No. _____

In The
Supreme Court of the United States

LARRY C. MAYO, *et al.*,

Petitioners,

v.

BOARD OF EDUCATION OF
PRINCE GEORGE'S COUNTY, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state court action subject to removal under 28 U.S.C. § 1441 is brought against several defendants, all defendants must either join in a timely notice of removal or consent to removal. The question presented is:

Is the consent requirement satisfied by a mere representation from counsel for the removing defendant that all codefendants consent to removal (the rule in the Fourth, Sixth and Ninth Circuits) or must each codefendant file a timely written statement of consent with the court (the rule in the Fifth, Seventh and Eighth Circuits)?

PARTIES

The petitioners are Larry C. Mayo, Leslie Carroll-Wicks, Mary Mays-Carroll, Avery Milligan and Sandra Ponoski. This action is brought on behalf of a class of certain temporary employees of the Prince George's County Board of Education.

The respondents are the Board of Education of Prince George's County, its chair Verjeana M. Jacobs, and the Association of Classified Employees/ American Federation of State, County and Municipal Employees.

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Petitioners Larry C. Mayo, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 11, 2013.

OPINIONS BELOW

The April 11, 2013 opinion of the court of appeals, which is reported at 713 F.3d 735 (4th Cir. 2013), is set out at pp. 1a-23a of the Appendix. The July 14, 2011 opinion of the district court, which is reported at 797 F.Supp.2d 685 (D. Md. 2011), is set out at pp. 24a-33a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 11, 2013. On June 26, 2013, the Chief Justice extended the time within which to file the petition to and including September 6, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

When this action was filed[1] section 1446 of 28 U.S.C. provided in pertinent part:

[1] *See* n.3, *infra*.

> (a) A defendant or defendants desiring to remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> * * *

STATEMENT OF THE CASE

This case presents a recurring dispute about the standard governing removal to federal court of an action filed against several defendants.

This litigation arose out of a collective bargaining agreement ("CBA") between the Board of Education of Prince George's County ("the Board") and the

Association of Classified Employees/American Federation of State, County and Municipal Employees ("the Union"). The Union represents most full time employees of the Board in "classified" positions. Under the terms of the CBA, the Board could not, except in certain narrow circumstances, employ a temporary employee for more than 60 days to perform duties of permanent workers in classified positions. The wages and benefits paid to temporary employees are lower than those for permanent employees; the 60-day limit assures that the Board does not use lower paid temporary employees to avoid hiring better paid permanent workers. (App. 4a-5a). Temporary employees are not members of the Union.

In 2008 the Board disclosed that "many" of a group of 2,180 temporary employees had been employed for more than 60 days and had been doing the same work as permanent classified employees. (App. 5a). The Union filed a grievance under the CBA in which it sought an order requiring that temporary employees who for more than 60 days performed the duties of permanent workers in classified positions "be made whole for their losses, measured by backpay and benefits that they would have earned as permanent employees from their 61st workday forward." (Doc. 10-2, p. 8). The dispute proceeded to arbitration. The arbitrator concluded that the Board had repeatedly violated the CBA, employing hundreds of temporary employees, often for years at a time, to do the same work as permanent classified employees, but with lower wages and benefits. "[T]he Board has

circumvented the requirements of the [CBA] by intentionally creating a second class of employees who, for all practical purposes, perform bargaining unit work without the benefit of any of the negotiated contractual provisions." (*Id*. at 13). The arbitrator held that compensatory relief should be limited to violations of the CBA that occurred after the filing of the Union's grievance (App. 6a-7a); it defined the "temporary employees who are covered by this Award" as "temporary employees who have [since the filing of the grievance] performed the work of.... classified bargaining unit positions in excess of 60 days." (Doc. 10-2, pp. 15, 17) (capitalization omitted). The arbitrator concluded that it was inappropriate to direct the Board to retroactively convert the temporary employees into permanent employees; subject to that limitation, however, the arbitrator directed the Board and Union to negotiate an appropriate remedy. (App. 7a).

The Board and Union reached an agreement that the Board would pay approximately $1 million in connection with the violation found by the arbitrator. Under the terms of that agreement, however, none of the proceeds was to be distributed to the temporary employees who had been paid lower wages while doing the work of permanent employees. Rather, the Union and Board agreed that the Board "will pay to Local 2250 backpay amounts" totaling $1,002,669.20. (Doc. 12-3, p. 6; App. 7a-8a).[2] The Union kept the

[2] An earlier "Proposed Memorandum of Understanding" had characterized this amount as "back dues." (Doc. 12-2, p. 1).

entire amount for itself, and did not disburse any of the "backpay" to the temporary employees covered by the award.

In March 2011 the plaintiffs, five then current or former temporary employees who had worked for more than 60 days doing the work of permanent employees, initiated this action in Maryland state court. The plaintiffs sought to represent a class of temporary employees who had done such work for more than the 60-day limit. (App. 8a). The plaintiffs claimed that they were entitled to the benefits of the arbitration award, as well as to benefits from the underlying CBA. (App. 3a). The plaintiffs sued the Board, its Chair, and the Union. The complaint alleged several state law claims; it also asserted that the disputed agreement between the Board and the Union violated the Takings Clause of the United States Constitution. (App. 8a-9a).

The Board was served on March 24, 2011, and the Union on March 26, 2011. On April 22, 2011, within the 30-day period allowed for removal, the Board and its Chair filed a notice of removal pursuant to 28 U.S.C. § 1446. "The Union, however, did not sign the notice of removal, nor did it timely file its own notice or a *written* consent to the School Board's notice." (App. 11a) (emphasis in original). The Board's notice of removal stated that the Union "agrees with the removal of this action to federal court." (App. 24a). On April 25, 2011 (also within the 30-day period) counsel for the Union filed his appearance in district court. On April 28, 2011, after the expiration of the

30-day period, the Union filed a motion to dismiss in district court; the Union's accompanying memorandum stated that it had earlier consented to the notice of removal. (App. 9a).

The plaintiffs moved to remand the case to state court. They argued that the removal was improper because the Union had failed within the 30-day period either to file its own notice of removal or to file with the district court a written consent to the Board's removal. The Board and Union acknowledged that section 1446 required that every served defendant either file a notice of removal or consent to removal by another defendant. They argued, however, that the consent requirement could be satisfied if the defendant which did file a notice of removal represented in its notice of removal (or elsewhere) that the other non-removing defendant had consented to removal.

The district court noted that there was a circuit conflict regarding what steps are needed to satisfy the consent requirement. (App. 25a). The district judge rejected the Eighth Circuit standard, which requires a defendant which wishes to consent to removal to file a written statement to that effect with the court. (App. 27a) (citing *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057 (8th Cir. 2008)). The district court concluded that the "preferable" standard was that of the Sixth Circuit, which permits counsel for the removing defendant to represent that the non-removing defendant has consented to removal. (*Id.*) (citing *Harper v. AutoAlliance Int'l*, 392 F.3d 195 (6th

Cir. 2004)). The district court proceeded to reach the merits of the claims and granted the defendants' motions to dismiss. (App. 28a-33a).

On appeal the Fourth Circuit recognized that the circuit split already involved five circuits. The court of appeals noted that the Ninth Circuit had adopted the Sixth Circuit rule in *Harper*. (App. 13a) (quoting *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009)). On the other hand, the Fourth Circuit observed, both the Fifth Circuit and the Seventh Circuit had joined the Eighth Circuit in rejecting the *Harper* standard. (App. 13a-14a) (quoting *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) and *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997)). The Fourth Circuit adopted the Sixth and Ninth Circuit standard. The Board's representation that the Union had consented to removal, the court of appeals held, satisfied the consent requirement. (App. 15a-16a). The court of appeals proceeded to address the merits of the action, and upheld the dismissal of the complaint. (App. 17a-22a).

REASONS FOR GRANTING THE WRIT

Introduction

Section 1446(b) provides that notice of removal of a civil action generally must be filed within 30 days of receipt by the defendant of the initial state court pleading. Where the state court action has been

brought against several defendants, this Court has long held that all the defendants must support removal. *Chicago, Rock Island and Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900). The lower courts generally refer to this as a "unanimity requirement." (App. 12a). All of the defendants, however, need not file separate notices of removal or formally join a joint notice of removal. So long as at least one defendant files a timely and otherwise proper notice of removal, it is sufficient that all other codefendants "consent" to that removal. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) ("removal requires the consent of all defendants"); *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 391, 393 (1998) (Kennedy, J., concurring).[3] This case presents a long-standing and growing circuit split regarding what

[3] In 2011 section 1446 was amended to codify the unanimity requirement. Section 1446(b)(2)(A) now provides, "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." Congress understood that this provision "codifies the well-established 'rule of unanimity' for cases involving multiple defendants. Under that rule, which is generally traced to the Supreme Court decision in *Chicago, Rock Island & Pac. Ry. v. Martin*, ... , all defendants who have been properly joined and served must join in or consent to removal." H.R.Rep. No. 112-10, p. 13; *see* 157 Cong. Rec. H1369 ("this bill ... [c]odifies current practice that all defendants must join in or consent to removal in order for the action to be removed to federal court") (Feb. 28, 2011) (remarks of Rep. Lee). The court of appeals explained that the statute "still does not indicate the form of that consent, and our analysis in this opinion would be unchanged were we to have before us the current version of the statute." (App. 12a n.1).

steps a non-removing defendant must take to satisfy this consent requirement. (Like a number of lower courts, we refer to the defendant that files a notice of removal as the "removing defendant," and to the defendant which did not file or join that notice as the "non-removing defendant").

I. THE CIRCUIT COURTS ARE DIVIDED REGARDING WHAT ACTION IS NEEDED TO SATISFY THE CONSENT REQUIREMENT IN REMOVAL CASES

The circuits are sharply divided regarding what action must be taken to satisfy the consent requirement in multi-defendant removal cases. The Fourth, Sixth and Ninth Circuits hold that the consent requirement is satisfied if counsel for the removing defendant merely represents that the non-removing defendant has consented to removal. In the Fifth, Seventh and Eighth Circuits, on the other hand, such a representation by the removing defendant is legally insufficient; those circuits instead require the non-removing defendant itself to file a written statement of consent with the district court within the applicable 30-day period. In the remaining circuits there is no controlling appellate decision; defendants cannot be sure what they must do to comply with section 1446 in multi-defendant cases. Because potentially removable state court actions against multiple defendants are common, this issue has arisen repeatedly; there are more than 120 district court decisions in which a

plaintiff has challenged the sufficiency of such a removing party representation.

A. The Fifth, Seventh and Eighth Circuits Require A Written Statement of Consent From The Non-Removing Defendant

The earliest and most influential appellate opinion requiring the timely filing of a written consent from the non-removing defendant is the Fifth Circuit decision in *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988). In *Getty Oil* one defendant, INA, filed a notice of removal and stated in its notice that a second defendant, NL, had consented to removal. The Fifth Circuit held that statement by INA was insufficient.

