Dale,* 386 F.3d 763, 776 (6th Cir.2004); *see also Ritchie v. Williams,* 395 F.3d 283, 286-87 (6th Cir.2005). Here, section 10501(b) does not completely preempt all regulations that affect railroads, but rather, only those that interfere with interstate rail operations. *See Woodbridge,* STB Dkt. No. 42053, 2000 WL 1771044. As such, Defendants' preemption arguments act as a federal defense to Plaintiffs' amended complaint, but do not create a basis for removal to this Court.

III. CONCLUSION

***5** Accordingly, the Court hereby **GRANTS** Plaintiff's motion to remand (Dkt. # 16) and orders this matter **REMANDED** to the Court of Common Pleas, Mahoning County, Ohio.

IT IS SO ORDERED.

N.D.Ohio,2006.
Allied Erecting and Dismantling Co., Inc. v. Ohio Central R.R., Inc.
Slip Copy, 2006 WL 2933950 (N.D.Ohio)

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Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2006 WL 1350286 (S.D.Tex.)
(Cite as: 2006 WL 1350286 (S.D.Tex.))

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Only the Westlaw citation is currently available.

United States District Court, S.D. Texas, Corpus Christi Division.

Doug BEARD, Plaintiff,

v.

AURORA LOAN SERVICES, et al, LLC, Defendants.

No. C.A. C-06-1142.

May 17, 2006.

Brantley Walter White, Sico White et al, Robert C. Hilliard, Hilliard & Munoz, Corpus Christi, TX, Brian Conway Hamilton, Locke Liddell et al, Dallas, TX, William H. Oliver, Pipkin Oliver & Bradley, L.L.P., San Antonio, TX, for Plaintiff.

Moulton S. Dowler, Jr., David Montgomery Evans, Langley Banack Inc, San Antonio, TX, Arthur E. Anthony, Robert T. Mowrey, Locke Liddell et al, Dallas, TX, Ralph F. Meyer, Royston Rayzor et al, Corpus Christi, TX, for Defendants.

ORDER OF REMAND

JANIS GRAHAM JACK, District Judge.

*1 On this day came on to be considered Plaintiff's Motion to Remand the above-styled action for lack of subject matter jurisdiction. (D .E.7.) For the reasons discussed below, the motion to remand is GRANTED and the above-styled action is REMANDED pursuant to 28 U.S.C. § 1447(c) to the County Court at Law No. 3 of Nueces County, Texas, where it was originally filed and assigned Cause Number 0660565-3.

I. BACKGROUND

On February 22, 2006, Plaintiff Doug Beard ("Plaintiff") filed suit in County Court at Law No. 3 in Nueces County, Texas, against Defendants Aurora Loan Services, LLC, Lisa Cockrell, Mary Speidel, Robert L. Negrin, Sue Anthony, and Codilis & Stawiarski, P.C. (collectively, "Defendants") [FN1] alleging wrongful foreclosure, breach of contract, negligence, intentional infliction of emotional distress, breach of fiduciary duty, unlawful debt collection practices, and violations of the Texas Deceptive Trade Practices Act. (See Pl.'s Orig. Pet. ("POP") at ¶¶ 3-9, 27-49.) Plaintiff is a citizen of Texas. (Not. of Rem. ("NOR") at ¶ 6.) Defendant Aurora Loan Services ("Aurora") is a citizen of Delaware and Colorado. (NOR at ¶ 7.) Defendants Lisa Cockrell, Mary Speidel, Robert L. Negrin, Sue Anthony, and Codilis & Stawiarski, P.C. (The "Law Firm Defendants") are all citizens of Texas. (NOR at ¶ 8.)

> FN1. Plaintiff's Petition also named as Defendants the "Unknown Holders and/or Owners of Residual Interest In Securitization of Mortgage Loans that Included Mortgage Loan of Doug Beard."

According to his state court petition, Plaintiff owned a home at 825 Alhambra Drive, Corpus Christi, Texas. (POP at ¶ 17.) Plaintiff had a mortgage on the home and Defendant Aurora serviced the mortgage. (POP at ¶ 17.) Plaintiff alleged that, while Aurora was servicing the loan, it intentionally miscalculated his mortgage balance and falsely claimed that it was not receiving loan payments from Plaintiff. (POP at ¶¶ 17-18, 28.) Plaintiff also alleged that Aurora failed to provide him with proper accountings or statements regarding the mortgage loan. (POP at ¶ 19.) Plaintiff claimed that Aurora, with the help of the Law Firm Defendants, then "maliciously and wrongfully" foreclosed on his home and failed to provide proper notice of the foreclosure sale. (POP at ¶¶ 20, 23, 28, 30.) According to Plaintiff, Aurora purchased Plaintiff's home at the foreclosure sale for far less than its market value and thus profited from its illegal foreclosure. (POP at ¶¶ 21, 24.) Finally, Plaintiff claimed that the Defendants are currently working to evict him from his home. (POP at ¶ 26.)

On February 27, 2006, Plaintiff served Defendant Aurora with a copy of his Original Petition. On March 28, 2006, Aurora removed the case to this Court alleging both diversity and federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. On April 12, 2006, Plaintiff filed a motion to remand the case for lack of subject matter jurisdiction. (D.E.7.) On May 1 and 2, 2006, Aurora and the Law Firm Defendants filed responses to Plaintiff's motion to remand. (D.E.16, 17.)

II. DISCUSSION

***2** A party may remove an action from state court to federal court if the action is one over which the federal court possesses subject matter jurisdiction. *See*28 U.S.C. § 1441(a). A court, however, "must presume that a suit lies outside its limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.,* 243 F.3d 912, 916 (5th Cir.2001); see *also Manguno v. Prudential Prop. & Cas. Ins. Co.,* 276 F.3d 720, 723 (5th Cir.2002). In evaluating jurisdiction, "[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand." *Manguno,* 276 F.3d at 723; see *also Acuna v. Brown & Root, Inc.,* 200 F.3d 335, 339 (5th Cir.2000) ("[D]oubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction").

A. Federal Question Jurisdiction

Aurora first claims that removal is proper because the Court has federal question jurisdiction over this case.

1. Well-Pleaded Complaint Rule

A federal district court has subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."28 U.S.C. § 1331. Generally, the determination of whether a court has federal question jurisdiction is resolved by application of the "well-pleaded complaint" rule. *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 808 (1986); *Hart v. Bayer Corp.,* 199 F.3d 239, 243 (5th Cir.2000). This rule:

> provides that the plaintiff's properly pleaded complaint governs the jurisdictional inquiry. If, on its face, the plaintiff's complaint raises no issue of federal law, federal question jurisdiction is lacking.

Hart, 199 F.3d at 243 (citing *Franchise Tax Bd. v. Laborers Vacation Trust,* 463 U.S. 1, 10 (1983))."The plaintiff is thus the master of her complaint." *Carpenter v. Wichita Falls Indep. Sch. Dist.,* 44 F.3d 362, 366 (5th Cir.1995). Where a plaintiff has a choice between federal and state law claims, he "may elect to proceed in state court on the exclusive basis of state law, thus defeating the defendant's opportunity to remove, but taking the risk that his federal claims will one day be precluded."*Id.*

A defendant cannot establish federal question jurisdiction merely by showing that federal law will "apply" to a case or that there is a "federal issue" in the plaintiff's state law causes of action. *Id.; see also Thompson,* 478 U.S. at 813. Similarly, it is insufficient for a defendant to show that there is a federal *defense* (including the defense of preemption) to a plaintiff's state law claims. *See, e.g., Hoskins v. Bekins Van Lines,* 343 F.3d 769, 772 (5th Cir.2003); *Carpenter,* 44 F.3d at 366. Rather, federal jurisdiction is sustainable only if the defendant "shows that (1) a federal right is an essential element of [the plaintiff's] state claim, (2) interpretation of the federal right is necessary to resolve the case, and (3) the question of federal law is substantial." *Howery,* 243 F.3d at 918.

***3** The Court finds that there is no federal question jurisdiction over this case. Plaintiff's petition does not invoke, or even reference, federal law except to state that:

> Plaintiff expressly disclaims any rights and causes of action under any federal law, choosing instead to base all claims and causes of action entirely on the common law and statutes of the state of Texas.

(POP at ¶ 11.) This language clearly shows that Plaintiff elected to proceed in state court on the exclusive basis of state law. Thus, under the well-pleaded complaint rule, there is no federal question jurisdiction.

