UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT SINGER, Individually and as Administrator of the Estate of Gloria A. Singer (Deceased), et al. (22-3083), Plaintiffs-Appellees, v. MONTEFIORE, et al., Defendants-Appellants.	Nos. 22-3083/3084
ROBERT SINGER, Individually and as Administrator of the Estate of Gloria A. Singer (Deceased) (22-3084), Plaintiff-Appellee, v. MONTEFIORE, et al., Defendants-Appellants.	

APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

Plaintiffs-Appellees Robert Singer, Steven A. Ross, Robyn Finkenthal Kulbarsh, the Estate of Carrol Kenney, and Nicholas Laudato hereby move to dismiss these consolidated appeals for lack of jurisdiction. Because both appeals arise from orders remanding cases removed from the Cuyahoga County Court of Common Pleas to federal district court solely on the basis of federal-question

jurisdiction, review of such orders is barred by 28 U.S.C. § 1447(d) and the Court should dismiss the appeals.[1]

INTRODUCTION

Cases, not claims, are removed from state court to federal court. Thus, when on November 5, 2021, some defendants filed notices of removal in each of the four Cuyahoga County cases at issue in these appeals with the consent of all defendants and satisfying all of the requirements set out in 28 U.S.C. § 1446, each of the four cases was removed in its entirety. Those notices did not invoke 28 U.S.C. § 1442 or § 1443. Since 28 U.S.C. § 1447(d) only allows review of remand orders in cases "removed pursuant to section 1442 or 1443" and these cases were not so removed, appellate review of the district court's remand order is unavailable.

The removal notices filed the following week by one of the defendants, Ariel Hyman—whose consent to removal had been provided in the earlier notice—are irrelevant. The first notices of removal divested the state court of jurisdiction, and there was nothing left for Mr. Hyman to remove the following week. In any event, the single oblique reference to 28 U.S.C. § 1442(a)(1), the federal-officer removal

[1] On April 4, 2022, the Court ordered Defendants-Appellants to show cause why "Appeal No. 22-3083 should not be dismissed in part for lack of jurisdiction" based on 28 U.S.C. § 1447(d). Dkt. 37-2 at 2. Because Plaintiffs-Appellees believe both appeals should be dismissed in their entirety, they have filed this motion to dismiss, in addition to a substantively identical reply to the response to the order to show cause.

statute, in the "argument" section of Mr. Hyman's notices does not render the cases "removed pursuant" to that statutory provision.

BACKGROUND

These appeals arise out of four separate actions initially filed in the Cuyahoga County, Ohio Court of Common Pleas: *Singer v. Montefiore*, Cuyahoga County No. CV 21 954105; *Ross v. Montefiore*, Cuyahoga County No. CV 21 954109; *Kenney v. Montefiore*, Cuyahoga County No. CV 21 953936; and *Kulbarsh v. Montefiore*, No. CV 21 953958 (collectively the Cuyahoga County cases). Each case is brought on behalf of the estate of a resident of the Montefiore of Menorah Park nursing home in Beachwood, Ohio, who died of COVID-19 in November 2020, and each case alleges that the failure of the nursing home and individual nursing home administrators to implement adequate infection control policies at Montefiore led to the resident's death.

Each case has followed the same procedural path to this Court. First, on November 5, 2021, Defendants-Appellees Montefiore, the Montefiore Foundation, the Montefiore Home, the Montefiore Housing Corporation, and the Menorah Park Foundation ("Facility Defendants") timely removed each action to the United States District Court for the Northern District of Ohio. *See* 21-cv-2102 (*Singer*) ECF 1; 21-cv-2103 (*Ross*) ECF 1; 21-cv-2105 (*Kulbarsh*) ECF 1; 21-cv-2106 (*Kenney*) ECF 1. In each removal notice, the Facility Defendants invoked 28 U.S.C. § 1441(a), and

asserted that removal jurisdiction was appropriate "because Plaintiff's Complaint asserts a claim 'arising under' and governed by federal law within the meaning of 28 U.S.C. § 1331." 21-cv-2102 ECF 1 ¶ 4; 21-cv-2103 ECF 1 ¶ 4; 21-cv-2105 ECF 1 ¶ 4; 21-cv-2106 ECF 1 ¶ 4. No other bases for jurisdiction were included. Each removal notice also included a statement that "Defendants Ariel S. Hyman, Tina King, and Marie Gelle consent to removal of this action to the United States District Court for the Northern District of Ohio, Eastern Division." 21-cv-2102 ECF 1 ¶ 12; 21-cv-2103 ECF 1 ¶ 12; 21-cv-2105 ECF 1 ¶ 12; 21-cv-2106 ECF 1 ¶ 12.