> [W]hile it may be true that consent to removal is all that is required under section 1446, a defendant must do so itself. This does not mean that each defendant must sign the original petition for removal, but there must be some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have authority to do so, that it has actually consented to such action. Otherwise, there would be nothing on the record to "bind" the allegedly consenting defendant. In the present case, nothing in the record, except INA's unsupported statement in the original removal petition, indicates that NL actually

> consented to removal when the original petition was filed. INA's removal petition alleged that ... NL "do[es] not oppose and consent[s] to this Petition for Removal"; it does not allege that NL has authorized INA to formally (or otherwise) represent to the court on behalf of NL that NL has consented to the removal. Accordingly, there was no adequate allegation or showing of NL's actual joinder in or consent to the original removal petition.

841 F.3d at 1262 n.11. In the Fifth Circuit 33 district court opinions have applied the rule in *Getty Oil*.[4]

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[4] *Bridge Point Yacht Center, Inc. v. Calcasieu Parish Sheriff's Office*, 2013 WL 1197143 at *3 (W.D. La. March 25, 2013); *Coffman v. Dole Fresh Fruit Co.*, 2013 WL 693433 at *3-*4 (E.D. Tex. Feb. 26, 2013); *Grand Texas Homes, Inc. v. American Safety Indemnity Co.*, 2012 WL 5355958 at *2-*3 (N.D. Tex. Oct. 30, 2012); *Crowley v. Amica Mutual Ins. Co.*, 2012 WL 3901629 at *3 (E.D. La. Sept. 7, 2012); *Grigsby v. Kansas City Southern Rwy. Co.*, 2012 WL 3526903 at *2 (W.D. La. Aug. 13, 2012); *Louisiana v. Aspect Energy LLC*, 2011 WL 3759754 at *2-*3 (W.D. La. Aug. 23, 2011); *Goldman v. Nationwide Mutual Ins. Co.*, 2011 WL 3268853 at *3-*4 (E.D. La. July 28, 2011); *Spoon v. Fannin County Community Supervision and Corrections Dept.*, 794 F.Supp.2d 703, 706-09 (E.D. Tex. 2011); *Memfrey v. Anco Insulations, Inc.*, 2011 WL 1527180 at *1-*2, *4 (E.D. La. April 20, 2011); *Roybal v. Fontenot*, 2010 WL 4068868 at *2-*3 (W.D. La. Oct. 14, 2010); *Cornella v. State Farm Fire and Cas. Co.*, 2010 WL 2605725 at *2-*3 (E.D. La. June 22, 2010); *Abney v. City of Bretna*, 2009 WL 5126116 at *1 (E.D. La. Dec. 17, 2009); *Hobson v. Chase Home Finance, LLC*, 2009 WL 2849591 at *4-*7 (S.D. Miss. Sept. 1, 2009); *Taco Tico of New Orleans, Inc. v. Argonaut Great Central Ins. Co.*, 2009 WL 2160436 at *2 (E.D. La. July 16, 2009); *S & S Investment Co, Inc. v. Petrohawk Properties, LP*, 2009 WL 1575273 at *1 (W.D. La. June 3, 2009); *Brantley v.*

(Continued on following page)

The Seventh Circuit adopted the same requirement in *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994), *abrogated on other grounds by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). In *Roe* the plaintiff sued the American National Red Cross and several other defendants; the Red Cross filed a notice of removal which stated that the other defendants "do not object to the removal of this action to federal court." 38 F.3d at 300. The Seventh Circuit held that this was legally insufficient.

Pacific Pioneer Shipping, 2009 WL 1458258 at *1-*2 (E.D. La. May 21, 2009); *Johnston v. Health Bilal*, 2009 WL 981696 at *2-*3 (E.D. La. April 13, 2009); *Gipson v. Wal-Mart Stores, Inc.*, 2008 WL 4844206 (S.D. Tex. Nov. 3, 2008); *Snead v. Woodbine Prod. Corp.*, 2008 WL 4610236 at *1-*3 (W.D. La. Oct. 11, 2008); *Extreme Outdoors Limited, Inc. v. Gary Yamamoto Custom Baits, Inc.*, 2008 WL 2810874 at *4-*5 (S.D. Tex. July 21, 2008); *Killen v. Atlantic Paper & Foil, LLC*, 2007 WL 4299990 at *2 (W.D. La. Dec. 3, 2007); *Marshall v. Air-Liquide – Big Three, Inc.*, 2006 WL 286011 at *2-*3 (E.D. La. Feb. 7, 2006); *Hammonds v. Youth for Christ USA*, 2005 WL 3591910 at *2-*6 (W.D. Tex. Aug. 16, 2005); *Taylor v. B & F Corporate Benefits, Inc.*, 2005 WL 1383160 at *2 (N.D. Tex. June 10, 2005); *Martinez v. Entergy Corp.*, 2004 WL 2661815 at *2-*3 (E.D. La. Nov. 19, 2004); *Aucoin v. Gulf South Pipeline Co., L.P.*, 2004 WL 1196980 at *1-*2 (E.D. La. May 26, 2004); *Jacob v. Greyhound Lines, Inc.*, 2002 WL 31375612 at *6-*7 (E.D. La. Oct. 21, 2002); *Baker v. Ford Motor Co.*, 1997 WL 88260 at *1-*2 (N.D. Miss. Feb. 25, 1997); *Marshall v. Skydive America South*, 903 F.Supp. 1067, 1069-70 (E.D. Tex. 1995); *Samuel v. Langham*, 780 F.Supp. 424, 427-28 (N.D. Tex. 1992); *Luckett v. Harris Hospital-Fort Worth*, 764 F.Supp. 436, 442 (N.D. Tex. 1991); *Moody v. Commercial Ins. Co. of Newark, N.J.*, 753 F.Supp. 198, 200 (N.D. Tex. 1990); *Burkhart v. City of New Orleans*, 1988 WL 54767 at *2 (E.D. La. May 23, 1988).

> The notice of removal stated that '[a]ll other defendants who have been served with summons in this action have stated that they do not object to the removal of this action to federal court." Under ordinary standards, this is deficient. A petition for removal fails unless all defendants join it.... To "join" a motion is to support it in writing, which the other defendants here did not.

38 F.3d at 301. The Seventh Circuit reiterated this rule in *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997). District courts in that circuit interpret *Roe* and *Gossmeyer* to mean that a codefendant can meet the consent requirement by filing a written statement of consent (as well as by signing a notice of removal), but require that a non-removing defendant file that consent within the applicable 30-day period.[5]

In *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057 (8th Cir. 2008), the Eighth Circuit adopted the Fifth Circuit rule in *Getty Oil*.

> While the failure of one defendant to consent renders the removal defective, each defendant need not necessarily sign the notice of removal. *See Getty Oil Corp.*, ... 641 F.2d ... [at] 1262 n.11.... There must, however, "be some

[5] *Komacko v. American Erectors, Inc.*, 2013 WL 3233229 at *2 (N.D. Ind. June 25, 2013); *Village of Elliott v. Wilson*, 2011 WL 4404049 at *2 (C.D. Ill. Aug. 16, 2011); *Boruff v. Transervice, Inc.*, 2011 WL 1296675 at *1-*2 (N.D. Ind. March 30, 2011); *Polus v. Bell*, 2009 WL 88347 at *2 (N.D. Ind. Jan. 12, 2009).

> timely filed written indication from each served defendant," or from some person with authority to act on the defendant's behalf, indicating that the defendant "has actually consented" to the removal. *Id.*

512 F.3d at 1062. Even prior to *Pritchett* that was the prevailing rule in the district courts in the Eighth Circuit,[6] which today are bound by the decision in *Pritchett* itself.[7]

B. The Fourth, Sixth and Ninth Circuits Hold That The Consent Requirement Can Be Satisfied by A Representation by The Removing Party

The circuit split has existed since the Sixth Circuit decision in *Harper v. AutoAlliance International, Inc.*, 392 F.3d 195 (6th Cir. 2004). In *Harper* three of the four defendants filed a notice of removal. The notice stated with regard to the fourth defendant, Kelly, that "Counsel for [the removing parties] has obtained concurrence from counsel ... who represents defendant ... Kelly, in removing this matter." 392 F.3d at 199. The Sixth Circuit held this statement in the

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[6] *Moore v. Federal Ins. Co.*, 2006 WL 1382330 (W.D. Mo. May 19, 2006); *Ametco v. Bway Corp.*, 241 F.Supp. 1028, 1030-32 (E.D. Mo. 2003).

[7] *See Stewart v. Mayberry*, 2009 WL 1735773 at *3 (E.D. Mo. June 28, 2009) (citing *Pritchett*); *Byrd v. Auto-Owners Ins. Co.*, 2008 WL 5071105 at *2-*3 (E.D. Mo. Nov. 24, 2008) (citing *Pritchett*).

notice was sufficient. "Nothing ... required Kelly or his attorney to submit a pleading, written motion, or other paper directly expressing that concurrence or prohibited counsel for the other defendants from making such a representation on Kelly's behalf." 392 F.3d at 201-02. Although the contrary rule had earlier been applied by district courts in the Sixth Circuit,[8] *Harper* is now controlling there.[9]

The Ninth Circuit, relying on the Sixth Circuit's decision in *Harper*, holds that a removing party can satisfy the requirement of unanimity merely by asserting that the remaining defendants consent to removal. In *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208 (9th Cir. 2009), one of several defendants removed that action, representing in its notice of removal that "[a]ll defendants consent to the removal of this action." 584 F.3d at 1224 (emphasis omitted). The Ninth Circuit held that this representation was sufficient to meet the requirement of unanimity.

> [W]e conclude that the filing of a notice of removal can be effective without individual consent documents on behalf of each defendant. One defendant's timely removal notice containing an averment of the other defendants' consent and signed by an attorney of

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[8] *Local Union No. 172, Int'l Assoc. of Bridge, etc., Ironworkers*, 253 F.Supp. 1022, 1025-26 (S.D. Ohio 2003); *Knickerbocker v. Chrysler Corp.*, 728 F.Supp. 460, 461 (E.D. Mich. 1990).

[9] *Cadez v. Residential Credit Solutions, Inc.*, 2013 WL 2238486 at *3 (E.D. Mich. May 21, 2013).

> record [for the removing defendant] is sufficient. [The removing party] submitted such an averment ... [that] the other co-defendants were notified of the removal notice and had an opportunity to object to it.... Like the Sixth Circuit, we interpret th[e] requirement [that all codefendants join in requesting removal] as met if, as here, one defendant avers that all defendants consent to removal.

584 F.3d at 1225. *Proctor* has repeatedly been applied by district courts in the Ninth Circuit.[10] The Ninth Circuit in *Proctor* expressly disagreed with the contrary decisions in the Fifth, Seventh and Eighth Circuits.