Aurora's argument that this case is "nonetheless removable to federal court [because] it turns on the resolution of substantial predicate questions of federal law" is unpersuasive because Aurora has failed to establish all the prongs of the *Howery* jurisdiction test. (NOR at ¶ 12.) The mere fact that the Real Estate Settlement Practices Ac t [FN2], Home Owners Loan Act [FN3], Fair Debt Collection Practices Act [FN4], and Truth-in-Lending Act [FN5] may govern some of the conduct of which Plaintiff complains in this case is not alone sufficient to confer federal jurisdiction. See, *e.g., Howery,* 243 F.3d at 915, 917-18 (issue of whether defendants violated FTC rules and regulations was not sufficient to confer federal jurisdiction where the federal violations merely described the conduct that violated Texas law); *Thompson,* 478 U.S. at 805-06 (issue of whether a drug was "misbranded in violation of the [FDCA]" was not sufficient to confer federal jurisdiction where the misbranding was used to establish negligence *per se* under Ohio law); *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.,* 418 F.3d 535, 543 (5th Cir.2005) (stating that "[p]otential defenses, including a federal statute's preemptive effect, *do not provide a basis for removal").* Aurora has failed to show that the issue of whether it violated these federal statutes is *itself an element* of Plaintiff's state law claims. *See Howery,* 243 F.3d at 918. Likewise, because a violation of federal law is not an essential element of Plaintiff's claims, "interpretation of a federal right is not necessary to this case."*Id.* Finally, the federal issues are not "substantial" because the state law issues in Plaintiff's seven Texas causes of action are likely to overwhelm any federal issues in the case. *Id.* at 919.Therefore, Aurora has failed to meet its burden of establishing that the Court has federal question jurisdiction over this case.

FN2.12 U.S.C. § 2601 et seq.

FN3.12 U.S.C. § 1461 et seq.

FN4.15 U.S.C. § 1692 et seq.

FN5.15 U.S.C. § 1601 et seq.

2. Complete Preemption Exception

Despite the fact that Plaintiff's complaint does not support federal question jurisdiction, Aurora nonetheless argues that jurisdiction is appropriate because "Plaintiff's claims against Aurora are wholly preempted by federal law."(NOR at ¶ 9.) In particular, Aurora argues that the "Home Owners Loan Act ("HOLA") ... and accompanying regulations expressly preempt state laws" and "preclude application of state law effecting *[sic],* inter alia, loan-related fees, including servicing fees and overlimit fees as well as with respect to the processing, origination, and servicing of mortgages."(NOR at ¶¶ 10-11.)

***4** Where the plaintiff's complaint does not invoke federal law, a court has federal question jurisdiction only if the defendant can show that federal law "completely preempts" state law. *Hart,* 199 F.3d at 244. If complete preemption is found, a plaintiff's facially state law claims will be "recharacterized" as a federal cause of action. *Id.* (citing *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393 (1987))."Federal preemption is ordinarily a federal defense to the plaintiff's suit," and not an authorization of removal to federal court. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63 (1987) (emphasis supplied). "Complete preemption," however, is an exception to the normal rules for evaluating jurisdiction. Absent "extraordinary circumstances the well-pleaded complaint rule gov-

erns." *Carpenter,* 44 F.3d at 367 (citing *Franchise Tax Bd.,* 463 U.S. at 10).

In order to establish complete preemption, a defendant must do more than show that federal law provides a *defense* to the application of state law. *Hart,* 199 F.3d at 244; see *also Taylor,* 481 U.S. at 66 ("even an obvious pre-emption defense does not, in most cases, create removal jurisdiction"). Rather, "the defendant must demonstrate that Congress intended not just to preempt a state law to some degree, but to altogether *substitute* a federal cause of action for a state cause of action." *Hart,* 199 F.3d at 244 (emphasis supplied); see *also Carpenter,* 44 F.3d at 366 (stating that Congress must "so forcibly and completely displace state law that the plaintiff's cause of action is either wholly federal or nothing at all"). The Fifth Circuit will not find complete preemption of state law unless (1) federal law provides the plaintiff with a private right of action, and (2) Congress intended that the federal cause of action be the plaintiff's *exclusive remedy. PCI Transp.,* 418 F.3d at 544; *Hoskins v. Bekins Van Lines,* 343 F.3d 769, 775-76 (5th Cir.2003) .[FN6]

> FN6. The Supreme Court has found very few federal statutes to have such broad preemptive scope: § 301 of the Labor Management Relations Act, § 502(a)(1)(B) of the Employee Retirement Income and Security Act, and § 86 of the National Bank Act. *See Avco v. Aero Lodge No. 735,* 390 U.S. 557 (1968); *Metropolitan Life,* 481 U.S. at 66; *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1 (2003).

Defendant Aurora has failed to meet its burden of showing that HOLA has the "extraordinary pre-emptive power" needed to support federal jurisdiction. *Metropolitan Life,* 481 U.S. at 65. First, Aurora has failed to show that HOLA contains a private, civil enforcement provision applicable to the facts alleged in Plaintiff's petition. The only civil enforcement provision cited by Aurora is contained in 12 U.S.C. § 1463, which provides for private suits against savings associations for charging excessive interest. *See Id.* at § 1463(g)(1)-(2). Aurora argues that this section of HOLA is similar to § 86 of the National Bank Act, which the Supreme Court found to completely preempt a plaintiff's state law usury claims in *Beneficial National Bank v. Anderson,* 539 U.S. 1 (2003). Therefore, Aurora argues that § 1463(g)(2) also completely preempts state law claims in this case.

This argument, however, ignores the fact that Plaintiff has *not alleged a usury claim* against Aurora. The plaintiffs in *Beneficial* explicitly "sought relief for usury violations and claimed that [defendants] charged excessive interest in violation of the common law usury doctrine and violated Alabama [law] by charging excessive interest." *Beneficial,* 539 U.S. at 9. In this case, however, Plaintiff has not alleged that Aurora charged excessive interest and, in fact, expressly disclaimed "that any fees [or] charges ... are, in and of themselves, illegal."(POP at ¶ 12.) Thus, while HOLA may completely preempt state law claims of usury, Plaintiff has not asserted a usury claim in this case and therefore Aurora may not rely on § 1463(g)(2) to show preemption.

***5** Rather than alleging usury, Plaintiff has claimed that Aurora intentionally miscalculated his mortgage balance, falsely claimed that it was not receiving loan payments, and wrongfully foreclosed on his home. (POP at ¶¶ 17-18, 28.) Aurora has failed to demonstrate that HOLA provides a private federal remedy for such conduct. In fact, courts have consistently noted that HOLA generally does *not* allow for such private suits. *See, e.g., Taylor v. Citizens Fed. Sav. & Loan Ass'n,* 846 F.2d 1320, 1323-24 (11th Cir.1988) (finding "no express language or other evidence of congressional intent to provide a private right of action" under HOLA); *Burns Intern., Inc. v. Western Sav. & Loan Ass'n,* 978 F.2d 533, 535 (9th Cir.1992) (finding no private federal cause of action for violation of HOLA); *Reschini v. First Fed. Sav. & Loan Ass'n of Indiana,* 46 F.3d 246, 255 (3d Cir.1995) (plaintiff "has not identified any provision of

HOLA or the National Housing Act that indicates congressional intent to create, either expressly or by implication, a private cause of action. Our own examination has been no more fruitful"); *Korfhage v. Great Financial Corp.*, 127 F.3d 1102, 1997 WL 671717 at *1 (6th Cir. Oct. 24, 1997) (Table decision) (dismissing, as without jurisdiction, an action filed pursuant to HOLA, noting that the "act did not provide jurisdiction to consider" such a claim).[FN7] Without a private, federal cause of action for the conduct alleged in Plaintiff's petition, Aurora cannot rely on complete preemption to support federal jurisdiction.

> FN7. Nor can the federal regulations accompanying HOLA be the basis for a private right of action. *See Casas v. American Airlines, Inc.* 304 F.3d 517, 520 (5th Cir.2002) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("language in a regulation [cannot] conjure up a private cause of action that has not been authorized by Congress")).

Second, even if HOLA did provide a federal remedy for the conduct of which Plaintiff complains, Aurora has also failed to show that Congress intended that remedy to be exclusive. Indeed, the federal regulations accompanying HOLA contradict such an assertion. 12 C.F.R. § 560.2 expressly states that certain state laws "are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent" with the regulation. *See Id.* at § 560.2(c). Examples of laws that are not preempted include contract and commercial law, real property law, and tort law. *Id.* Thus, the regulations assume that a savings association may be subject to state law tort and contract claims in certain circumstances. Therefore, it cannot be said that Congress intended HOLA to be a plaintiff's exclusive remedy against a savings association.