The following week, although the state court actions had already been removed, one of the other defendants, Ariel S. Hyman, filed notices of removal in each of the four Cuyahoga County cases. 21-cv-2120 (*Kenney*) ECF 1; 21-cv-2125 (*Kulbarsh*) ECF 1; 21-cv-2148 (*Ross*) ECF 1; 21-cv-2149 (*Singer*) ECF 1. Like the Facility Defendants, Mr. Hyman invoked 28 U.S.C. § 1441(a) as the sole basis for removal, asserting that "this case is removable under 28 U.S.C. § 1441(a) on the basis of 'original jurisdiction' because Plaintiff's Complaint asserts a claim 'arising under' and governed by federal law within the meaning of 28 U.S.C. § 1331." 21-cv-2120 ECF 1 ¶ 4; 21-cv-2125 ECF 1 ¶ 4; 21-cv-2148 ECF 1 ¶ 4; 21-cv-2149 ECF 1 ¶ 4. Under the heading "Argument and Citation to Authority," each notice repeated this assertion, stating:

> This case is removable under 28 U.S.C.A. § 1441(a) on the basis of "original jurisdiction" because Plaintiff's Complaint asserts a claim

> "arising under" federal law within the meaning of § 1331. Original jurisdiction is also through an action pursuant to 28 U.S.C. §1442(a)(1). The Court also has supplemental jurisdiction over state law claims under 28 U.S.C. § 1367.

21-cv-2120 ECF 1 ¶ 12; 21-cv-2125 ECF 1 ¶ 12; 21-cv-2148 ECF 1 ¶ 12; 21-cv-2149 ECF 1 ¶ 12. The notices also stated that "all other defendants consent to removal of this action to the United States District Court for the Northern District of Ohio, Eastern Division," and that "the Facility Defendants separately removed this action." 21-cv-2120 ECF 1 ¶ 21; 21-cv-2125 ECF 1 ¶ 21; 21-cv-2148 ECF 1 ¶ 21; 21-cv-2149 ECF 1 ¶ 21. The district court assigned new district court docket numbers to each of Mr. Hyman's notices of removal.

On November 9, 2021, the district court *sua sponte* consolidated the first five civil action numbers—the four assigned to the Facility Defendants' notices of removal (21-cv-2102, 2103, 2105, and 2106), and one assigned to one of the two notices of removal Mr. Hyman had filed prior to that date (21-cv-2120)—under the caption and docket number of the Facility Defendants' removal of the *Singe*r action. *Singer v. Montefiore*, 2021 WL 5193984, at *1 (N.D. Ohio Nov. 9, 2021). The court also set a briefing schedule for remand motions ordered that "Plaintiffs and Defendants collectively may file only a single memorandum per side addressing the issue of remand," limited to 20 pages. *Id.* at *1–2.

On December 6, 2021, the district court ordered 21-cv-2148, Mr. Hyman's purported removal of the *Ross* action, consolidated into the *Singer* action. *See* Dec.

6, 2021 Minute Order. Mr. Hyman's purported removals of the *Kulbarsh* and *Kenney* matters were consolidated into the *Singer* action on December 22, 2021. *See* Dec. 22, 2021 Minute Order.

On December 27, 2021, the district court granted Plaintiffs' motion to remand in the consolidated *Singer* action, and the following day, mailed a certified copy of its opinion and order of remand to the Cuyahoga County Court of Common Pleas. *Singer v. Montefiore*, 2021 WL 6111671 (Dec. 27, 2021); 21−cv−2102 ECF 21. The district court granted the motion to remand in the one docket that remained open (from Mr. Hyman's purported removal of the *Singer* case), 21-cv-2149, on January 6, 2022, expressly adopting its December 27, 2021 opinion. 21-cv-2149 ECF 22.