In the instant case the Fourth Circuit, citing the decisions in *Harper* and *Proctor*, adopted the rule in the Sixth and Ninth Circuits. "[W]e conclude that a notice of removal signed and filed by an attorney for one defendant representing unambiguously that the

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[10] *Cardroom Int'l LLC v. Scheinberg*, 2012 WL 2263330 at *4-*5 (C.D. Cal. June 18, 2012); *Koklich v. Cal. Dept. of Corrections*, 2012 WL 654895 at *3 (E.D. Cal. Feb. 28, 2012); *Morales v. Prolease Peo, LLC*, 2011 WL 6740329 at *2 (C.D. Cal. Dec. 22, 2011); *Schayes v. T.D. Service Co. of Ariz.*, 2011 WL 1793161 at *3 (D. Ariz. May 11, 2011); *Stalcup v. Liu*, 2011 WL 1753493 at *4 (N.D. Cal. April 22, 2011); *Zandotti v. Colorado Savings Banks*, 2010 WL 4737776 at *1 (D. Ariz. Nov. 16, 2010); *In re Hydroxycut Marketing and Sales Practices Litigation*, 2010 WL 2998855 at *5 (S.D. Cal. July 29, 2010); *Aguilar v. Union Pac. RR. Co.*, 2010 WL 2674452 at *3 (C.D. Cal. July 2, 2010); *Flatwire Solutions, LLC v. Sexton*, 2009 WL 5215757 at *2 (C.D. Cal. Dec. 29, 2009).

other defendants consent to the removal satisfies the requirement of unanimous consent for purposes of removal." (App. 16a; *see id*. 15a ("we can see no policy reason why removal in a multiple-defendant case cannot be accomplished by the filing of one paper signed by at least one attorney, representing that all defendants have consented to the removal")).

C. The Circuit Conflict Is Widely Recognized

The Fourth Circuit characterized the division among the circuit courts as a three-way split: the "formal approach" of the Seventh Circuit, the "less formal process" in the Sixth and Ninth Circuits, and a "hybrid position[ ]" in the Fifth and Eighth Circuits. (App. 13a-14a). The district court acknowledged that the removal in this case would be improper under the standard in the Eighth Circuit decision in *Pritchett* (and several other decisions), but pointed out that the Sixth Circuit decision in *Harper* was "[i]n contradistinction to those cases." (App. 25a). It chose to follow the Sixth Circuit standard rather than the rule in *Pritchett*. "I find that the rule enunciated in *Harper* ... is the preferable one." (App. 27a).

In their brief in the court of appeals, respondents expressly recognized the circuit conflict regarding the issue presented by this case. "There is a split among Circuits regarding how explicit a defendant must be in order to express its desire to join in a notice to remove a case to federal court.... Though the

majority of courts do require some writing to evidence joining in the removal, the Circuits split again over what type of writing will be satisfactory." (Brief of Appellees, 50) (citing *Pritchett*, *Getty Oil*, *Harper*, and *Proctor*).

The Ninth Circuit in *Proctor* described the circuit split that already existed prior to the Fourth Circuit decision in the instant case.

> The circuits are divided as to what form a codefendant's joinder in removal must take.... The Sixth Circuit requires only that "at least one attorney of record" sign the notice and certify that the remaining defendants consent to removal; it does not insist that each defendant submit written notice of such consent. *See Harper*.... In contrast, the Fifth, Seventh, and Eighth Circuits have adopted the more demanding requirement that each codefendant must submit a timely, written notice of consent to joinder. *See Getty Oil Corp. v. Ins. Co. of N.Am. ...* ; *Roe v. O'Donohue ...* ; *Pritchett v. Cottrell, Inc.*....

584 F.3d at 1224-25. *See Siebert v. Norwest Bank Minnesota*, 166 Fed.Appx. 603, 607 n.2 (3d Cir. 2006) (whether oral consent given to counsel for a removing party is sufficient "is the subject of some disagreement among federal courts nationwide.").

Ten district court decisions have recognized the existence of this circuit split.[11]

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[11] *Brown v. Cribb*, 2013 WL 1181500 at *2 (D.S.C. Feb. 26, 2013) ("Circuit courts have varying standards regarding the form of a codefendant's joinder in removal."); *Grand Texas Homes, Inc. v. American Safety Indemnity Co.*, 2012 WL 5355958 at *2 n.1 (N.D. Tex. Oct. 30, 2012) ("Not all circuits share [the Fifth Circuit's] interpretation."); *Smith v. McCormick-Armstrong Co.*, 2012 WL 4839918 at *1 n.1 (D. Kan. Oct. 11, 2012) ("The Circuit Courts of Appeals are split on whether the consent requirement is satisfied by a representation from counsel for the removing defendant that all co-defendants consent to removal"); *Estate of Dean v. New Jersey*, 2012 WL 1900924 at *2 (D.N.J. May 24, 2012) ("There is disagreement among courts as to whether a defendant who does not sign the notice of removal must provide the court with written consent in order to satisfy the rule of unanimity.... Several circuits hold that only one attorney of record is required to sign and certify that all served defendants have consented to removal. *See Proctor ... Harper*.... The majority view, however, is that non-signing defendants must do more than merely advise the removing defendant of their consent. Defendants must communicate their consent directly to the Court. *See Pritchett ... Roe ... Getty Oil*...."); *Zhao v. Skinner Engine Co.*, 2011 WL 3875524 at *2 n.6 (E.D. Pa. Sept. 2, 2011) ("The circuits are split as to what constitutes proper consent to removal. Some courts require that each defendant either sign the notice of removal or submit a timely written notice of consent. *See*, *e.g.*, *Pritchett ...* ; *Roe ...* ; *Getty Oil*.... Other courts, however, require only that an attorney of record sign the notice of removal and certify that all the defendants consent to removal. *See*, *e.g.*, *Proctor ...* ; *Harper*...."); *Gannon v. HSBC Card Services, Inc.*, 2011 WL 2448912 at *1-*2 (M.D. Fla. April 5, 2011) ("A number of courts have stated that each defendant must indicate its consent to removal in some manner on the record. *See*, *e.g.*, *Pritchett ...* ; *Roe ...* ; *Getty Oil*.... The Sixth and Ninth Circuits, however, have found that '[o]ne defendant's timely removal notice containing an averment of the other defendants'

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Commentators have repeatedly described this conflict as well.

> Although all courts agree generally on the requirement of unanimity, the circuits are split as to exactly what form a co-defendant's joinder must take.... The Fifth, Seventh, and Eighth Circuits ... generally required that each served codefendant sign the removal petition or submit a timely, written notice of consent to removal. Under this view, it is not enough for the removing party to simply state that the codefendants consent to or do

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consent and signed by an attorney of record is sufficient' to satisfy the rule of unanimity.") (quoting *Proctor*); *Tresco, Inc. v. Continental Cas. Co.*, 727 F.Supp.2d 1243, 1248-49 (D.N.M. 2010) ("The United States Courts of Appeals for the Fifth, Seventh, and Eighth Circuits ... have held that each co-defendant must either sign the removal petition or submit a timely notice of consent in writing.... The United States Courts of Appeals for the Sixth and Ninth Circuits require only that at least one attorney of record sign the notice and certify that the remaining defendants consent to removal"); *In re Hydroxycut Marketing and Sales Practices Litigation*, 2010 WL 2998855 at *5 (S.D. Cal. July 29, 2010) ("some of the circuits differ on the issue [from] *Proctor*"); *Wolfenden v. Long*, 2010 WL 2998804 at *3 (E.D.N.C. July 26, 2010) ("Some circuits hold that the removing party's representation in the notice of removal that the codefendants consent is sufficient, *see Proctor* ... ; *Harper* ... , while others disagree, *see Pritchett* ... ; *Roe* ... ; *Getty Oil*...."); *Roylance v. ADT Security Services, Inc.*, 2008 WL 2168690 at *4 (N.D. Cal. May 22, 2008) ("Some courts have held that a mere allegation of joinder in the notice of removal is insufficient to satisfy the rule of unanimity. *See*, *e.g.*, *Getty Oil*.... Other courts have held that an allegation of joinder in the notice of removal is sufficient.... *See*, *e.g.*, *Harper*....").

> not oppose removal.... The Sixth and Ninth Circuits require only that at least one attorney of record sign the notice and certify that the remaining consent to removal.

16 Moore's Federal Practice § 107.11[1][c] (3d ed. 2013) (footnotes omitted).

> Courts are split on how consent of codefendants must be presented. Some courts hold that the removing party cannot simply represent in the notice that other defendants consent or do not object to removal; such courts require codefendants to sign the notice of removal, file their own notice of removal, or file a notice of consent within the 30-day removal period. Other courts, however, have declined to require written notice from each defendant, finding sufficient one defendant's timely notice of removal certifying the other defendants' consent and signed by at least one attorney of record.

1 Bus. & Com. Litig. Fed. Cts. § 11.44 (3d ed. 2012) (footnotes omitted) (citing *Roe*, *Getty*, *Proctor* and *Harper*).

> The courts are divided as to what form a codefendant's joinder in removal must take. Some require only that "at least one attorney of record" sign the notice and certify that the remaining defendants consent to removal; it does not insist that each defendant submit written notice of such consent.... Others have adopted the more demanding requirement

> that each co-defendant must submit a timely, written notice of consent to joinder.

Cal. Civ. Prac. Procedure, § 5:33 (2013) (citing *Proctor* and *Pritchett*).

> [There is a] [c]ircuit [s]plit.... [F]ederal courts are divided regarding the functional application of the [unanimity] rule in multi-defendant lawsuits. Some federal courts require each defendant to submit his own consent form, whereas other federal courts allow one defendant to pledge in the notice of removal that all other defendants have consented.

Note, *On Removal Jurisdiction's Unanimous Consent Requirement*, 53 Wm. & Mary L.Rev. 235, (2011) (citing *Getty*, *Pritchett*, *Roe*, *Harper*, and *Proctor*) (footnotes omitted); *see* Note, *Proctor v. Vishay Intertechnology, Inc.: The Ninth Circuit Failed to Follow the Rule of Unanimity When Applying Rule 11 to a Case with Multiple Defendants*, 44 Creighton L.Rev. 261, 261-62 (2010) (citing *Getty*, *Pritchett*, *Roe*, *Harper*, and *Proctor*).

D. In Five Other Circuits There Is Disagreement Among The District Courts

In the remaining circuits the district courts apply divergent standards to removal of multi-defendant cases. Although most district courts have required the non-removing party to file with the court a timely written statement of consent, there is no circuit

precedent dictating what will happen in any given case.

In *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72 (1st Cir. 2009), the First Circuit declined "to establish a wooden rule, regardless of whether such a rule would have the benefit of promoting clarity." 590 F.3d at 77. That court of appeals merely urged defendants who wish to consent to removal by another defendant to file a document with the court stating their position.

> [I]t is undoubtedly the better practice for a defendant who wants to be in federal court to join the removal notice explicitly, either by signing the notice itself or by filing its consent. By failing to do so in this case, [the non-removing defendant in this case] ran the risk that the district court might find a breach of the unanimity requirement and remand this case to the state court, a decision [which the appellate court] would have been powerless to review.

590 F.3d at 77. Several district court decisions in the First Circuit require that a party wishing to consent to removal file a specific statement of its own with the court. *Dichiara v. RDM Technologies*, 2009 WL 1351640 at *4-*5 (D. Mass. Jan.13, 2009); *Sansone v. Morton Machine Works, Inc.*, 188 F.Supp.2d 182, 185 (D.R.I. 2002). On the other hand, in *Samaan v. St. Joseph Hospital*, 685 F.Supp.2d 163 (D. Me. 2010), the district court concluded that it had discretion to accept or reject the representation of removing counsel.