All that Aurora has shown is that HOLA preemption may be a *defense* to some of Plaintiff's claims. *See, e.g., Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141 (1982) (holding that a due-on-sale regulation pursuant to HOLA provided a defense to application of state law). The preemption defense, however, is not enough to show that a case is removable to federal court. *See, e.g., Caterpillar,* 482 U.S. 386, 397 (1987). Therefore, the complete preemption exception does not establish federal question jurisdiction in this case.

B. Diversity Jurisdiction

*6 Aurora and the Law Firm Defendants also argue that the Court has diversity jurisdiction over the case because the Law Firm Defendants "are merely nominal parties and were improperly joined" to the action. (NOR at ¶ 28.)

1. Fraudulent Joinder

Where the alleged basis for federal jurisdiction is diversity under 28 U.S.C. § 1332, a court has subject matter jurisdiction if there is: (1) complete diversity of citizenship; and (2) an amountin-controversy greater than $75,000. *See*28 U.S.C. § 1332(a).Section 1332 requires "complete diversity" of citizenship and a district court generally "cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship as any one of the defendants." *Corfield v. Dallas Glen Hills LP,* 355 F.3d 853, 857 (5th Cir.2003) (citations omitted). In analyzing diversity, however, the Fifth Circuit has counseled district courts to disregard the citizenship of parties that have been *improperly* joined. *See Smallwood v. Ill. Cent. R.R. Co.,* 385 F.3d 568, 572-73 (5th Cir.2004) (en banc) (stating that "federal courts should be "vigilant not to sanction devices intended to prevent the removal to a federal court where a defendant has that right").

The burden of proving fraudulent joinder, however, is on the defendant, and that burden is a "heavy one." See *Griggs v. State Farm Lloyds,* 181 F.3d 694, 699, 701 (5th Cir.1999). Indeed, the Supreme Court has stated that:

> Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet "fraudulent" to the joinder, will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith.

Chesapeake & O.R. Co. v. Cockrell, 232 U.S. 146, 152 (1914). Therefore, in order to establish improper joinder, a defendant must show that the Plaintiff has "no reasonable basis" for recovery against an in-state defendant. *Smallwood,* 385 F.3d at 573. When applying this test, the court conducts "a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether [it] states a claim under state law against the in-state defendant."*Id.* The court must "resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party." *Hart,* 199 F.3d at 246. Generally, if the plaintiff "survive [s] a Rule 12(b)(6) challenge, there is no improper joinder." *Smallwood,* 385 F.3d at 573.

In this case, the Court finds that Plaintiff has stated a claim against the Law Firm Defendants. Plaintiff does not specify exactly what role each of the Law Firm Defendants played in the foreclosure of his home, except to allege generally that Law Firm Defendants acted as "substitute trustees." (*See, e.g.,* POP at ¶¶ 10, 30.) Similarly, the Law Firm Defendants each filed answers alleging that each was sued "solely in the capacity as trustee."(NOR Ex. C(18)-(22).) The evidence on record, however, suggests that only Defendant Sue Anthony acted as trustee and that the other Law Firm Defendants facilitated the foreclosure by "produc[ing], mail[ing], and post[ing] all requisite documents and notices."(See, *e.g.,* D.E. 14, Ex. 1; D.E. 16, Ex. 2.) In any case, which Law Firm Defendant in particular acted as trustee is irrelevant because this Court cannot exercise diversity jurisdiction if any *one* of the properly-joined defendants is a citizen of the same state as Plaintiff. *Corfield,* 355 F.3d at 857. As explained below, Plaintiff has stated a claim against the trustee for failing to comply with the terms of the deed of trust and Texas law.

*7 Under Texas law, "a trustee exercising the authority to foreclose in accordance with the terms of a deed of trust does not act merely as an agent or employee of the lienholder but has a separate capacity with a particular legal responsibility." *Peterson v. Black,* 980 S.W.2d 818, 822 (Tex.App.-San Antonio 1998) (citing *Hammonds v. Holmes,* 559 S.W.2d 345, 347 (Tex.1977))."When exercising a power in a deed of trust, the trustee becomes a special agent for both parties, and he must act with absolute impartiality and with fairness to all concerned in conducting a foreclosure." *Powell v. Stacy,* 117 S.W.3d 70, 74 (Tex.App.-Fort Worth 2003). It is true that a trustee does not owe a traditional "fiduciary duty to the mortgagor." *Stephenson v. LeBoeuf,* 16 S.W.3d 829, 837 (Tex.App.-Houston 2000) (citing *First State Bank v. Keilman,* 851 S.W.2d 914, 925 (Tex.App.-Austin 1993)). The trustee *does have a duty,* however, to "strictly comply" with terms of the deed of trust as well as the notice and sale provisions of § 51.002 of the Texas Property Code. *See, e.g., Powell,* 117 S.W.3d at 74; *Stephenson,* 16 S.W.3d at 837 (stating that a trustee has a duty "to carry out the authority devolved, in scrupulous honesty, according to law and the provisions of the instrument"); *Cargal v. Cargal,* 750 S.W.2d 382, 385 (Tex.App.-Fort Worth 1988) (duty to follow provisions of Texas Property Code). With respect to the issue of notice in particular, "compliance with the notice condition contained in the deed of trust and as prescribed by law is a prerequisite to the right of the trustee to make the sale." *Harwath v. Hudson,* 654 S.W.2d 851 (Tex.App.-5th Dist.1983).

In this case, Plaintiff has alleged that the Law Firm Defendants (as trustees) foreclosed on his home without cause and failed to give the notice required by law. (POP at ¶¶ 23, 30.) In other words, Plaintiff has alleged that the Law Firm Defendants failed to strictly comply with the terms of the deed of trust and Texas law. Accepting these allegations as true

[FN8], Plaintiff has stated a claim against the trustees under Texas law.

> FN8. In their response to Plaintiff's motion to remand, the Law Firm Defendants argue that Plaintiff does not have any *evidence* to support his allegations that the trustees foreclosed without cause and failed to follow Texas law. (Joint Resp. at ¶¶ 7-13, 21-27.) This Court, however, is limited to looking to the allegations of Plaintiff's complaint. *See Smallwood,* 385 F.3d at 573-74. A summary or evidentiary inquiry "is appropriate *only* to identify the presence of *discrete and undisputed* facts that would preclude plaintiff's recovery against the in-state defendant." *Id.* at 573-74 (emphasis supplied). The Law Firm Defendants' general claim that the house was "rightfully and properly foreclosed" is not the kind of "discrete and undisputed" fact for which a summary inquiry is appropri- ate.

2. Personal Liability of the Trustees

Defendants argue, however, that Plaintiff "does not allege any specific facts or conduct ... that would give rise to a claim or cause of action against the Law Firm Defendants independent of those asserted against Aurora."(NOR at ¶ 29.) Thus, Defendants reason that the Law Firm Defendants' "citizenship must be ignored for the purposes of assessing diversity jurisdiction because they are being sued for their alleged conduct as Aurora's agents."(Aurora's Resp. at 14.) Resolving all ambiguities in Texas law in favor of Plaintiff, however, this Court finds that Plaintiff can state a claim against the trustees in their personal capacities. As the Texas Supreme Court said of a trustee:

> He was trustee in the deed of trust, and plaintiffs allege that he foreclosed without cause to do so.... It cannot be said as a matter of law that he acted in the foreclosure in the capacity of bank employee. The trustee has a separate capacity and is imposed with a particular legal responsibility.... Summary judgment was not justified [with respect to the trustee] on ... the allegations of these pleadings alone.

***8** *Hammonds,* 559 S.W.2d at 347;*see also Peterson,* 980 S.W.2d at 822 ("a trustee exercising the authority to foreclose ... does not act merely as an agent or employee of the lienholder but has a separate capacity with a particular legal responsibility").[FN9] Therefore, there is no merit in Defendants' claim that the Law Firm Defendants are mere extensions of Aurora as a matter of law.