Defendants subsequently moved for a stay of the district court's remand orders. 21−cv−2102 ECF 23. In response, the district court vacated its judgment, reinstated the matters, recalled the papers delivered to the state court, and stayed proceedings pending appeal of the remand order to this Court. 21-cv-2012 ECF 24. Defendants then filed a notice of appeal, identifying the seven civil action numbers addressed in the December 27, 2021 district court order (Nos. 21-cv-2102, 2103, 2105, 2106, 2120, and 21-cv-2148). *See* 21-cv-2012 ECF 25. This Court assigned that appeal No. 22-3083. Defendants then filed a separate notice of appeal in the remaining civil action number, 21-cv-2149 ECF 28. This Court assigned that appeal No. 22-3084.

On February 16, 2022, Defendants filed a motion to consolidate the two appeals. In so doing, they acknowledged that the notices of appeal from 21-cv-2102 and from 21-cv-2149 involved "the same case that was filed in and removed from state court." Dkt. 24. The Court granted the motion on February 18, 2022. The same day, the Court issued an Order to Show Cause as to why the "appeals should not be dismissed for lack of jurisdiction based on the district court's vacatur of the judgments." Dkt. 31-2 at 4. Defendants then filed a motion for clarification in the district court. *See* 21-cv-2102 ECF 29. In response, on February 23, 2022, the district court reinstated its remand order, and stayed enforcement of that order pending appellate review. *See* 21-cv-2102 ECF 30.

On March 25, 2022, Defendants filed an amended notice of appeal bearing all eight district court docket numbers. Two new appeal numbers were generated: No. 22-3268 for civil action numbers 21-cv-2102, 2103, 2105, 2106, 2120, and 21-cv-2148, and 22-3269 for civil action number 21-cv-2149.

On April 4, 2022, the Court issued an Order to Show Cause as to why "Appeal No. 22-3083 should not be dismissed in part for lack jurisdiction as to Case Nos. 1:21-cv-2102, 1:21-cv-2103, 1:21-cv-2105, and 1:21-cv-2106,"—that is, the civil actions created as a result of the Facility Defendants' November 5, 2021, notices of removal.

ARGUMENT

I. Because the cases were removed in their entirety on November 5, 2021, solely on the basis of federal-question jurisdiction, the remand order is unreviewable.

Most remand orders are not reviewable on appeal. Section 1447(d) states an exception to the general rule, though, by allowing appeal from an order "remanding a case to the State court from which it was removed pursuant to section 1442 or 1443." To qualify for the "removed pursuant to section 1442 or 1443" exception, the "defendant's notice of removal must assert the case is removable 'in accordance with or by reason of' one of those provisions." *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1538 (2021) (quoting Black's Law Dictionary, at 1401 (rev. 4th ed. 1968)). Section 1442 addresses federal-officer removal, and section 1443 addresses removal of certain civil rights actions.

Section 1447(d) refers to removed "cases," not claims, because, "[i]n a case where a plaintiff has sued multiple defendants in state court, an 'all for one and one for all' rule applies with respect to removal." *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 75 (1st Cir. 2009). "[O]nce the removal petition is properly filed and notice is given, the entire case is transferred to federal court, and the state court is deprived of jurisdiction unless the federal court subsequently remands it." *Seaton v. Jabe*, 992 F.2d 79, 81 (6th Cir. 1993).

Accordingly, each of the four Cuyahoga County cases was removed, in its entirety, when the Facility Defendants filed their notices of removal on November 5, 2021, with the consent of all defendants. None of the notices asserted that the case was removable "in accordance with or by reason of" either section 1442 or section 1443. Thus, the district court's order cannot be said to have remanded "a case to the State court from which it was removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). This Court therefore lacks appellate jurisdiction.