It chose to reprimand the non-removing defendant for failing to file an express consent, and then exercised that discretion to accept the representation by the removing defendant. 685 F.Supp.2d at 167 n.4.[12] In *In re Pharmaceutical Industry Wholesale Price Litigation*, 431 F.Supp.2d 109 (D. Mass. 2006), the removing defendant represented that "all defendants will consent to this removal." 431 F.Supp.2d at 113. When, however, the district judge asked for an explanatory declaration from removing counsel, it became clear that several defendants had not consented. The district court remanded the case on the ground that the removing party made "made a material misrepresentation in its notice of removal and that its inquiry [of its codefendants] was not reasonable under the circumstances." *Id*. at 124.

In the Second Circuit fifteen district court opinions have held that each non-removing defendant must file some form of unambiguous written consent within the requisite 30 days.[13] That rule

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[12] "The hospital simply ignored this recent practice pointer from the First Circuit, failed to expressly consent during the thirty day period, and gave [the plaintiff] the opportunity and right to challenge the Court's retention of the case. That the Court exercised its discretion in favor of retention does not make ... the Hospital's inattention commendable."

[13] *National Waste Associates, LLC v. TD Bank, N.A.*, 2010 WL 1931031 at *3-*6 (D. Conn. May 12, 2010); *Heller v. New York City Health and Hosps. Corp.*, 2010 WL 481336 at *2 (S.D.N.Y. Feb. 1, 2010); *Ricciardi v. Kone, Inc.*, 215 F.R.D. 455, 458 (E.D.N.Y. 2003); *Ferreira v. New York Daily News*, 2009 WL 8905777 at *2 (E.D.N.Y. March 31, 2009); *Edelman v. Page*, 535

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is regarded as "the well-settled precedent in the Second Circuit." *National Waste Associates, LLC v. TD Bank, N.A.*, 2010 WL 1931031 at *3, *6 (D. Conn. May 12, 2010). One more recent district court decision expressly rejected the Ninth Circuit decision in *Proctor* as contrary to established law in the Second Circuit:

> This Court remains unpersuaded by *Proctor* and finds no need to break with the well-settled precedent in this Circuit of strictly construing and applying the unanimity rule to removal. To the extent that *Proctor* suggests it is sufficient for one defendant to represent that all defendants have consented to removal, it is contrary to the overwhelming weight of authority within this Circuit that *each* defendant must provide written notice of consent within the requisite thirty days.

Id. *6 (footnote omitted; emphasis in original).

F.Supp.2d 290, 295 (D. Conn. 2008); *Glatzer v. Cardozo*, 2007 WL 6925941 at *2-*3 (S.D.N.Y. Sept. 26, 2007); *Chabowski v. Caterpillar, Inc.*, 2007 WL 2493088 at *1 (W.D.N.Y. Aug. 28, 2007); *Dunlop v. City of New York*, 2006 WL 2853972 at *2 (S.D.N.Y. Oct. 4, 2006); *Burr v. Toyota Motor Credit Co.*, 478 F.Supp.2d 432, 440 (S.D.N.Y. 2006); *Payne v. Overhead Door Corp.*, 172 F.Supp.2d 475, 477 (S.D.N.Y. 2001); *Tate v. Mercedes-Benz USA, Inc.*, 151 F.Supp.2d 222, 224 (N.D.N.Y. 2001); *Berrios v. Our Lady of Mercy Medical Center*, 1999 WL 92269 at *2-*3 (S.D.N.Y. Feb. 19, 1999); *Miller v. First Security Investments, Inc.*, 30 F.Supp.2d 347, 351 (E.D.N.Y. 1998); *Codapro Corp. v. Wilson*, 997 F.Supp. 322, 325-26 (E.D.N.Y. 1998); *Town of Moreau v. New York State Dept. of Environmental Conservation*, 1997 WL 243258 at *4-*5 (N.D.N.Y. May 5, 1997).

Within the Third Circuit, the requirement that each non-removing defendant must itself file a timely statement of consent is "well-settled" in the Eastern District of Pennsylvania. *Green v. Target Stores, Inc.*, 305 F.Supp.2d 448, 450 (E.D. Pa. 2004).[14] It is also "the approach used in" the District of New Jersey. *Estate of Dean v. New Jersey*, 2012 WL 1900924 at *2 (D.N.J. May 24, 2012).[15] However, there do not appear to be decisions on this issue in other districts within that circuit.

In the Tenth Circuit "whether a case remains in federal court may hinge on something as random as the judge to whom [it] has been assigned." *State Farm Fire and Casualty Co. v. Dunn-Edwards Corp.*, 728 F.Supp.2d 1273, 1276 (D.N.M. 2010). Judges in the District of New Mexico disagree about

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[14] *See Zhao v. Skinner Engine Co.*, 2011 WL 3875524 at *2 (E.D. Pa. Sept. 2, 2011); *Kinit With v. Aurora Yarns*, 2010 WL 844739 at *10 (E.D. Pa. March 11, 2010); *Sovereign Bank v. Park Development West, LLC*, 2006 WL 2433465 at *1-*2 (E.D. Pa. Aug. 17, 2006); *Lewis v. Consolidated Freightways Corp. of Del.*, 2005 WL 503317 at *2 (E.D. Pa. Feb. 28, 2005); *Morganti v. Armstrong Blum Mfg. Co.*, 2001 WL 283135 at *2 (E.D. Pa. March 19, 2001); *Weinrach v. White Metal Rolling, etc. Co.*, 1999 WL 46627 at *1 (E.D. Pa. Jan. 6, 1999); *Landman v. Borough of Bristol*, 896 F.Supp. 406, 408-09 (E.D. Pa. 1995); *Ogletree v. Barnes*, 851 F.Supp. 184, 187-90 (E.D. Pa. 1994); *Jordan v. Philadelphia Housing Auth.*, 1991 WL 236465 at *1 (E.D. Pa. Nov. 5, 1991).

[15] *See Wal-Mart Stores, Inc. v. Electric Ins. Co.*, 2007 WL 137238 at *2-*3 (D.N.J. Jan. 18, 2007); *Michaels v. New Jersey*, 955 F.Supp. 315, 320-21 (D.N.J. 1996).

the governing rule; three decisions hold that a non-signing defendant must file a timely statement of consent,[16] one decision rejects that rule,[17] and two opinions expressly avoid deciding the issue.[18] On the other hand, "[t]he federal courts within the District of Kansas which have addressed this issue ... are not split," *McShares, Inc. v. Barry*, 979 F.Supp. 1338, 1343 (D. Kan. 1997); they require such a written statement from the non-removing defendant.[19] Outside of these two districts there appears to be only one district court decision in the Tenth Circuit.[20]

The district courts in the Eleventh Circuit are divided regarding the action needed to satisfy the consent requirement. Twelve decisions hold that the

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[16] *State Farm*, 728 F.Supp.2d at 1276-78; *Vasquez v. Americano U.S.A., LLC*, 536 F.Supp.2d 1253, 1258-59 (D.N.M. 2008); *Wiatt v. State Farm Ins. Cos.*, 560 F.Supp.2d 1068, 1076 (D.N.M. 2007).

[17] *Tresco, Inc. v. Continental Cas. Co.*, 727 F.Supp.2d 1243, 1254-55 (D.N.M. 2010).

[18] *McEntire v. Kmart Corp.*, 2010 WL 553443 at *6 (D.N.M. Feb. 9, 2010); *Roybal v. City of Albuquerque*, 2008 WL 5991063 at *7-*8 (D.N.M. 2008).

[19] *Propane Resources Supply and Marketing, L.L.C.*, 2013 WL 1446784 at *3-*4 (D. Kan. Apr. 9, 2013); *Wakefield v. Olcott*, 983 F.Supp. 1018, 1021 (D. Kan. 1997); *McShares*, 979 F.Supp. at 1342-43; *Henderson v. Holmes*, 920 F.Supp. 1184, 1186-88 (D. Kan. 1996); *Barger v. Bristol-Myers Squibb Co.*, 1994 WL 69508 at *2 (D. Kan. Feb. 25, 1994).

[20] *Jarvis v. FHP of Utah, Inc.*, 874 F.Supp. 1253, 1254 (D. Utah 1995) (requiring timely filed statement of consent by non-signing defendant).

non-signing party must within the 30-day limitation period file a written statement of consent; these decisions generally rely on the Fifth Circuit decision in *Getty Oil*.[21] Two other decisions in this circuit, the most recent in 2011, have taken the opposite position, accepting as sufficient a representation by counsel for the removing defendant.[22]

II. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT

This deeply entrenched circuit split regarding the steps needed to remove a case involving multiple defendants is inconsistent with this Court's insistence

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[21] *Yezzi v. Hawker Financial Corp.*, 2009 WL 4898380 at *2-*3 (S.D. Ala. Dec. 14, 2009); *In re Managed Care Litigation*, 2009 WL 413512 at *3-*4 (S.D. Fla. Feb. 19, 2009); *Mitsui Lines Ltd., Inc. v. CSX Intermodal, Inc.*, 564 F.Supp.2d 1357, 1360 (S.D. Fla. 2008); *Leaming v. Liberty University*, 2007 WL 1589542 at *2 (S.D. Ala. June 1, 2007); *Beard v. Lehman Bros. Holdings, Inc.*, 458 F.Supp.2d 1314, 1319-20 (M.D. Ala. 2006); *Whetstone v. Fred's Stores of Tennessee, Inc.*, 2006 WL 559596 at *2 (M.D. Ala. March 7, 2006); *Diebel v. S.B. Trucking Co.*, 262 F.Supp.2d 1319, 1329 (M.D. Fla. 2003); *Smith v. Health Center of Lake City, Inc.*, 252 F.Supp.2d 1336, 1339-40 (M.D. Fla. 2003); *Jones v. Florida Dept. of Children and Family Servs.*, 202 F.Supp.2d 1352, 1353-54 (S.D. Fla. 2002); *Newman v. Spectrum Stores, Inc.*, 109 F.Supp.2d 1342, 1345-46 (M.D. Ala. 2000); *Miles v. Kilgore*, 928 F.Supp. 1071, 1076-77 (N.D. Ala. 1996); *Nathe v. Pottenberg*, 931 F.Supp. 822, 824-25 (M.D. Fla. 1995).

[22] *Gannon v. HSBC Card Services, Inc.*, 2011 WL 2448912 at *2 (M.D. Fla. April 5, 2011); *Jasper v. Wal-Mart Stores, Inc.*, 732 F.Supp. 104, 105 (M.D. Fla. 1990).

that "the removal statutes ... are intended to have uniform nationwide application." *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705 (1972). Clarity in this area of the law is particularly important, because if a district court incorrectly refuses to remand a removed case, the ensuing federal court decision on the merits of the controversy will have to be set aside and the entire proceeding begun anew in state court. Even where a district court recognizes that a case was improperly removed, "[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." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). Because of the large number of cases in which removal is sought, this Court has repeatedly granted review to clarify which cases can be removed and what steps are required to do so.[23]

Disputes about what steps are needed to satisfy the consent requirement at issue in this case have arisen in a substantial number of cases. In the Fourth Circuit, for example, there are 17 district court decisions on this issue in addition to the decision in the

[23] *E.g.*, *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

instant case.[24] Overall there have been more than 120 district court decisions about this question. (*See* pp. 11-20, *supra*).