> FN9. Aurora asserts that the citizenship of "agents" are ignored for diversity purposes. (Aurora's Resp. at 15.) The settled law in the Fifth Circuit, however, is that an agent's citizenship is considered for diversity purposes if the plaintiff can hold the agent personally liable under state law. *See Hart,* 199 F.3d at 248. "The fact that [an agent] was acting within the course and scope of his employment is not dispositive" of the jurisdictional question. *Id.*

Furthermore, Texas Property Code § 51.007 does not, as Defendants claim, stand for the proposition that "substitute trustees are not proper parties in an action challenging the propriety of mortgage foreclosures."(Aurora's Resp. at 14.) Under § 51.007, a trustee named in a suit may plead "that the trustee is not a necessary party" to the action based on the trustee's "reasonable belief" that he or she was named as a party solely in the capacity as a trustee. *Id.* at § 51.007(a). The plaintiff then may file a "verified response" rebutting the trustee's claim. *Id.* at § 51.007(b). If no such response is filed, the court must dismiss the trustee. *Id.* at § 51.007(c). If, however, plaintiff files a timely response, the court holds a hearing to determine whether the plaintiff has alleged actionable conduct on the part of the trustee or whether the trustee acted in good faith reliance on information provided by a third-party. *See Id.* at § 51. 007(d), (f). Thus, § 51.007 does *not*

stand for the proposition that trustees are never appropriate parties to a lawsuit. Rather, the section provides a procedure for identifying and dismissing (where appropriate) claims against trustees in their personal capacities early in the litigation. In this case, Plaintiff has pled, in both his petition and in a verified response (D.E.10), that he is suing the Law Firm Defendants in their personal capacities. (*See, e.g.,* POP at ¶ 10). As noted above, Plaintiff has also alleged facts which, if true, state a claim against the Law Firm Defendants under Texas law. Therefore, the Law Firm Defendants have been properly joined and the Court does not have diversity jurisdiction over this case.

III. CONCLUSION

For the reasons discussed above, Plaintiff's Motion to Remand (D.E.7) is GRANTED and the above-styled action is REMANDED pursuant to 28 U.S.C. § 1447(c) to the County Court at Law No. 3 of Nueces County, Texas, where it was originally filed and assigned Cause Number 0660565-3.

SIGNED and ENTERED this 17th day of May, 2006.

S.D.Tex.,2006.
Beard v. Aurora Loan Services, LLC
Not Reported in F.Supp.2d, 2006 WL 1350286 (S.D.Tex.)

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279 Fed.Appx. 340
279 Fed.Appx. 340, 2008 WL 2130472 (C.A.6 (Mich.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 279 Fed.Appx. 340, 2008 WL 2130472 (C.A.6 (Mich.)))

H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)

United States Court of Appeals, Sixth Circuit.

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.

May 22, 2008.

Background: Unsuccessful bidder on city public works contract brought action in state court against city, its water and sewer department, and the mayor, alleging breach of contract, defamation, interference with business relationships and contracts, failure to follow procedural rules, and negligent misrepresentation. Defendants obtained removal. The United States District Court for the Eastern District of Michigan, 476 F.Supp.2d 651,Feikens, J., granted defendants' motion for summary judgment. Bidder appealed.

Holdings: The Court of Appeals, Boggs, Chief Judge, held that:
(1) removal was warranted on grounds of federal question jurisdiction;
(2) bidder lacked standing to sue for breach of contract;
(3) letter notifying other bidders that unsuccessful bidder was non-responsible did not give rise to defamation claim;
(4) bidder failed to establish tortious interference; and
(5) recusal of district court judge was not warranted.

Affirmed.

West Headnotes

[1] Removal of Cases 334 ⚿19(1)

334 Removal of Cases
334II Origin, Nature, and Subject of Contro- versy
334k19 Cases Arising Under Laws of United States
334k19(1) k. In General. Most Cited Cases
Unsuccessful bidder's state court action against city, its water and sewer department, and mayor, arose under federal law, so as to entitle defendants to removal of action to federal court on grounds of federal question jurisdiction; bidder's action contended that mayor violated his powers as a special master over water and sewer department pursuant to federal court order. 28 U.S.C.A. §§ 1331, 1441(b).

[2] Removal of Cases 334 ⚿17

334 Removal of Cases
334I Power to Remove and Right of Removal in General
334k17 k. Waiver of Right. Most Cited Cases
Forum-selection clause in unsuccessful bidder's bidding documents with city, water and sewer department, and mayor, whereby bidder agreed to submit to exclusive personal jurisdiction of competent state court in Michigan, did not constitute a waiver of defendants right to removal to federal court; clause did not even mention either removal or the defendants seeking removal. 28 U.S.C.A. § 1441(b).

[3] Municipal Corporations 268 ⚿336(1)

268 Municipal Corporations

268IX Public Improvements
268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases

Unsuccessful bidder on sewer facility contract lacked standing to sue city, its water and sewer department, and the mayor for breach of contract, arising out of defendants' failure to provide bidder with an opportunity to be heard at a board meeting following its filing of a protest, where bidder was never awarded the contract and mayor had unlimited discretion in awarding contracts in order to comply with an Environmental Protection Agency (EPA) consent decree. U.S.C.A. Const.Amend. 14.

[4] Municipal Corporations 268 ⚿747(1)

268 Municipal Corporations
268XII Torts
268XII(B) Acts or Omissions of Officers or Agents
268k747 Particular Officers and Official Acts
268k747(1) k. In General. Most Cited Cases

City and its water and sewer department were immune, under Michigan law, from liability for unsuccessful bidder's state-law claims for defamation and tortious interference, arising out of denial of sewer facility contract to bidder. M.C.L.A. Const. Art. 7, § 24; M.C.L.A. § 691.1407(1).

[5] Municipal Corporations 268 ⚿170

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(A) Municipal Officers in General
268k170 k. Duties and Liabilities. Most Cited Cases

Denial of sewer facility contract to unsuccessful bidder, based upon a finding that bidder was not "responsible," by mayor and director of city water and sewer department was within both mayor and director's authority as the highest official of their respective level of government, so as to entitle them, under Michigan law, to absolute immunity from liability in unsuccessful bidder's defamation and tortious interference claims. M.C.L.A. § 691.1407(5).

[6] Libel and Slander 237 ⚿36

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k35 Absolute Privilege
237k36 k. In General. Most Cited Cases

Letter notifying other bidders that unsuccessful bidder was non-responsible based on performance on a prior project was not an unprivileged communication to a third party, as element of unsuccessful bidder's defamation claim against city defendants under Michigan law; bidder consented to the 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.

[7] Torts 379 ⚿241

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k241 k. Business Relations or Economic Advantage, in General. Most Cited Cases

Unsuccessful bidder's alleged "valid promissory relationship" with city water and sewer department as to sewer facility contract did not constitute the type of relationship that could give rise to a tortious interference claim, under Michigan law, allegedly arising out of director and deputy director's interference with the relationship.

[8] Municipal Corporations 268 ⚿336(1)

268 Municipal Corporations
268IX Public Improvements

268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases
Mayor did not exceed his powers as special administrator of city water and sewer department, pursuant to federal court order appointing mayor as special administrator with power to enter into and perform all contractual obligations, when he awarded sewer facility contract to contractor other than unsuccessful bidder; mayor specifically invoked the power and explained that the order was necessary to ensure that department complied with Environmental Protection Agency (EPA) consent decree.

[9] Judges 227 ⇐49(1)

227 Judges
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) k. In General. Most Cited Cases
District court judge's knowledge of, and relationship with, city water and sewer department, which arose solely from his judicial role in overseeing consent decree with Environmental Protection Agency (EPA), did not constitute personal or extrajudicial bias, as required to justify recusal in unsuccessful bidder's action against city defendants, arising out of city's denial of sewer facility contract in favor of bidder.

***342** On Appeal from the United States District Court for the Eastern District of Michigan.

Before BOGGS, Chief Judge; ROGERS, Circuit Judge; and SHADUR, [FN*] District Judge.

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

BOGGS, Chief Judge.
****1** 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 DW SD, and Detroit's mayor, Kwame Kilpatrick. EBI claims that the defendants breached a contract and committed various intentional torts 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 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 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.

**2 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. [FN1]

> FN1. "Bid equalization" is a process that allows a government body to give preference to bidders with certain 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 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 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.

**3 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 1, 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 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 (1989) (quoting *Mayor v. Cooper,* 73 U.S. 247, 6 Wall. 247, 252, 18 L.Ed. 851 (1867)). 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 & Nashville R.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 case could have been filed in federal court. *Caterpillar Inc.,* 482 U.S. at 392, 107 S.Ct. 2425. 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, 109 S.Ct. 959. 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 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.

**4 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 of the County of Winnebago, Ill.,* 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 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," [FN2] EBI's own complaint establishes routine federal question jurisdiction under 28 U.S.C. § 1331.

FN2. 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

[1] 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 "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. Kilpatrick's power* and contrary to the provisions of the Contract Documents (emphases added).

**5 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 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."

[2] 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 and unequivocal." *Regis Associates 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.[FN3]

> FN3. 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 Valves, 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 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), 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

**6 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

[3] 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 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 reframing 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 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 DW SD 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 [FN4] 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 bidder suffered no cognizable antitrust injury); *Leo J. Brielmaier Co. v. Newport Housing Auth.*, 173 F.3d 855 (table), 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.

> FN4. 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., In re Colony Hill Associates*, 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 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 (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).