Appellants rely on the removal notices filed by Mr. Hyman the week after the Facility Defendants removed the four cases to the Northern District of Ohio. But a case can only be removed once (until and unless it has been remanded), and thus those notices of removal were each a nullity. *See, e.g.*, *Williams v. Equifax Info. Servs. LLC*, 359 F. Supp. 2d 1284, 1286 (M.D. Fla. 2005) ("Strict construction of 28 U.S.C. § 1446 leads this Court to the certain conclusion that the filing of only one notice of removal is contemplated."). As Mr. Hyman acknowledged in each of the notices, the cases had already been removed—the notices even cited the federal court docket numbers. *See, e.g.*, 21-cv-2120 ECF 1 ¶¶ 6, 21. There was thus no case still pending in state court for Mr. Hyman to remove. *See also* Dkt. 24 (Mot. to Consolidate) at 1 (conceding that Hyman's *Singer* notice concerned "the same case that was filed in and removed from state court" by the Facility Defendants). As one district court observed in a related case, "Hyman's consent to the 11/5/2021 removal

implies that he consented to removal on the basis of federal question jurisdiction *only*." *Estate of Spring v. Montefiore Home*, 2022 WL 1120381, at *6 n.2 (N.D. Ohio Apr. 14, 2022). As the "cases" had already been removed to federal court, Mr. Hyman's purported second removal was a nullity. *Cf. Balleteros v. Pocta*, 2021 WL 979240, at *4 (E.D. Va. Mar. 16, 2021) (second notice of removal while case was pending in federal court could not cure inadequate first notice of removal).

Relying on district court decisions from outside this Circuit, Appellants suggest that *each* notice of removal was "proper and effective." Dkt. 42 at 2. Those decisions do not support Appellants here. Two of the decisions stand for the proposition that the rule of unanimity can be satisfied by, and thus removal effectuated by, either each defendant filing a separate notice of removal or a single notice of removal expressing the consent of all the defendants. *See Shaffer v. Northwestern Mutual Life Ins. Co.*, 394 F. Supp. 2d 814, 819–20 (N.D.W. Va. 2005); *Sullivan v. Leaf River Forest Prod., Inc.*, 791 F. Supp. 627, 629 (S.D. Miss. 1991).[2]

[2] *Sullivan*'s holding that "the differences in defendants' removal petitions do not affect the propriety of the removal petitions," because a federal court should "consider all applicable jurisdictional grounds *sua sponte* whether or not the grounds were raised by a party to the lawsuit" in a notice of removal, is contrary to the weight of authority, which holds that a failure to raise a basis for removal in a notice of removal constitutes waiver. *See, e.g., Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4 (1st Cir. 2014); *Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1012 n. 4 (11th Cir. 2013). In any event, sua sponte consideration of a ground for removal would not satisfy section 1447(d)'s requirement that the *notice of removal* must be based on section 1442 or 1443 for an appeal to lie from a remand order.

Where the defendants choose the former path, removal is not effectuated until the last defendant files a separate notice of removal. Here, though, the defendants chose the latter path. And under this Court's precedent, all of the requisite elements for removal established by section 1446 were present on November 5, 2021. *See Harper v. AutoAlliance Int'l Inc.*, 392 F.3d 195, 202 (6th Cir. 2004).

The other two district court decisions cited by Appellants reflect that "a defendant seeking removal generally has the right to amend its removal petition to include either missing or imperfectly stated grounds for removal." *Muhlenbeck v. KI, LLC*, 304 F. Supp. 2d 797, 799 (E.D. Va. 2004); *Davis v. Citibank, N.A.*, No. 4:14 CV 1129 CDP, 2014 WL 6673520, at *3 (E.D. Mo. Nov. 24, 2014). This rule is irrelevant to the circumstances here, as the defendants who filed the first removal notices never amended them. And even if one defendant could amend another defendant's notice of removal—a dubious proposition at best—Mr. Hyman did not purport to do so here.