In the six circuits that have not addressed this issue, litigants cannot predict with confidence what standard will govern the removal of a multi-defendant case. "At present, parties before one judge may find that strict compliance is required, while litigants before another – even in the same district – may find that it is not. They are thus left to guess at the scope of the unanimity rule's mandate on the

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[24] *Costley v. Service Protection Advisors*, 887 F.Supp.2d 657, 658 (D. Md. 2012); *Grandison v. Food Lion, LLC*, 2011 WL 3652437 at *2 (E.D. Va. Aug. 18, 2011); *Bengfort v. Twise*, 2011 WL 2111893 at *2 (S.D. W.Va. May 26, 2011); *Funchess v. Blitz U.S.A., Inc.*, 2010 WL 4780357 at *4 (D.S.C. Nov. 16, 2010); *Givens v. Main Street Financial Services Corp.*, 2010 WL 4386725 at *2 (N.D. W.Va. Oct. 28, 2010); *Wolfenden v. Long*, 2010 WL 29998804 at *3-*4 (E.D.N.C. July 26, 2010); *Ammar's, Inc. v. Singlesource Roofing Corp.*, 2010 WL 1961156 at *4 (S.D. W.Va. May 17, 2010); *Daniels v. Town of Farmville*, 2007 WL 4246478 at *2 (E.D. Va. Nov. 29, 2007); *Smith v. City of Newport News*, 2007 WL 1655341 at *1 (E.D. Va. June 6, 2007); *Henrich v. Falls*, 2006 WL 335635 at *1 (E.D. Va. Feb. 13, 2006); *Nozick v. Davidson Hotel Co.*, 2004 WL 34873 at *2 (D. Md. Jan. 6, 2004); *Unicom Systems, Inc. v. National Louis University*, 262 F.Supp.2d 638, 641-43 and n.5 (E.D. Va. April 28, 2003); *Dorsey v. Borg-Warner Automotive, Inc.*, 218 F.Supp.2d 817, 818-20 (S.D. W.Va. 2002); *Stonewall Jackson Memorial Hospital v. American United Life Ins. Co.*, 963 F.Supp. 553, 558-59 (N.D. W.Va. 1997); *Anne Arundel Cnty., Md. v. United Pacific Ins. Co.*, 905 F.Supp. 277, 278-79 (D. Md. 1995); *Martin Oil Co. v. Philadelphia Life Ins. Co.*, 827 F.Supp. 1236, 1238-39 (N.D. W.Va. 1993); *Creekmore v. Food Lion, Inc.*, 797 F.Supp. 505, 508-09 (E.D. Va. 1992).

front end, and pay for motions exploring the rule's contours on the back end." *State Farm Fire and Cas. Co. v. Dunn-Edwards Corp.*, 728 F.Supp.2d 1273, 1276 (D.N.M. 2010). Even where there was been a consistent pattern of district court decisions requiring a non-removing defendant to file a timely written statement of consent, it is always possible in any given case that another district judge, unconstrained by any appellate precedent, will depart from the past practice of his or her colleagues. That is precisely what occurred in this case; prior to the district court decision in the instant case, district courts in the Fourth Circuit for two decades had repeatedly rejected as insufficient the representation of a removing defendant that non-removing defendants had consented to removal. (*See* n.24, *supra*).

The current unsettled state of the law undermines enforcement of section 1447(c), which authorizes an "[a]ssess[ment] [of] costs and fees on remand [to] reduce[ ] the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005); *see* 28 U.S.C. § 1447(c). Under *Martin* a court may only impose fees and costs on a defendant for improperly removing a case if "the removing party lacked an objectively reasonable basis for seeking removal." 546 U.S. at 141. So long as the circuit courts are divided about the standard governing consent in multi-defendant cases, it may be difficult to meet that standard. *See Siebert v. Norwest Bank Minnesota*, 166 Fed.Appx. 603, 606 (3d Cir. 2006)

(lower court's denial of fees proper because "the law in the District of New Jersey, and the Third Circuit, and elsewhere was unsettled as to whether defendants could orally consent to removal").

III. THE DECISION OF THE FOURTH CIRCUIT IS INCORRECT

The decision of the Fourth Circuit is unsound for several reasons.

Only an express statement of consent filed by the non-removing party can definitively avoid uncertainty about what the non-removing party may have said or done prior to the expiration of the 30-day period. Under the rule in the Fourth, Sixth and Ninth Circuits, the information initially before the district court consists only of a report from counsel for the removing defendant about what occurred in a private exchange with counsel for the non-removing defendant. That report comes from an interested party, which wants to construe as an expression of consent whatever counsel for the non-removing defendant may have said or done. That interpretation may be shaped by the "morass of ambiguities, disparate memories, and misapprehensions that often accompany attorneys' verbal agreements with one another." *State Farm Fire and Cas. Co. v. Dunn-Edwards Corp.*, 728 F.Supp.2d 1273, 1277 (D.N.M. 2010). The particular language used by non-removing counsel in whatever informal exchanges took place within the 30-day period could be dispositive; in the instant case,

for example, the district court believed that a statement that a non-removing party "did not object to removal" might be insufficient. (App. 25a). If counsel for the codefendants had exchanged emails during that period, the actual language used might be unearthed in discovery. Where, however, the report of consent was based on a telephone conversation, an after-the-fact account by defense counsel of the words that were used might not be entirely reliable. The rule in the Fifth, Seventh and Eighth Circuits avoids these problems. "Our jurisprudence supports an almost fool-proof directive, which follows the clear language of the rule and should satisfy every judge: If you represent a served, properly joined defendant who consents to a co-defendant's removal, you must sign the notice of removal on behalf of your client, file your own notice of removal, or file a notice of consent to removal within the thirty-day removal period." *State Farm*, 728 F.Supp. at 1277.

If counsel for the non-removing party is required to file a statement of consent, Rule 11 will apply to that document. By filing such a statement counsel necessarily represents that the consent is "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." F.R.Civ.Pro. 11(b)(1). As this Court recognized in *Martin*, removal provides an opportunity for that type of abuse. No such representation is required of an attorney for a non-removing defendant who merely gives some form of oral assent to the removing defendant, even if that attorney has

reason to doubt the bona fides of the removal. The Fourth Circuit thought it sufficient that counsel for a single party would "*fil*[*e*] *a paper* that is *signed* and that *represents* the *bona fides* of the removal." (App. 15a) (emphasis in original). The fair and efficient administration of justice would be better served, however, if counsel for *all* of the parties – each of whose agreement is a necessary precondition of removal – were obligated to make the same representation.

As the Fifth Circuit emphasized in *Getty Oil*, in the absence of a written statement of consent, a non-removing defendant would not be bound by the representation made by the removing defendant. 841 F.2d at 1262 n.11. A prudent attorney who was willing to have an informal conversation with counsel for a removing codefendant might be more reluctant to sign and file an unequivocal written statement of consent, if only because the consequences of such a binding action are not always foreseeable. Section 1447(c), for example, does not specify the defendant against whom costs and attorney fees may be awarded when a case is improperly removed; a judge who concluded in a particular case that removal lacked an objectively reasonable basis might be more inclined to allocate partial responsibility for that baseless removal to a non-removing defendant if that defendant had filed a written statement of consent.

Limiting removal in multi-defendant litigation to cases in which all non-removing defendants are willing to file binding written statements of consent, subject to Rule 11, is consistent with the longstanding

practice of narrowly interpreting federal removal statutes. "For over the last hundred years ... the federal courts have construed the removal statutes to effectuate the congressional purpose generally to restrict the removal jurisdiction.... [B]ecause the effect of removal is to deprive the state court of jurisdiction over a case properly before the state court, removal raises federalism concerns that mandate strict construction." 16 Moore's Federal Practice § 107.05 (3d ed. 2013) (footnotes omitted).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LARRY C. MAYO; LESLIE CARROLL-WICKS; MARY MAYS-CARROLL; AVERY MILLIGAN; SANDRA PONOSKI, *Plaintiffs-Appellants,* v. BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; VERJEANA M. JACOBS; ASSOCIATION OF CLASSIFIED EMPLOYEES/ AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, *Defendants-Appellees.*	No. 11-1816

LARRY C. MAYO; LESLIE CARROLL-WICKS; MARY MAYS-CARROLL; AVERY MILLIGAN; SANDRA PONOSKI, *Plaintiffs-Appellants,* v. BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; VERJEANA M. JACOBS; ASSOCIATION OF CLASSIFIED EMPLOYEES/ AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, *Defendants-Appellees.*	No. 11-2037

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
J. Frederick Motz, Senior District Judge.
(8:11-cv-01052-JFM)

Argued: January 31, 2013

Decided: April 11, 2013

Before NIEMEYER, GREGORY,
and DAVIS, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Gregory and Judge Davis joined.

COUNSEL

ARGUED: Richard Talbot Seymour, LAW OFFICES OF RICHARD T. SEYMOUR, PLLC, Washington, D.C., for Appellants. Abbey G. Hairston, THATCHER LAW FIRM, Greenbelt, Maryland; Mark James Murphy, MOONEY, GREEN, SAINDON, MURPHY & WELCH, PC, Washington, D.C., for Appellees. **ON BRIEF:** Nicholas W. Woodfield, R. Scott Oswald, THE EMPLOYMENT LAW GROUP, P.C., Washington, D.C.; Jay P. Holland, Timothy F. Maloney, Brian J. Markovitz, JOSEPH, GREENWALD & LAAKE, P.A., Greenbelt, Maryland, for Appellants. Natalie R. Bedard, MOONEY, GREEN, SAINDON, MURPHY & WELCH, PC, Washington, D.C., for Appellee Association of Classified Employees/American Federation of State, County and Municipal Employees; Sarah M. Burton, THATCHER LAW FIRM, Greenbelt, Maryland,

for Appellees Board of Education of Prince George's County and Verjeana M. Jacobs.

OPINION

NIEMEYER, Circuit Judge:

Five current or former temporary employees (the "Temporary Employees") of the Board of Education of Prince George's County, Maryland ("School Board") filed a class action complaint in the Circuit Court for Prince George's County, asserting employee-compensation claims against the School Board, its chair, and the Association of Classified Employees/ American Federation of State, County and Municipal Employees, AFL-CIO, Local 2250 (the "Union"). They alleged that even though the collective bargaining agreement ("CBA") excluded "temporary employees" from the bargaining unit, they were entitled to the benefits of an arbitration award entered as the result of an arbitration between the School Board and the Union, as well as benefits from the underlying CBA.

The School Board and its chair filed a notice of removal to federal court, which included a statement that the Union also agreed to the removal, and all defendants thereafter filed motions to dismiss for failure to state a claim. The Temporary Employees not only opposed the motions to dismiss but also filed a motion to remand, arguing that the removal was invalid because the Union did not timely file its own notice of removal or other paper giving its consent in writing. The district court denied the Temporary

Employees' motion to remand and entered an order under Federal Rule of Civil Procedure 12(b)(6), dismissing the complaint for failure to state a claim. After filing a notice of appeal from the order of dismissal, the Temporary Employees also filed a motion in the district court for reconsideration of its dismissal order. The district court granted the defendants' motion to strike the motion for reconsideration. The Temporary Employees then filed a second notice of appeal from that order.

We affirm on both appeals, concluding (1) that the Union adequately consented to the notice of removal; (2) that the Temporary Employees' complaint failed to state a claim for relief; and (3) that the district court did not err in striking the Temporary Employees' motion for reconsideration.