**7 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 Pav. Co. v. Detroit*, 109 Mich. 657, 67 N.W. 979, 980 (1896)).

United of Omaha is particularly 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 nev-

er 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); *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 WL 236193 at *7. But we need not definitively answer the standing question now, because even if EBI has standing, its claims fail.

1

8 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. Dept. of Pub. Health,* 428 Mich. 540, 410 N.W.2d 749, 772 (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 (1994) (relying on *Smith350 to grant immunity to police officers); *Flones v. Dalman,* 199 Mich.App. 396, 502 N.W.2d 725, 731 (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 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 (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 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 (2008), *reconsideration granted, order vacated by* 480 Mich. 1184, 747 N.W.2d 249, 250 (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 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,* 480 Mich. 1184, 747 N.W.2d 249, 250 (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.

**9 [4] 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 (2002) (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. *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 (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.

[5] 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. 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 (2006) (vacated in part on other grounds by *Brown v. Mayor of Detroit,* 478 Mich. 589, 734 N.W.2d 514 (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. *Am. Transmissions, Inc. v. Attorney Gen.,* 454 Mich. 135, 560 N.W.2d 50, 52 (1997). The offi-

cial'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 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.*[FN5]

> FN5. 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,* 480 Mich. 1184, 747 N.W.2d 249, 250.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.

**10 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 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 (1990) (granting immunity to both Director and Deputy Director of the Department of Corrections) *with Taylor v. Bomar-Parker,* 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 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.

[6] 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 (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. *See Merritt v. Detroit Mem.'l Hosp.*, 81 Mich.App. 279, 265 N.W.2d 124, 127 (1978) (statements consented to are privileged).

[7] 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." *P.T. Today, Inc. v. Comm'r of the Office of Fin. & Ins. Servs.*, 270 Mich.App. 110, 715 N.W.2d 398, 422 (2006).

****11** 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 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. ***353***Timmons v. Bone*, 2002 WL 745089, at *2 (Mich.Ct.App. April 23, 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, 641 N.Y.S.2d 581, 664 N.E.2d 492, 497 (1996) (disappointed bidder in merger could not bring tortious interference suit because it had only an expectation of contractual relations).

D

[8] 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. 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 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

**12 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. 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.

[9] 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. 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.

C.A.6 (Mich.),2008.
EBI-Detroit, Inc. v. City of Detroit
279 Fed.Appx. 340, 2008 WL 2130472 (C.A.6 (Mich.))

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Not Reported in N.E.2d
Not Reported in N.E.2d, 1988 WL 35809 (Ohio App. 10 Dist.)
(Cite as: 1988 WL 35809 (Ohio App. 10 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
STATE, ex rel. Mary PICKREL, Relator,
v.
INDUSTRIAL COMMISSION of Ohio, James Mayfield, Administrator, Bureau of Workers' Compensation, and Rockwell Standard Company, Respondents.
No. 86AP-736.

March 24, 1988.

On Objections to Referee's Report in Mandamus.

James E. Buchan, Jr., for relator.
Anthony J. Celebrezze, Jr., Attorney General, Helen M. Ninos and Gerald H. Waterman, for respondent Industrial Commission of Ohio.

OPINION

WHITESIDE, Presiding Judge.
*1 This original action in mandamus, pursuant to Cir.R. 53, was referred to a referee who has rendered a report recommending that the requested writ of mandamus be denied. Relator has filed objections to the referee's report contending that the referee misapplied and misconstrued R.C. 4123.59.

After a review of the evidence and the applicable law, we find that the referee correctly found the salient facts and applied the applicable law thereto. Accordingly, we approve and adopt the findings of fact of the referee.

Relator contends that, pursuant to R.C. 4123.59, she is entitled to receive death benefits at the maximum rate of $275 per week because of the death of her spouse as a result of an industrial injury while employed with respondent Rockwell Standard Company. The respondent Industrial Commission found that relator is entitled to death benefits in the amount of only $137.50 per week.

On the date of his death, relator's deceased spouse was receiving permanent total disability compensation because of his industrial injury, having been found to be permanently and totally disabled some nineteen years earlier. Relator's claim for death benefits as a wholly dependent surviving spouse was allowed, but the amount of such benefit was fixed at $137.50 per week. R.C. 4123.59 provides in pertinent part that:

"In case an injury to * * * an employee causes his death, benefits shall be in the amount and to the persons following:

" * * *

"(B) If there are wholly dependent persons at the time of the death, the weekly payments shall be sixty-six and two-thirds per cent of the average weekly wage, but not to exceed a maximum aggregate amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not in any event less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, regardless of the average weekly wage; * * * provided that when any claimant is receiving total disability compensation at the time of death the wholly dependent person shall be eligible for the maximum compensation provided for in this section. * * * "

Although the referee's report turns in part upon a distinction between entitlement and eligibility in re-

liance upon a former decision of this court in *State, ex rel. Zupp, v. City of Youngstown Fire Dept.* (Oct. 14, 1986), No. 85AP-425, unreported (1986 Opinions 2763), there is an additional predicate for such conclusion. Under the contention made by relator, a surviving dependent would be entitled to the maximum possible compensation in every case where the decedent was receiving total disability compensation (without apparent distinction between temporary and permanent), at the time of his death. However, reading the provisions of R.C. 4123.59(B) to reach a logical result, the weekly payment shall be sixty-six and two-thirds percent of the average weekly wage of the decedent, with a minimum and a maximum provision, namely, the minimum amount being fifty percent of the statewide average weekly wage, and the maximum amount being the statewide average weekly wage. (There is another provision applicable only to injuries received after January 1, 1976, which has no application herein.)

We disagree with relator's construction of the words "maximum compensation provided for in this section." Relator contends that the maximum amount of compensation provided for in this section is the statewide average weekly wage. Even though, pursuant to R.C. 4123.95, the provisions of R.C. 4123.59(B) must be liberally construed in favor of claimants, we do not find that such liberal construction requires the result contended by relator. The words "the maximum compensation provided for in this section" is sixty-six and two-thirds percent of the average weekly wage of the decedent but in no event less than one-half of the statewide average weekly wage. The words "not to exceed a maximum aggregate amount of weekly compensation which is equal to sixty-six and two-thirds percent of the statewide average weekly wage" is a ceiling and in that sense a maximum beyond which no compensation may be made. Such ceiling is reached and is applicable only if the decedent's average weekly wage exceeds the statewide average. However, had the legislature intended to apply the statewide average provision as the amount dependents are entitled, it could have simply stated that the wholly dependent person would be eligible to receive sixty-six and two-thirds percent of the statewide average weekly wage.

***2** Relator further contends that the amount should be the actual statewide average weekly wage since the maximum amount payable under the section would be that amount with respect to injuries which occurred after January 1, 1976. We find no such legislative intent. Rather, had the legislature so intended, it would have been simple for the legislature to have provided that the wholly dependent person shall be eligible for payment of compensation equal to the statewide average weekly wage. Since the legislature chose not to use such language but, instead, used the words "maximum compensation," we must conclude that the legislature had some different meaning in mind. That apparent meaning is the amount determined by application of the statutory formula. Additionally, this court considered and determined the issue in *Zupp, supra,* and there is no reason for this court at this time to reach an opposite conclusion.

Accordingly, for the foregoing reasons, we approve and adopt the referee's report as supplemented herein as that of the court and deny the requested writ of mandamus.

Writ denied.

STRAUSBAUGH and BRYANT, JJ., concur.
Ohio App.,1988.
State ex rel. Pickrel v. Industrial Com'n
Not Reported in N.E.2d, 1988 WL 35809 (Ohio App. 10 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Ann H. Womer BENJAMIN, etc., Plaintiff-Appellee,
v.
ERNST & YOUNG, LLP, Defendant-Appellee,
Foley & Lardner et al., Defendants/Third-Party Plaintiffs-Appellants,
v.
Ohio Department of Insurance, Third-Party Defendant-Appellee.
Ann H. Womer Benjamin, etc., Plaintiff-Appellee,
v.
Ernst & Young, LLP, Defendant-Appellant,
Foley & Lardner et al., Defendants/Third-Party Plaintiffs-Appellees,
v.
Ohio Department of Insurance, Third-Party Defendant-Appellee/Cross-Appellant.
Nos. 06AP-1244, 06AP-1245.

Decided Aug. 16, 2007.

Appeals from the Ohio Court of Claims.