Finally, Appellants' suggestion that the Supreme Court's decision in *BP* means that *any order* that addresses federal-officer removal is appealable in its entirety, Dkt. 42 at 3–4, misstates the holding of that case and the plain text of section 1447(d). Neither the decision nor the statute state that appellate review is available any time a party references in proceedings, or a district court addresses, jurisdiction under section 1442 or 1443. Rather, a remand order is reviewable in its entirety only

where a defendant "assert[ed] the case is removable 'in accordance with or by reason' of" section 1442 or 1443" in the notice of removal that brought the case from state to federal court. *BP*, 141 S. Ct. at 1538. None of the November 5, 2021 notices of removal invoked federal officer removal, and thus there is no appellate jurisdiction. *Cf. Wood v. Crane Co.*, 764 F.3d 316, 325 (4th Cir. 2014) (declining to consider section 1442 as a basis for removal where defendant had "made a strategic decision not to assert" that basis in notice).

II. Mr. Hyman did not purport to remove the cases pursuant to section 1442 or 1443.

In addition to the fact that Mr. Hyman's removal notices had no effect because the cases were no longer pending in state court when they were filed, those notices cannot be the basis for appellate jurisdiction, as none "assert[ed] the case is removable 'in accordance with or by reason of'" section 1442 or 1443, as *BP* requires for the exception to section 1447(d)'s bar on review to apply. *See* 141 S. Ct. at 1538; *see also* 28 U.S.C. § 1446(a) (requiring a notice of removal to contain "a short and plain statement of the grounds for removal").

Like the Facility Defendants' notices, Mr. Hyman's notices (twice) stated that "[t]his case is removable under 28 U.S.C. § 1441(a)," which provides for removal of certain cases within the original jurisdiction of the federal courts; the notices invoked federal-question jurisdiction pursuant to 28 U.S.C. § 1331 as the claimed basis for original jurisdiction. *See, e.g.*, 21-cv-2120 ECF 1 ¶¶ 4, 12. The notices went

on to address, in detail, their theory of federal-question jurisdiction—complete preemption—before concluding:

> Therefore, Plaintiff's Complaint invokes a federal question for which the governing federal law "completely preempts" Plaintiff's state law claims, and removal is proper under 28 U.S.C. § 1441(a).

In contrast to the three explicit assertions that the case was removable under 28 U.S.C. § 1441(a), the removal notices made only a passing reference to section 1442(a)(1) in the section entitled "Argument and Citation to Authority," stating that "Original jurisdiction is also through an action pursuant to 28 U.S.C. § 1442(a)(1)."

This reference to section 1442(a)(1) does not mean that the case was removed pursuant to that statute. As one district court noted in addressing the same language in another case, "Hyman's sole mention of § 1442(a) in his Notice is nearly impossible to parse." *Spring*, 2022 WL 1120381, at *6 n.2. To the extent it is intelligible, the sentence in the notices citing section 1442(a) refers to that provision (incorrectly) only as a basis for "original jurisdiction" under section 1441(a)(1). Original jurisdiction, of course, is a distinct concept from *removal* jurisdiction, which is all that section 1442(a) provides. Here, as a basis of removability—which is the relevant inquiry under the standard adopted by the Supreme Court in *BP*—Mr. Hyman's notice of removal solely invoked section 1441(a). *Cf. County of San Mateo v. Chevron Corp.*, __ F.4th __, 2022 WL 1151275, at *18 n.23 (9th Cir. Apr. 19, 2022) (holding that a "reference to 'federal common law'" in notice of removal was

insufficient to invoke admiralty jurisdiction); *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (finding notice of removal did not invoke federal-question jurisdiction where it explicitly invoked diversity as basis for removal jurisdiction and merely referenced a federal statute in "background and facts" section of notice); *Thompson v. Gulf Stream Coach, Inc.*, 2007 WL 2413108, at *2–3 (W.D. Mich. Aug. 21, 2007) (holding notice did not invoke federal-question jurisdiction where it explicitly cited diversity as the basis for removal). Accordingly, his notices (in any event ineffective because the cases were already removed) did not render these cases "removed pursuant to" section 1442, and the exception to section 1447(d)'s reviewability bar does not apply.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request the Court dismiss the appeals in their entirety for lack of jurisdiction.

May 3, 2022

Respectfully submitted,

s/ Adam R. Pulver
Adam R. Pulver
Allison M. Zieve
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7790
apulver@citizen.org

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(a)(d)(2) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 3,322 words.

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Times New Roman.

May 3, 2022 /s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

May 3, 2022 /s/ Adam R. Pulver
Adam R. Pulver