I

The School Board and the Union were parties to a CBA that covered "all employees of the Board who are contained within the bargaining unit represented by the Union" for the period July 1, 2007, through June 30, 2010. Article 2, § 1 of the CBA defined the bargaining unit to include "all classified employees of Prince George's County Public Schools with the exception[ ] of" certain employees, including "[t]emporary employees." And to protect the work positions for members of the bargaining unit, Article 7, § 17 of the CBA provided:

> A substitute or temporary employee will not be used to fill an authorized position in excess of sixty (60) working days except (1) when a qualified individual is not available to fill a position on a permanent basis or (2) where necessary to hold a position for a person on an approved leave of absence or (3) to preserve a vacancy for an employee currently assigned to a position scheduled to be eliminated (e.g., school closings, budget reductions, reorganization).

During wage-related negotiations in July 2008, the School Board provided the Union, at the Union's request, with a list identifying the substitute and temporary employees in the School Board's employ and giving information about them. The list included 2,180 such employees, many of whom had been employed by the School Board in the same position for more than 60 days and were performing the same duties as permanent classified employees who, as members of the bargaining unit, received higher pay and benefits. After receiving this information, the Union filed a grievance against the School Board, contending that the School Board's practice of hiring substitute and temporary employees violated Article 7, § 17 of the CBA. The grievance thereafter proceeded to arbitration.

In a decision dated July 8, 2009, the arbitrator concluded that the School Board had indeed violated the CBA by "employ[ing] substitute and temporary employees to fill what would be permanent positions but for the failure of the Board to establish those

positions pursuant to the terms of the Agreement, and to seek their funding as [full-time equivalent employees] through the budgeting process." The arbitrator found that Article 7, § 17 "specifically was negotiated as a limitation on the ability of the Board to employ substitute and temporary employees to perform bargaining unit work" and that "the issue is the preservation of bargaining unit work for bargaining unit personnel, not the identity of the specific substitute or temporary employee who may be filling a position at any particular time." Although the arbitrator concluded that the Board had violated Article 7, § 17, he acknowledged that the scope of the violation was unclear. Accordingly, he instructed the parties to identify "[t]hose positions filled for in excess of 60 days by substitute and temporary employees that comprise duties covered by existing bargaining unit classifications," clarifying that "those that amount to bargaining unit positions are covered by this Award, and those that do not, are not."

The arbitrator tailored relief to three relevant periods of time. He determined that "[n]o remedy [was] warranted for the period of the violation occurring prior to the filing of the grievance," because "the Union's long silence" would make any remedy "grossly unfair and inequitable." For the period going forward, however, the arbitrator directed that the School Board cease its practice of "circumvent[ing] the terms of the Agreement by using substitute or temporary employees" to do work that should have been performed by "classified position[s]," emphasizing that

"this ruling is tied not to the individual being employed on a substitute or temporary basis, but rather is tied to the position that is being filled by a substitute or temporary employee, whomever the individual happens to be." Finally, for the period between the Union's filing of the grievance and the School Board's compliance with the award, the arbitrator concluded that "it would be inappropriate to order the conversion to permanent status of those substitute and temporary employees who ultimately are found . . . to have filled what should have been permanent classified positions." The arbitrator explained that there was no evidence that the School Board and the Union had discussed the "automatic conversion of substitute and temporary employees under such circumstances" and that, in the absence of such evidence, ordering such a conversion would be inappropriate given "the numerous important questions, unanswered on this record, that normally are addressed upon the hiring of an individual into a permanent position." Subject to the "proviso that retroactive conversion of the incumbents . . . is not warranted," the arbitrator "return[ed] to the parties for settlement in the first instance, along with several other unresolved remedial questions, the question of appropriate remedy for the period of time between the filing of the grievance and the Board's compliance with this Award."

As directed by the arbitrator, the Union and the School Board reached a settlement regarding the issues committed to them and reduced the settlement to a memorandum of understanding dated May 13,

2010. Under the settlement, the School Board agreed to pay the Union just over $1 million as "backpay amounts." The School Board also agreed to hire a minimum number of additional full-time bargaining unit employees by specified targeted dates.

On March 11, 2011, five current or former temporary employees of the School Board – Larry Mayo, Leslie Carroll-Wicks, Mary Mays-Carroll, Sandra Ponoski, and Avery Milligan – filed a class action complaint in the Circuit Court for Prince George's County, Maryland, naming as defendants the School Board, Verjeana Jacobs (in her capacity as Chair of the School Board), and the Union. They purported to represent a class defined as "[a]ll present and former Temporary Employees of the Board and its Chair performing duties covered by a CBA bargaining unit classification . . . for in excess of 60 days." In Count I, the Temporary Employees sought a declaratory judgment "that the Arbitration Award is valid and enforceable" by members of the class; that they had become permanent employees after 60 days of employment; and that they were therefore entitled to damages. In Count II, they alleged that the Union had "breached its duty of fair representation by fraudulently misleading the Plaintiffs and the Temporary Employees about the July 8, 2009 arbitration decision and award in their favor and instead accepting a payoff from the Board to resolve the Plaintiffs' and Temporary Employees' rights." In Count III, they alleged a breach of contract by the School Board, claiming that "Plaintiffs are third-party beneficiaries

under the CBA and were not paid the compensation and benefits of full time employees that the CBA mandates." And finally, in Count IV, they alleged a Takings Clause violation against the School Board and its chair, under 42 U.S.C. § 1983.

The School Board and its chair filed a notice of removal, pursuant to 28 U.S.C. § 1441, in which they stated that the Union had been consulted and had "agree[d] with the removal of this action to federal court." Three days later, counsel for the Union entered his appearance in the district court, and yet another three days later, on April 28, 2011, the Union filed a motion to dismiss the complaint for failure to state a claim. In its accompanying memorandum of law, the Union noted that it had been served with process "[o]n or about March 26, 2011" and that it had consented to the notice of removal. The School Board and its chair also filed a motion to dismiss. The Temporary Employees opposed the motions to dismiss and also filed a motion to remand the case on the ground that the Union had not timely filed its own notice of removal or other writing reflecting its consent to the removal.

In an order dated July 19, 2011, the district court denied the Temporary Employees' motion to remand and granted the defendants' motions to dismiss the complaint. On the remand motion, the court said that it had determined that removal was effective because of (1) Fourth Circuit precedent; (2) its assumption that "generally attorneys will act professionally"; and (3) Rule 11, which, the court noted, "provides a fully

satisfactory deterrent to an attorney making a misrepresentation to the court as to whether a co-defendant has consented to removal." On the motions to dismiss, the court concluded that Count I appeared to be requesting an advisory opinion and that, in any event, the requested declaratory judgment was "absolutely inconsistent" with the arbitration decision. As to Count II, the court concluded that the Union did not owe the Temporary Employees a duty of fair representation; that the claim was in any event untimely; and that the plaintiffs did not exhaust their state administrative remedies. With respect to Count III, the court again concluded that, to the extent that the Temporary Employees could claim to be third-party beneficiaries of the CBA, their remedy was to seek state administrative relief. Finally, as to Count IV, the court concluded that state agencies, such as the School Board, are not "persons" within the meaning of 42 U.S.C. § 1983 and that the Eleventh Amendment bars damage claims against state agencies and officials.

The Temporary Employees promptly filed a notice of appeal from the district court's July 19, 2011 order. And several weeks later, on August 19, 2011, the Temporary Employees filed a motion in the district court, requesting reconsideration of the order dismissing their complaint. The School Board and its chair filed a motion to strike the Temporary Employees' motion for reconsideration, arguing that the motion was untimely and that, in any event, the court had been divested of jurisdiction by the Temporary

Employees' earlier appeal. By order dated September 12, 2011, the district court granted the motion to strike, and the Temporary Employees filed a second notice of appeal from that order.

On appeal, the Temporary Employees contend (1) that the Union's consent to removal was inadequate to effect a removal on its behalf; (2) that the district court erred in concluding that the Union did not owe the Temporary Employees a duty of fair representation and that they were not entitled to the benefits of the arbitration award; (3) that the district court erred in dismissing their claim for breach of the CBA based on a third-party beneficiary theory; and (4) that the district court abused its discretion in striking their motion for reconsideration of the dismissal order.

II

In removing this case from state court to federal court under 28 U.S.C. § 1441(a), the School Board and its chair stated in the notice of removal that they had consulted with the Union and that the Union had consented to the removal. The Union, however, did not sign the notice of removal, nor did it timely file its own notice or a *written* consent to the School Board's notice. The Temporary Employees contend that the removal was defective and that the district court erred in refusing to remand this case to state court. They argue that all defendants must "join" in the notice of removal and that "joining" means to "support [it] in writing." Because the Union did not sign

the notice of removal or timely sign a paper giving its own notice of removal or consent, they contend that the case was not properly removed.

The text of 28 U.S.C. § 1446 provides that to remove a case to federal court, "[a] defendant or defendants" (1) must file a notice of removal that includes a "short and plain statement of the grounds for removal, together with a copy of all [previously served] process, pleadings, and orders"; (2) must sign the removal pursuant to Federal Rule of Civil Procedure 11, which in turn provides that the notice must be "signed by at least one attorney of record in the attorney's name – or by a party personally if the party is unrepresented"; and (3) must file the notice within 30 days after receipt of the complaint through service of process. The applicable version of the statute does not address how a case involving multiple defendants is to be removed or how the defendants must coordinate removal, if coordination is required.[1] Nonetheless, the Supreme Court has construed the statute to include a "unanimity requirement," such that all defendants must consent to

[1] The current version of 28 U.S.C. § 1446, not applicable to the case at hand, provides, "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). Although the statute now explicitly requires consent, it still does not indicate the form of that consent, and our analysis in this opinion would be unchanged were we to have before us the current version of the statute.

removal. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (citing *Chicago, R.I. & P.R. Co. v. Martin*, 178 U.S. 245, 248 (1900), for the proposition that "removal requires the consent of all defendants"); *Wis. Dep't of Corrections v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) ("Removal requires the consent of all of the defendants"). But neither the statute nor the Supreme Court's decisions have specified how defendants are to give their "consent" to removal.

Adopting a formal approach, the Seventh Circuit has stated that "[a] petition for removal is deficient if not all defendants join in it" and that, to do so, "all served defendants . . . have to support the petition in writing, i.e., sign it." *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997). Approving a less formal process – the procedure used by the defendants in this case – the Sixth Circuit has held that a notice of removal filed by three defendants which stated that the fourth defendant concurred in the removal satisfied the rule of unanimity. *See Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 201-02 (6th Cir. 2004). The Ninth Circuit has adopted the Sixth Circuit rule. *See Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009) (concluding that "[o]ne defendant's timely removal notice containing an averment of the other defendants' consent and signed by an attorney of record is sufficient"). And other courts of appeals have taken hybrid positions. *See Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) (concluding that while each defendant

need not sign the notice of removal, there must be at least "some timely filed written indication from each served defendant . . . that it has actually consented to such action"); *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1062 (8th Cir. 2008) (applying the Fifth Circuit's rule in *Getty Oil*).

We have not addressed this precise question. In *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 187 n.2 (4th Cir. 2002), we noted that a defendant's notice of removal "was filed with [the other defendant's] consent," but we did not state how the other defendant expressed its consent.