Kegler, Brown, Hill & Ritter Co., LPA, Melvin D. Weinstein, Richard W. Schuermann, Jr. and Charles R. Dyas, Jr., for plaintiff.
Squire, Sanders & Dempsey, LLP, John R. Gall and Aneca E. Lasley; Mayer, Brown, Rowe & Maw, LLP, and Stanley J. Parzen, for Ernst & Young, LLP.
Zeiger, Tigges & Little, LLP, John W. Zeiger and Stuart G. Parsell, for Foley & Lardner and Michael H. Woolever.
Marc Dann, Attorney General, Karl W. Schedler and Lawrence D. Pratt, for Ohio Department of Insurance.

BRYANT, J.

*1 {¶ 1} Appellants/third-party plaintiffs, Foley & Lardner and Michael Woolever, as well as appellant, Ernst & Young, LLP (collectively, "appellants"), appeal from a judgment of the Ohio Court of Claims granting the motion to dismiss of appellee/thirdparty defendant, the Ohio Department of Insurance ("ODI"). Because the Court of Claims improperly granted ODI's motion to dismiss, we reverse.

{¶ 2} In her capacity as Liquidator for American Chambers Life Insurance Company ("ACLIC"), Ann H. Womer Benjamin, Superintendent of the Ohio Department of Insurance ("superintendent"), commenced this action in the Franklin County Court of Common Pleas against (1) Ernst & Young, LLP ("E & Y"), and (2) Foley & Lardner and Michael J. Woolever (collectively, "Foley"). E & Y is an accounting firm that audited ACLIC's financial statements prior to the delinquency proceedings that resulted in the liquidation of ACLIC; Foley & Lardner is a law firm that represented ACLIC prior to liquidation; and Woolever was a partner at Foley & Lardner. The superintendent's complaint alleged appellants not only negligently performed services for ACLIC, but also breached their fiduciary duty to ACLIC. The superintendent sought recovery of payments ACLIC made to appellants.

{¶ 3} In response to the superintendent's complaint, E & Y filed a motion to dismiss or to compel arbitration; the trial court has not ruled on the motion. Foley, however, filed an answer setting forth affirmative defenses, counterclaims against ODI, and a motion to transfer the action to the Ohio Court of Claims. On transfer to the Ohio Court of Claims, the superintendent filed a motion to dismiss Foley's counterclaims and to strike its affirmative defenses. The Court of Claims granted the motion to dismiss and returned the action to the Franklin County Court of Common Pleas. Both E & Y and Foley filed notices of appeal that were consolidated in this court.

{¶ 4} The superintendent and Foley subsequently partially settled the superintendent's claims against Foley, and Foley dismissed its appeal. Concluding E & Y had standing to appeal, this court affirmed the judgment of the Court of Claims that dismissed Foley's counterclaims. In affirming, we determined the superintendent may act in two separate capacities: regulator and liquidator. While Foley's counterclaims asserted claims against the superintendent as regulator, the superintendent filed the action against appellants in her separate capacity as liquidator. Accordingly, we concluded a counterclaim was not an available means to bring Foley's claims against the superintendent as regulator. *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App.3d 350, 2006-Ohio-2739.

{¶ 5} While the appeal was pending, Foley filed both a third-party complaint in the Franklin County Court of Common Pleas seeking money damages against ODI and a petition that removed the entire action to the Court of Claims. Due to a partial settlement, parts of the third-party complaint were dismissed with prejudice; only Foley's third-party claim seeking contribution from ODI remains. ODI filed a motion to dismiss the third-party complaint pursuant to Civ.R. 12(B)(1) and (6) and, alternatively, a motion to sever. After the appeal was resolved, the Court of Claims granted ODI's motion to dismiss the third-party complaint. In the absence of an extant claim against the state, the Court of Claims returned the action to the Franklin County Court of Common Pleas.

***2** {¶ 6} Both Foley and E & Y filed appeals, again consolidated in this court, assigning the following error:

The Court of Claims committed reversible error in dismissing the Third Party Complaint, filed by Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance for lack of subject matter jurisdiction, and remanding the case to the Franklin County Court of Common Pleas.

ODI filed a cross-appeal, assigning the following errors:

1. To the extent that the Court of Claims erred in concluding that R.C. 3903.04 divested the court of subject matter jurisdiction over the Third-Party Complaint filed by Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance, the complaint should have instead been dismissed for failure to state a claim upon which relief could be granted under Sections 3903.01 to 3903.59 of the Revised Code.

2. To the extent that the Court of Claims erred in concluding that R.C. 3903.04 applied to the Third-Party Complaint filed by the Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance, the complaint should have instead been dismissed under the discretionary function immunity doctrine.

3. To the extent the Court of Claims erred in concluding that R.C. 3903.04 applied to the Third-Party Complaint filed by Defendants/Third Party Plaintiffs Foley & Lardner and Michael Woolever against the Ohio Department of Insurance, the complaint should have instead been dismissed due to the failure of F & Y to plead the existence of a special duty/special relationship on the part of ODI.

{¶ 7} In their single assignment of error, appellants contend the Court of Claims erred in concluding that R.C. 3903.04 vests the Franklin County Court of Common Pleas with exclusive jurisdiction over Foley's third-party complaint against ODI. In reviewing the Court of Claims' judgment dismissing Foley's third-party complaint pursuant to Civ.R. 12(B)(1), we must determine whether the third-party complaint states "any cause of action cognizable by the forum * * *." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80.

{¶ 8} R.C. 3903.04(A) provides that "[n]o delinquency proceeding shall be commenced under this chapter by anyone other than the superintendent of insurance of this state. No court has jurisdiction to

entertain, hear, or determine any delinquency proceeding commenced by any other person."As used in the statute, delinquency proceeding "means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving the insurer, and any summary proceeding under section 3903.09 or 3903.10 of the Revised Code."R.C. 3903.01. R.C. 3903.04(A) thus determines, for purposes of this action, who may institute delinquency proceedings under R.C. 3903.04 to liquidate ACLIC: the superintendent of insurance.

***3** {¶ 9} R.C. 3903.04(B) states that "[n]o court of this state has jurisdiction to entertain, hear, or determine" the superintendent's complaint praying for the liquidation of ACLIC or praying for a temporary "restraining order, preliminary injunction, or permanent injunction, *or other relief preliminary to, incidental to, or relating to delinquency proceedings* other than in accordance with sections 3903.01 to 3903.59 of the Revised Code."(Emphasis added.) R.C. 3903.04(E) specifies that "[a]ll actions authorized in sections 3903.01 to 3903.59 of the Revised Code shall be brought in the court of common pleas of Franklin County."Based on the italicized language in R.C. 3903.04(B), ODI argues that because the claim in Foley's third-party complaint "arises directly from, is incidental to, or is related to delinquency proceedings,"R.C. 3903.04 mandates exclusive jurisdiction in the Franklin County Court of Common Pleas.

{¶ 10} A proper third-party complaint arises from the transaction or occurrence that is the subject matter of the primary claim. As the Supreme Court of Ohio explained, "[t]he transaction or occurrence which forms the subject matter of the primary claim must be the same transaction or occurrence that gives rise to legal rights in the defendant against the third-party defendant. If the claim asserted in the third-party complaint does not arise because of the primary claim, or is in some way derivative of it, then such claim is not properly asserted in a third-party complaint." *State ex rel. Jacobs v. Municipal Court* (1972), 30 Ohio St.2d 239, 242.Thus, ODI argues, the third-party complaint necessarily is "preliminary to, incidental to, or related to delinquency proceedings."

{¶ 11} ODI's argument invokes one possible interpretation of R.C. 3903.04(B): only the Franklin County Common Pleas Court has jurisdiction to determine a request for "relief preliminary to, incidental to, or relating to delinquency proceedings."Indeed, it is one we cannot summarily reject as bearing no relation to the language of the statute. The interpretation ODI suggests, however, results in insulating ODI from possible negligence in the performance of its duties as regulator for the insurance industry and, in particular, ACLIC. Specifically, under ODI's proposed interpretation, Foley would be required to initiate the third-party complaint in the Franklin County Common Pleas Court. The same court, however, lacks jurisdiction to hear the third-party complaint because the third-party defendant, ODI, is subject to suit for money damages only in the Court of Claims. See R.C. 2743.03(A)(1) (stating that "[t]he court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code"); *Boggs v. State* (1983), 8 Ohio St .3d 15.

{¶ 12} By statute, the superintendent as liquidator is immune under R.C. 3903.24 from civil actions, but nowhere has the legislature expressed an intent that ODI be immune for negligent actions taken in pursuit of its regulatory function. As a result, although ODI posits a possible interpretation of R.C. 3903.04(B), ODI's interpretation directly contradicts the provisions of R.C. Chapter 2743 that permit the state to be held liable in money damages.

***4** {¶ 13} Accordingly, we necessarily examine the language of R.C. 3903.04(B) to determine whether it lends itself to any other interpretation consistent with the authority granted in R.C. Chapter 2743 to sue the state for money damages. In that context, we must resolve whether R.C. 3903.04 requires Fo-

ley's third-party complaint to be adjudicated in the Franklin County Court of Common Pleas. See *Franklin Township v. Village of Marble Cliff* (1982), 4 Ohio App.3d 213, 217 (stating "[i]t is a fundamental rule of statutory construction that, where under one possible construction two statutes would appear to be irreconcilable, but under another possible construction they would not, the construction will be adopted which harmonizes the statutes and gives effect to each").

{¶ 14} Appellants urge that R.C. 3903.04(B) does not apply to Foley's third-party claim because the third-party complaint does not seek "relief preliminary to, incidental to, or relating to delinquency proceedings."Appellants base their interpretation of R.C. 3903.04(B) on the statutory language that a "delinquency proceeding" is a proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving the insurer. From that premise, appellants contend R.C. 3903.04(B) addresses only a complaint seeking relief in the form of dissolution, liquidation, rehabilitation, or other relief the superintendent institutes against or on behalf of an insurer. Because Foley's third-party complaint seeks monetary damages from a third party non-insurer, appellants assert R.C. 3903.04 does not apply to Foley's claim.

{¶ 15} R.C. 3903.04(B) lends itself to the interpretation appellants suggest. While R.C. 3903.04(A) defines *who* may commence delinquency proceedings, R.C. 3903.04(B) addresses *where* the superintendent must commence those proceedings and any related litigation. Pursuant to such interpretation, R.C. 3903.04(B), combined with R.C. 3903.04(E), states that the delinquency proceedings the superintendent commences, including "any other relief preliminary to, incidental to, or relating to delinquency proceedings" that she initiates, are to be filed in the Franklin County Common Pleas Court. Under that interpretation, the statute does not address where Foley's third-party complaint must be filed.

{¶ 16} Interpreting R.C. 3903.04(B) to state only where the superintendent must commence delinquency proceedings and related actions not only preserves the positive effects of ODI's interpretation, but has other corollary results. Specifically, it provides the superintendent a defense to suggestions that the superintendent's action is more appropriately venued elsewhere. Secondly, it preserves the legislative intent that the superintendent's complaint for liquidation, as well as any related matters she may initiate, are litigated in, and under the supervision of, one court. In that regard, third-party complaints do not directly affect the rehabilitation, dissolution or liquidation of the subject insurance company. Rather, they address whether the defendant subject of the superintendent's complaint in the related action can recover any portion of the assessed damages from a third party, a matter of little or no consequence to the superintendent. Nor can Foley's third-party complaint be used as leverage in the superintendent's action against appellants, as the superintendent there is acting as liquidator, not as the regulator who oversees the third-party defendant, ODI.

***5** {¶ 17} Significantly, appellants' interpretation also allows R.C. Chapter 2743 to be fully effective. Because R.C. 3903.04(B) does not govern Foley's third-party complaint, the Court of Claims may (1) sever the third-party complaint from the superintendent's complaint, (2) return the complaint to the common pleas court for further proceedings, (3) stay the third-party complaint, and (4) hear it in the Court of Claims following the conclusion of the action against Foley in the common pleas court. At that time, if appropriate under the result reached in resolving the complaint against Foley in the common pleas court, the Court of Claims may determine whether ODI is liable in damages to Foley.

{¶ 18} ODI's cross-assignments of error present other arguments supporting the dismissal of Foley's third-party complaint. The Court of Claims, however, did not address any of ODI's other arguments because it dismissed the third-party complaint for lack of subject matter jurisdiction. Since the Court of Claims did not consider ODI's argu-

ments, we decline to address them in the first instance. Once the litigation in the common pleas court is concluded and the stay of the third-party complaint is lifted, the Court of Claims initially will need to address ODI's other contentions regarding dismissal.

{¶ 19} For the foregoing reasons, appellants' assignment of error is sustained; we decline to address ODI's cross-assignments of error at this time. We remand this matter to the Court of Claims with instructions to sever Foley's third-party complaint, to return the remainder of the action to the Franklin County Common Pleas Court, to stay the third-party complaint pending completion of the superintendent's action against Foley in the common pleas court, and, on conclusion of that action, to lift the stay, address ODI's other arguments supporting its motion to dismiss, and, as necessary, address the merits of the third-party complaint.

Judgment reversed and cause remanded with instructions.

BROWN and McGRATH, JJ., concur.
Ohio App. 10 Dist.,2007.
Benjamin v. Ernst & Young, L.L.P.
Slip Copy, 2007 WL 2325812 (Ohio App. 10 Dist.), 2007 -Ohio- 4176

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.
Debra M. ZWEBER, Plaintiff-Appellant,
v.
MONTGOMERY COUNTY BOARD OF ELECTIONS, et al., Defendants-Appellees.
No. 19305.

Decided April 25, 2002.

After trial court denied political candidate's request for declaratory and injunctive relief regarding county board of elections' and Secretary of State's refusal to recognize candidate's party and to place her name on the primary ballot as that party's candidate, candidate appealed. The Court of Appeals, Montgomery County, held that statute that designated a newly formed political party as a "minor political party" for not less than 12 months did not extend the life of a such party that was extinguished under another statute for failure to obtain a minimum percentage of votes in a general election.

Assignments of error overruled, judgment affirmed.

West Headnotes

[1] Elections 144 ⇐121(1)

144 Elections
144VI Nominations and Primary Elections
144k121 Party Organizations and Regula- tions
144k121(1) k. In General. Most Cited
Trial court properly concluded that first statute that provided that a newly formed political party shall be known as a "minor political party" until the time of first election for governor or president which occurs not less than 12 months after formation of party did not extend the life of a political party that was extinguished under other provision due to its failure to obtain five percent of votes in an election for governor or president; first statute merely designated new party as a minor party, and provided that such party may not elevate itself as an intermediate or major party until such election at which time party's status would be determined by percentage of election votes achieved. R.C. 3501.01(F), 3517.01(A).

[2] Statutes 361 ⇐223.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases
A well-recognized principle of statutory construction requires Court of Appeals to construe two seemingly conflicting statutes, when possible, to give effect to both.

[3] Statutes 361 ⇐223.2(1.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(1) Statutes That Are in Pari Materia
361k223.2(1.1) k. In General. Most Cited Cases
All statutes pertaining to the same general subject matter must be read in pari materia.

Debra M. Zweber, Kettering, OH, plaintiff-appellant, pro se.
Victor Whisman, Atty Reg. # 0008033, Dayton, OH, for defendant-appellee Montgomery County Board of Elections.
Elizabeth Luper Schuster, Atty Reg. # 0068022, Assistant Attorney General, Chief Counsel's Staff, Columbus, OH, for defendant-appellee Ohio Secretary of State.

PER CURIAM.
***1** Debra M. Zweber appeals pro se from the trial court's denial of her request for declaratory and injunctive relief regarding her right to be placed on the May 7, 2002, primary ballot as a Libertarian Party candidate. In its April 1, 2002, ruling, the trial court held that the Montgomery County Board of Elections and the Ohio Secretary of State, the appellees herein, were not required to recognize the Libertarian Party as an existing political party in Ohio or to place Zweber's name on the upcoming primary ballot as a Libertarian Party candidate for the office of Montgomery County Commissioner. On appeal, Zweber argues that the Libertarian Party is a viable political party under Ohio law. As a result, she insists that the appellees are obligated to recognize the Libertarian Party and to place her name on the primary ballot as a candidate of that party.

The parties agree that resolution of Zweber's appeal requires an interpretation of Ohio election law, specifically R.C. 3501.01(F) and R.C. 3517.01(A), in light of stipulated facts. In her four assignments of error, Zweber argues that the trial court misinterpreted these two statutes and, as a result, erred in denying her request for declaratory and injunctive relief.[FN1]As a means of analysis, we first will set forth the stipulated facts upon which the trial court based its decision. We then will address the operation of R.C. 3501.01(F) and R.C. 3517.01(A) in the context of the stipulated facts.

> FN1. In her first assignment of error, Zweber contends that "[t]he trial court erred in holding that Ohio Revised Code § 3501.01(F) only classifies political parties into categories."In her second assignment of error, Zweber argues that "[t]he trial court erred in holding that Ohio Revised Code § 3517.01(A) is the exclusive statute for the determination of the formation and existence of a political party."In her third assignment of error, Zweber claims "[t]he trial court erred in denying the request for declaratory judgment."In her final assignment of error, she contends "[t]he trial court erred in denying the request for injunctive relief."*See* Appellant's Brief at 5.