The relevant procedure for removal, set forth in § 1446, requires rather simply that "[a] defendant or defendants desiring to remove any civil action . . . shall file . . . a notice of removal signed pursuant to Rule 11." 28 U.S.C. § 1446(a). And Rule 11 in turn provides, "Every . . . paper must be signed by at least one attorney of record. . . ." These texts do not make clear how a case involving multiple defendants is to be removed in light of the requirement that all defendants must consent to the removal. While § 1446 does include the plural "defendants" in the subject, it requires only "a notice" of removal. The plural use of "defendants" is apparently included to accommodate the situation where more than one defendant "*desire*" to remove, without recognizing the required interplay among defendants in light of the originally court-made rule that all defendants *must* consent to removal.

To be sure, § 1446 requires at least one notice of removal *signed* by at least one attorney, in accordance with Rule 11, thus mandating that at least one attorney for the removing defendant or defendants be accountable to the court by representing, as provided in Rule 11, that removal is warranted by law and is not pursued for an improper purpose and that the facts alleged are justified or supported. *See* Fed. R. Civ. P. 11(b). Thus, the texts do indeed require the formality of *filing a paper* that is *signed* and that *represents* the *bona fides* of the removal. They do not, however, require that in a case involving multiple defendants where all defendants must consent to removal that each of the defendants sign the notice of removal or file a separate notice of removal complying with § 1446(b).

Moreover, we can see no policy reason why removal in a multiple-defendant case cannot be accomplished by the filing of one paper signed by at least one attorney, representing that all defendants have consented to the removal. It is true that such a procedure does not include the signature of an attorney representing each defendant. But that does not suggest that the nonsigning attorneys for the defendants lack accountability to the court when they will be before the court within days of the removal, signing papers and otherwise performing as officers of the court. Indeed, in this case, the Union did file papers early on, signed by its attorney, indicating that it had

consented to the removal.[2] The practice of having one attorney represent to the court the position of other parties in the case, with the intent that the court act on such representation, is quite common. The courts often receive motions representing that the opposing party consents to the motion, and courts have not traditionally required the other party to file a separate paper confirming that consent. Were there to be a misrepresentation by an attorney signing a paper, falsely stating that another defendant consented to removal, the other defendant "would [no doubt] have brought this misrepresentation to the court's attention and it would have been within the district court's power to impose appropriate sanctions, including a remand to state court." *Harper*, 392 F.3d at 202. And those "appropriate sanctions" would surely include the sanctions authorized by Rule 11, which are explicitly available when an attorney misrepresents the evidentiary basis for a "factual contention." *See* Fed. R. Civ. P. 11(b)-(c).

Accordingly, we conclude that a notice of removal signed and filed by an attorney for one defendant representing unambiguously that the other defendants consent to the removal satisfies the requirement of unanimous consent for purposes of removal. Because the Union adequately consented to the

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[2] Because the Union's written indication of consent was filed more than 30 days after its receipt of the complaint by process, that written indication, the Temporary Employees say, cannot be advanced to satisfy the time requirement for removal.

removal filed by the School Board and its chair, we conclude that the removal was effective in this case and that the district court did not err in declining to remand the case to state court.

III

In Count II of their complaint, the Temporary Employees purported to allege that the Union breached a duty of fair representation owed to them. They alleged that the Union did so "by fraudulently misleading [them] about the July 8, 2009 arbitration decision and award in their favor and instead accepting a payoff from the Board to resolve [their] rights." More fully, they asserted that the Union mislead them by "failing to inform [them] . . . [1] that the Union had secured an arbitration award against the Board *declaring them to be permanent employees* under the CBA and [2] that *they were entitled to an award of retroactive compensation and benefits* consistent with their rights under the CBA." (Emphasis added). And they asserted that instead of informing them and looking after their interests, "[t]he Board and the Union surreptitiously agreed to disregard the rights and interests of the Plaintiffs . . . in exchange for the payment of monies paid by the Board . . . to the Union."

The district court dismissed this count under Rule 12(b)(6) for failure to state a claim, and we review that order de novo to determine whether the claim they purport to assert was "plausible on its

face." *Francis v. Giacomelli*, 588 F.3d 186, 190 (4th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 570 (2007)).

It is well to note at the outset that the Temporary Employees were not members of the Union and were expressly excluded from the bargaining unit under the CBA. Moreover, the Temporary Employees were not parties to the arbitration action between the Union and the School Board. Nonetheless, the Temporary Employees allege that they were owed a duty of fair representation under Maryland law, citing Md. Code Ann., Educ. § 6-501(d), (g)(1). We do not need to reach whether the Union owed the Temporary Employees this duty because their theory of how the Union breached this duty is based on isolated statements in the arbitrator's decision, which were taken out of context. As a consequence, their claim is based on a complete misreading of the arbitrator's decision.

Contrary to the Temporary Employees' assertion, the arbitrator did not declare them to be permanent employees. He stated explicitly that "based on the record as a whole, the arbitrator concludes that it would be *inappropriate to order the conversion* to permanent status of those substitute and temporary employees who are ultimately found . . . to have filled what should have been permanent classified positions." The arbitrator repeatedly explained that "the issue is the *preservation of bargaining unit work for bargaining unit personnel*, not the identity of the specific substitute or temporary employee who may be filling a position at any particular time." Thus, the

arbitrator grounded his ruling on the purpose of preserving work provided by specific positions for members of the bargaining unit. There is simply no support for the Temporary Employees' assertion that the arbitrator declared them to be permanent employees.

Similarly, the arbitrator did not conclude that the Temporary Employees were entitled to retroactive compensation and benefits, as they claim. In granting relief, the arbitrator made three relevant rulings. First, he concluded that "[n]o remedy is warranted for the period of the violation occurring prior to the filing of the grievance." Second, he concluded that for the period after the award, the School Board must cease using substitute or temporary employees to do work that should have been done by bargaining unit personnel, emphasizing that "this ruling is tied not to the individual being employed on a substitute or temporary basis, but rather is tied *to the position* that is being filled by a substitute or temporary employee, whomever the individual happens to be." (Emphasis added). And third, he concluded that for the period between the Union's filing of the grievance and the School Board's compliance with the award, "the best course is to return to the parties for settlement in the first instance . . . subject to the foregoing proviso that *retroactive conversion of the incumbents of such positions is not warranted*." (Emphasis added). There is simply no language that can be read to provide relief to the Temporary Employees.

Accordingly, we affirm the district court's order dismissing Count II because the Temporary Employees' theory of breach is based on fundamental misreading of the arbitrator's decision and therefore is implausible.

IV

In Count III, the Temporary Employees purport to allege a breach of contract claim against the School Board, asserting that they were "third party beneficiaries under the CBA and were not paid the compensation and benefits of full time employees that the CBA mandates, and thus they suffered damages."

Again, we note that the Temporary Employees were not members of the bargaining unit under the CBA, nor were they parties to the CBA. And to be third-party beneficiaries of the CBA, they would have to demonstrate that the School Board and the Union intended them to be entitled to a benefit under the CBA. *See Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 131 S. Ct. 1342, 1347 (2011) ("A nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend").

But far from evincing such an intent, the CBA explicitly excludes the Temporary Employees from its coverage. The agreement states that it is between the School Board and the Union and that "[t]he term 'employees,' when used in this agreement, shall hereinafter refer to all employees of the Board who are contained within the bargaining unit represented

by the Union." The bargaining unit is then defined as "all classified employees of Prince George's County Public Schools *with the exception[ ] of . . . [t]emporary employees*." (Emphasis added). It is true that the agreement does limit the use of substitute or temporary employees to fill authorized positions, but it does so to protect those positions for members of the bargaining unit. We find no textual indication or suggestion that the Temporary Employees were intended beneficiaries of the CBA.

Perhaps recognizing the lack of textual support for their third-party beneficiary claim, the Temporary Employees argue further that the "facts support their claims that they are intended third-party beneficiaries." But the only facts they rely on are (1) that the Union's grievance was intended to benefit Temporary Employees and (2) that "the Arbitrator's Award clearly finds that employees who fill an 'authorized position' are working in bargaining unit positions and were intended to benefit from the arbitration award." These facts, however, were not established, and the Union's grievance was not a part of the record. In his decision, the arbitrator summarized the Union's grievance as "seek[ing] a ruling that the Board has employed substitute or temporary employees in violation of . . . the [CBA] . . . *by allowing non-bargaining unit employees to perform work reserved to bargaining unit employees*." (Emphasis added). And the Temporary Employees' argument that the arbitrator's award independently shows that they are intended beneficiaries of the CBA is also not supported.

The arbitrator emphasized that his ruling was based on the CBA's *protection of work for the bargaining unit*, concluding that the provision on the use of Temporary Employees "was negotiated as a limitation on the ability of the Board to employ substitute and temporary employees to perform bargaining unit work in lieu of establishing and filling permanent classified positions with bargaining unit employees."

Because we find no support for the Temporary Employees' claim that they were third-party beneficiaries of the CBA, we likewise affirm the district court's order dismissing Count III for failure to state a plausible claim for relief.

V

Finally, the Temporary Employees contend that the District Court abused its discretion in striking their motion for reconsideration of the court's order dismissing the complaint.

In their motion for reconsideration, the Temporary Employees recognized that their motion was untimely but requested that the court "waive the 14-day time period [as provided by local rules] under the circumstances." Relying on a new fact, they also reargued a position that they originally took in opposition to the motion to dismiss and that the district court had previously addressed. The defendants filed a motion to strike the Temporary Employees' motion, arguing that the Temporary Employees' motion was untimely and that the district court lacked subject

matter jurisdiction in view of the fact that the Temporary Employees had already appealed the dismissal order. The district court granted the motion to strike without explanation.

In these circumstances we conclude that the district court did not abuse its discretion. To be sure, if the Temporary Employees' motion was to be taken as a Rule 59(e) motion, it was filed beyond the 28-day period given for the filing of Rule 59(e) motions. But more importantly, they advanced no new argument that would require the district court to alter or amend its judgment under Rule 59(e), or even under Rule 60(b). In the end, the position they took was considered by the district court and preserved for appeal, although we did not find it necessary to address the point because we concluded that the Temporary Employees' complaint failed to state plausible claims.

* * *

In sum, we conclude that the School Board properly removed this case to federal court; that neither substantive claim asserted by the Temporary Employees stated a plausible claim for which relief could be granted; and that the district court did not err in striking the Temporary Employees' motion for reconsideration. The judgment is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LARRY C. MAYO, et al.	*	
	*	
v.	*	
	*	
BOARD OF EDUCATION	*	Civil No. – JFM-11-1052
OF PRINCE GEORGE'S	*	
COUNTY, et al.	*	

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OPINION

Plaintiffs instituted this putative class action in the Circuit Court for Prince George's County, Maryland against the Board of Education of Prince George's County, Maryland ("the Board"), Verjeana Jacobs, and the Association of Classified Employees/ American Federation of State, County, and Municipal Employees, Local 2250, AFL-CIO ("Local 2250"). Plaintiffs assert state law claims against Local 2250 and the Board, and federal constitutional claims against the Board and Jacobs.

The Board and Jacobs removed the action to this court. In their notice of removal, their counsel state that they have confirmed with counsel for Local 2250 and "Defendant Local 2250 agrees with the removal of this action to federal court." (Notice of Removal ¶ 5.) Plaintiffs have filed a motion to remand. The Board and Jacobs have filed a motion to dismiss or for summary judgment. Local 2250 has filed a motion to dismiss. Plaintiffs' motion to remand will be denied. Defendants' motions to dismiss will be granted.