I. Stipulated Facts

The Libertarian Party qualified as a political party on November 8, 1999, having filed on that date with the Ohio Secretary of State at least the requisite number of signatures required to become a newly formed political party under Ohio law. Many people filed declarations of candidacy throughout the state for nomination to various federal and state offices in the March 7, 2000, primary election as candidates of the Libertarian Party and were so designated on the ballot. The Libertarian Party also ran joint candidates for president and vice president in the general election on November 7, 2000. Those candidates received 13,475 votes, which is 0.3% of the total votes cast at that election. This election occurred less than twelve months after the qualification of the Libertarian Party as a newly formed political party under Ohio law.

On February 5, 2002, the Secretary of State sent all County Boards of Elections Directive 2002-02, reminding them that the Democrat and Republican Parties are the only two parties recognized in Ohio at this time. The Directive further stated that: "No declaration of candidacy or nominating petition should be certified by board members as a valid petition if it seeks to nominate a person as a candidate of a political party that is not recognized in Ohio."

Zweber filed her Declaration of Candidacy and Petition for the nomination of the Libertarian Party for

Montgomery County Commissioner with the Montgomery County Board of Elections on February 11, 2002. On February 27, 2002, the Montgomery County Board of Elections decided not to certify Zweber's Declaration of Candidacy and Petition for the nomination of the Libertarian Party for Montgomery County Commissioner. This decision was based solely on the finding of the Montgomery County Board of Elections, in concurrence with Secretary of State Directive 2002-02, that the Libertarian Party is not a recognized political party in Ohio at this time. The Montgomery County Board of Elections indicated that the petition otherwise would have been certified.

II. Analysis

*2 [1] As noted above, resolution of Zweber's appeal requires us to interpret R.C. 3501.01(F) and R.C. 3517.01(A) in the context of the foregoing stipulated facts. Section 3501.01(F) provides that the phrase "political party" means "any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party."[FN2]With one exception that will be discussed *infra,* it then divides "political parties" into three categories, depending upon the votes a party's candidate received in the last election for president or governor. Specifically, R.C. 3501.01(F) reads as follows:

> FN2. We will discuss these requirements *infra* in our analysis of R.C. 3517.01.

> (1) "Major political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received no less than twenty per cent of the total vote cast for such office at the most recent regular state election.
>
> (2) "Intermediate political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received less than twenty per cent but not less than ten per cent of the total vote cast for such office at the most recent regular state election.
>
> (3) "Minor political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received less than ten per cent but not less than five per cent of the total vote cast for such office at the most recent regular state election or which has filed with the secretary of state, subsequent to any election in which it received less than five per cent of such vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote cast for such office in the last preceding regular state election, *except that a newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.*
>
> R.C. 3501.01(F)(1), (2) and (3) (emphasis added).

The other relevant portion of Ohio election law, R.C. 3517.01(A), sets forth the requirements for formation and continuation as a political party. It provides as follows:

> (A) A political party within the meaning of Title XXXV [35] of the Revised Code is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office *or* that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of

> organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing....*If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.*

*3 R.C. 3517.01(A) (emphasis added).

The parties' stipulated facts indicate that the Libertarian Party became a recognized political party in Ohio on November 8, 1999, under the second method set forth in R.C. 3517.01(A). On that date, a group of voters made the requisite filing with the Secretary of State. Thereafter, Libertarian Party candidates participated in both the March 7, 2000, primary election and the November 7, 2000, general election, which occurred just less than twelve months after the Libertarian Party's formation in Ohio. Although the Libertarian Party garnered only 0.3% of the votes cast in the November 7, 2000, general election, Zweber argues that it remains in existence today as a "minor political party." In support, she relies on the last sentence of R.C. 3501.01(F)(3), which, as noted above, provides "that a newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president."Because the November 7, 2000, general election *did occur* less than twelve months subsequent to the formation of the Libertarian Party, Zweber insists that the party remains viable, notwithstanding R.C. 3517.01(A), which states that "[i]f any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party."Not surprisingly, the appellees rely on section 3517.01(A) to argue that the Libertarian Party ceased to exist on November 7, 2000, when it *did fail* to cast five per cent of the total vote in the general election held that day.

[2][3] Upon review, we find Zweber's argument to be unpersuasive, and we agree with the trial court's and the appellees' interpretation of the foregoing statutes. A well-recognized principle of statutory construction requires us to construe two seemingly conflicting statutes, when possible, to give effect to both. *See, e.g., Gahanna Jefferson Local School Dist. Bd. of Educ. v. Zaino* (2001), 93 Ohio St.3d 231, 234, 754 N.E.2d 789. We note too that "[a]ll statutes pertaining to the same general subject matter must be read *in pari materia.*" *Hughes v. Ohio Bur. of Motor Vehicles* (1997), 79 Ohio St.3d 305, 308, 681 N.E.2d 430. In accordance with these principles, the trial court properly construed R.C. 3501.01(F) and R.C. 3517.01(A) in the only way that avoids an irreconcilable conflict and gives effect to both provisions as written.

As noted above, R.C. 3501.01(F) provides that the phrase "political party" means "any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party."In turn, R.C. 3517.01(A) provides that a viable political party comes into existence upon the requisite filing with the Secretary of State. Notably, R.C. 3517.01(A) also provides that a political party "shall cease to be a political party" if it fails to receive five per cent of the total vote cast at an election for the office of governor or president. In our view, the Libertarian Party came into existence on November 8, 1999, when it made the requisite filing, and it ceased to be a political party on November 7, 2000, when it failed to receive five per cent of the vote in the general election held that day. This conclusion is consistent with the plain language of R.C. 3517.01(A).

*4 The foregoing conclusion also is easily reconcilable with the portion of R.C. 3501.01(F) upon which Zweber relies. As an initial matter, we note that section 3501.01(F) itself explicitly references the requirements for the formation and existence of a political party found in R.C. 3517.01(A). It then

categorizes existing political parties based on the per cent of the total vote their candidates received at the most recent general election. If a party's candidate received at least twenty per cent of the vote at such election, then it is a "major political party." If a party's candidate received at least ten per cent but less than twenty per cent of the total vote at such election, then it is an "intermediate political party." If a party's candidate received at least five per cent but less than ten per cent of the total vote at such election, then it is a "minor political party." R.C. 3501.01(F)(1), (2) and (3).

The portion of section 3501.01(F) upon which Zweber relies merely provides an exception to the foregoing categorization of political parties. It provides that "a newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president."Under this exception, the Libertarian Party would have remained a "minor political party" after the November 7, 2000, general election even if it had garnered one-hundred per cent of the vote that day. This is so because the November 7, 2000, general election occurred slightly less than twelve months subsequent to the formation of the Libertarian Party. In other words, under the exception cited by Zweber, a newly formed party *cannot* elevate itself to an "intermediate political party" or to a "major political party" until it performs sufficiently well in a general election held at least twelve months after its formation.

If the Libertarian Party had received at least five per cent of the total vote on November 7, 2000, it certainly would have remained a viable political party under R.C. 3517.01(A). It did not do so, however. As a result, under section 3517.01(A) it ceased to be a political party on that day. Construing the language of R.C. 3501.01(F) upon which Zweber relies to produce a contrary result would require section 3501.01(F) to "trump" section 3517.01(A), and it would bring the two statutes, as written, into irreconcilable conflict. We decline to adopt such a reading of Ohio election law, particularly when the two statutes may be reconciled in a way that gives effect to the plain language of both.[FN3]

> FN3. In her appellate brief, Zweber suggests that our interpretation of R.C. 3501.01(F) and R.C. 3517.01(A) unlawfully infringes on the First Amendment rights of individuals who wish to form a political party. She cites absolutely no legal authority, however, to support the proposition that our reading of the two statutes violates the Constitution.

In short, the trial court properly concluded that section 3501.01(F)(3)"does not extend the life of a political party which has been extinguished by § 3517.01(A)." Accordingly, the trial court properly denied Zweber's request for declaratory and injunctive relief regarding her right to be placed on the upcoming primary ballot as a Libertarian Party candidate. In light of this conclusion, we need not address the parties' alternative arguments regarding the doctrines of laches and estoppel.

III. Conclusion

***5** Based on the reasoning and citation of authority set forth above, we hereby OVERRULE Zweber's assignments of error and AFFIRM the judgment of the Montgomery County Court of Common Pleas.

WOLFF, PJ., BROGAN and FAIN, JJ., concur.
Ohio App. 2 Dist.,2002.
Zweber v. Montgomery County Bd. Of Elections
Not Reported in N.E.2d, 2002 WL 857857 (Ohio App. 2 Dist.), 2002 -Ohio- 2152

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