I.

The basis of plaintiffs' motion to remand is that Local 2250 did not file its own notice of removal or another writing with the court reflecting that it consented to the removal. There is authority to support plaintiffs' position. *See, e.g.*, *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1062 (8th Cir. 2008); *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508-09 (E.D. Va. 1992); 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3730, at 440 (4th ed. 2009). Likewise, there are other cases that in their broad language appear to support plaintiffs. Those cases, however, are factually distinguishable in that the notice of removal filed by one defendant did not mention other defendants at all or stated that other defendants "did not object to removal," rather than that they "consented to removal." *See, e.g.*, *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994), *abrogated on other grounds by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999); *Anne Arundel Cnty. v. United Pac. Ins. Co.*, 905 F. Supp. 277 (D. Md. 1995); *see also Nozick v. Davidson Hotel Co.*, Civ. No. CCB-03-2988, 2004 U.S. Dist. LEXIS 101 (D. Md. Jan. 6, 2004) (ordering remand where the defendant seeking removal provided no information regarding the other defendant's consent in the notice of remand, but stated in subsequent correspondence with the court that the co-defendant consented during a telephone call with the removing defendant's counsel).

In contradistinction to those cases, the Sixth Circuit has squarely held that where the removing

defendant expressly states that counsel for the removing defendant has obtained concurrence to the removal from another defendant whose consent to removal was required, the removal is effective. *See Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195 (6th Cir. 2004). The Fourth Circuit likewise appears to have so ruled. In *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181 (4th Cir. 2002), the Court upheld the propriety of the removal where "Verizon's notice of removal . . . was filed with CORE's [Verizon's co-defendant's] consent. . . ." *Id.* at 187 n.2. Although the Fourth Circuit opinion itself does not make it clear, a review of the court docket in the District Court (which, of course, was before the Fourth Circuit when it issued its opinion) unquestionably demonstrates that CORE had not filed its own notice of removal or other document evidencing its consent to removal. The docket reflects that Verizon alone filed the notice of removal and that the plaintiff filed a motion to remand the case "Based on Procedural Defect in Defendants' Removal of Case: Failure of All Defendants to Properly Signify Written Assent to Removal within 30 days of Receipt of Notice Establishing Removability of Action." Civ. No. 01-45 (D. Md. Feb. 5, 2001), ECF No. 12. That motion was denied by the district court.[1] Civ. No. 01-45 (D. Md. Feb. 6, 2001), ECF No. 13.

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[1] I have not reviewed Verizon's notice of removal because the court file is now in archives. However, the docket sheet itself is electronically available through the CM/ECF system.

Perhaps I could find that *Darcangelo* is not binding because the Fourth Circuit's ruling was somewhat oblique. However, I find that the rule enunciated in *Harper* and followed in *Darcangelo* is the preferable one. I recognize that the removal statute should be strictly construed. *See, e.g.*, *Barbour v. Int'l Union*, 640 F.3d 599, 605 (4th Cir. 2011) (en banc); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333-34 (4th Cir. 2008). However, there is a difference between strictly construing a statute and creating requirements that a statute itself does not impose. Nothing in 28 U.S.C. § 1441 or § 1446 imposes a requirement that a defendant submit a writing to the court reflecting consent to removal. All that the removal statutes require is that the defendant consent to the removal. In my view, it may be assumed that generally attorneys will act professionally and will not represent in a notice of removal that another defendant has consented to the removal unless that defendant has, in fact, consented, either orally or in writing. Further, unlike the court in *Creekmore*, *supra*, I am confident that Fed. R. Civ. P. 11 provides a fully satisfactory deterrent to an attorney making a misrepresentation to the court as to whether a co-defendant has consented to removal. Nothing in Rule 11 is limited to statements made to an attorney by that attorney's client, and if, in fact, an attorney misrepresented to a court that a co-defendant's consent to removal has been obtained, appropriate

sanctions could be issued, including the entry of an order of remand.[2] *See Harper*, 392 F.3d at 202.

II.

A.

The dispute among the parties arises from the fact that for many years the Board employed numerous persons, including plaintiffs and the members of the putative class, as "temporary employees." (Compl. ¶ 5.) In 2008, during wage-related negotiations between Local 2250 and the Board, Local 2250 requested and was provided with a list from the Board indicating that over one-thousand persons were employed by the Board as "substitute and temporary employees." (*Id*. ¶¶ 36-41; Local 2250's Mot. Dismiss, Ex. A, at 3.) This eventually led to the filing of a grievance by Local 2250 that went to arbitration. (Compl. ¶¶ 42-44.)

During the arbitration, Local 2550 [sic] argued that all of the temporary employees should be converted to permanent status, and that they should be given back pay for the difference between what they were paid as temporary employees and what they

[2] I also note that in this case Local 2250 filed a notice of appearance with the thirty-day period permitted by § 1446(b). Although I do not base my ruling upon that fact, it appears clear that the entry of the notice of appearance constituted unambiguous written evidence that Local 2250 in fact consented to the removal.

would have been paid as permanent employees.[3] (Local 2250's Mot. Dismiss, Ex. A, at 2.) The arbitrator agreed with Local 2250 that the Board had improperly hired the temporary employees, but he declined to grant the remedy requested by Local 2250. (*Id.* at 16-17.) Instead, the arbitrator ordered that the parties negotiate and attempt to agree upon an appropriate remedy. (*Id.*) Local 2250 and the Board subsequently entered into a settlement agreement pursuant to which, according to plaintiffs, Local 2250 was paid approximately $3 million in dues that Local 2250 would have received if the positions filled by temporary employees had been filled by union members. (Compl. ¶ 54.) Local 2250 did not contend, and the arbitrator did not find, that the temporary employees were members of Local 2250's bargaining unit. (Local 2250's Mot. Dismiss, Ex. A, at 8.)

B.

As indicated earlier in this Opinion, the only federal claim that has been asserted by plaintiffs is one against the Board and Jacobs. Plaintiffs seek compensatory damages against these defendants under 42 U.S.C. § 1983 on the ground that they violated the due process clause of the Fourteenth

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[3] Plaintiffs did not attach a copy of the arbitration decision to their complaint. However, because the decision is integral to the claim asserted by plaintiffs, I may consider it in ruling on a motion to dismiss. *See Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004).

Amendment by not paying them wages compensation as permanent employees. (Compl. ¶¶ 96-104.) These claims are not cognizable. State agencies are not "persons" within the meaning of §1983, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and the Eleventh Amendment bars damage claims against state agencies and their officials, *see Huang v. Bd. of Governors*, 902 F.2d 1134, 1138 (4th Cir. 1999). As plaintiffs themselves have averred in paragraph 98 of their complaint, "[t]he Board is a component of the State of Maryland under the Maryland State Department of Education and the Maryland State Board of Education." *See also Zimmer-Rubert v. Bd. of Educ.*, 947 A.2d 135 (Md. Ct. Spec. App. 2007).[4]

C.

There remain to be considered plaintiffs' state law claims against Local 2250 and the Board. None of the claims are cognizable.[5]

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[4] Plaintiffs also request equitable relief in connection with their federal claims against the Board and Jacobs. A plaintiff may seek an injunction against a state official under § 1983. *See Will*, 491 U.S. at 71 n.10. However, plaintiffs have alleged no facts that support any plausible claims for the issuance of an injunction against Jacobs. *See generally Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1950 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It is evident that the "equitable relief" plaintiffs seek is an award in their favor of the back pay to which they allege they are entitled.

[5] Because state law predominates as to the state law claims, I have considered whether I should remand those claims

(Continued on following page)

In Count I, plaintiffs seek a judgment against all defendants "declaring that: (1) the Plaintiffs and the Temporary Employees became permanent employees of the Board after sixty days employment; (2) the Plaintiffs and the Temporary Employees are entitled to damages for the period commencing sixty days after their employment with the Board started; and (3) the amount of the Plaintiffs' and the Temporary Employees' damages." (Compl. ¶ 83.) As a conceptual matter, it appears that, standing alone, Count I is requesting that the court render a merely advisory opinion. In any event, Count I fails to state a claim upon which relief can be granted because the arbitration decision upon which it is based is absolutely inconsistent with the requested relief. As stated above, the arbitrator expressly declined to convert temporary employees to permanent employees and to order that they be given back pay.

In Count II, plaintiffs assert a claim for a breach of duty of fair representation against Local 2250. (Compl. ¶¶ 84-88.) There are three flaws in that claim. First, because the arbitrator declined to convert temporary employees to permanent employees and expressly recognized that Local 2250 was not the

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to the Circuit Court for Prince George's County pursuant to 28 U.S.C. § 1441(c). I have concluded, however, that because the issues are clear-cut and because remand of the case would cause unnecessary delay, expense, and uncertainty, I should decide the state law issues without further ado. I also note that plaintiffs have not requested a remand pursuant to § 1441(c).

exclusive bargaining agent for temporary employees, Local 2250 did not owe a duty of fair representation to plaintiffs. *See* Md. Code Ann., Educ. § 6-509(b). Second, assuming that Local 2250 did owe a duty of fair representation to plaintiffs, plaintiffs' claim is untimely. The most analogous limitations period for the bringing of claims for the breach of a duty of fair representation under Maryland law is the ninety day period established by the regulations of the State Labor Relations Board. *See* Md. Code Regs. 14.32.05.01.[6] This action was instituted long after the ninety days limitations period had expired. Third, if plaintiffs did have a viable fair representation claim, they were required to exhaust their administrative remedies by first submitting the claim to Maryland's Public School Labor Relations Board ("PSLRB").[7] *See Offutt v. Montgomery Cnty. Bd. of Educ.*, 404 A.2d 281, 284 (Md. 1979) (affirming dismissal of fair representation claim in light of finding by the

[6] I note that this claim would also be untimely under the six-month limitations period applicable to fair representation claims under federal law. *See* 29 U.S.C. § 160; *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169-70 (1983).

[7] Plaintiffs argue that they should not be required to seek administrative relief from the PSLRB at all because the PSLRB has not yet issued any regulations establishing a procedure for filing a claim. This argument rings hollow because plaintiffs never sought to file an administrative claim. Moreover, presumably, prior to the issuance of its own regulations, the PSLRB would have applied the regulations of its predecessor, the Maryland State Board of Education, in considering any request for administrative relief that was filed.

Maryland State Board of Education, the predecessor of PSLRB, of no breach of the duty to fairly represent employees, and noting with approval stay of action to permit review by the State Board).

In Count III, plaintiffs assert a claim for breach of contract against the Board. As with the fair representation claim, to the extent the plaintiffs can state a claim that they are third-party beneficiaries of the collective-bargaining agreement, their remedy for a breach of the agreement was to seek administrative relief from the PSLRB. *Cf. Bd. of Educ. v. Hubbard*, 506 A.2d 625 (Md. 1986) (holding that State Board of Education had primary jurisdiction over question of whether dispute about class size was subject to arbitration).

A separate order effecting the rulings made in this Opinion is being entered herewith.

Date: July 14, 2011

/s/
J. Frederick Motz
United States District Judge