UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VANDELAY HOSPITALITY GROUP, LP D/B/A HUDSON HOUSE,	§	**Case No. 3:20-cv-01348-D**
Plaintiff,	§	
v.	§	
THE CINCINNATI INSURANCE COMPANY, BARON CASS, and SWINGLE COLLINS COMPANY LLC	§	
Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND AND MEMORANDUM OF LAW IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants The Cincinnati Insurance Company ("Cincinnati"), Baron Cass ("Cass"), and Swingle Collins Company, LLC ("Swingle Collins") file this Response ("the Response") in Opposition to Plaintiff Vandelay Hospitality Group, LLC d/b/a Hudson House's ("Plaintiff" or "Vandelay") Motion to Remand, and would show the Court as follows:

PRELIMINARY STATEMENT

As Plaintiff's counsel wrote in his April 21, 2020 email, the addition of Cass and Swingle Collins to this matter was to *"defeat diversity"* jurisdiction in this Court, which would *"keep[] the case in state court"* as Plaintiff believed that would be *"more favorable to [Vandelay's] case."* *See* Email dated April 21, 2020 [Doc. No. 11-4]. That email further reveals that there is no actual case or controversy involving Cass or his employer, Swingle Collins, because Plaintiff's counsel admits *"[t]here is not anything antagonistic with [Cass]"* and "[i]n fact, given the probable

number of policies out there with other insureds, [Cass] could very well be advantaged by being part of the suit through a determination that the policy does afford coverage." *See id.* The email makes clear that Cass's (and, later, Swingle Collins's) inclusion in the declaratory judgment claim is not to obtain a finding of any wrongdoing against Cass or Swingle Collins, but instead that if there is a determination that there is no coverage for business interruptions relating to COVID-19, *"[t]his does not mean that the claim must be brought against the agent, but only that there is a potential claim in the future." See id.* Curiously, Plaintiff completely ignores this e-mail in its Motion to Remand, no doubt preferring that it not exist, or at least not be part of the Court's record. It proves unequivocally that the addition of the non-diverse defendants was solely an attempt to prevent Defendants from exercising their important right to a federal forum.

This is textbook fraudulent joinder. Vandelay cannot establish a cause of action against Cass or Swingle Collins in state court. Vandelay cites no cases from Texas or from any court within the Fifth Circuit that hold that an individual insurance agent or its brokerage is a proper party to an insurance coverage dispute. And for good reason. There are none because the agent is not a proper party.

Indeed, as Swingle Collins' Rule 12(b)(6) Motion to Dismiss [Doc. No. 12] demonstrates, there is no justiciable claim against Cass or Swingle Collins for a declaratory judgment claim that is redundant of the breach of contract claim Vandelay brings against Cincinnati. Moreover, as a matter of law, there is no negligent misrepresentation claim here against Swingle Collins—a party who was added and served *after* the initial removal of this matter. This is because there is both (a) no legal duty as a matter of law, and (b) such claims are barred by the economic loss rule.

Finally, there is no basis for an award of fees to Plaintiff. Even if the Court finds no jurisdiction, Defendants' removal was "objectively reasonable" in light of the case law and the

April 21, 2020 email. If fees are awarded at all, they should be awarded against Plaintiff for the fraud that necessitated the removal. For these reasons, and those shown below, the Court should deny Plaintiff's Motion to Remand and should retain jurisdiction over the above-captioned matter.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed its Original Petition on or about April 23, 2020, in the 68th Judicial District Court of Dallas County, Texas. Plaintiff asserted claims against Cincinnati relating to its anticipatory repudiation of Plaintiff's claim for business interruption coverage under its Policy relating to the closure of its restaurants during the Coronavirus (COVID-19) pandemic. Plaintiff brought claims against Cincinnati for: (1) a declaratory judgment that the Policy at issue provides coverage for business income losses and expenses, and that Plaintiff sustained a "direct loss to property" due to COVID-19 and the Orders issued from state and local authorities; (2) breach of contract based on Cincinnati's anticipatory breach/repudiation under the Policy; (3) breach of good faith and fair dealing; (4) violations of the Texas Prompt Pay Act; (5) violations of Texas Insurance Code Chapter 541; and (6) attorneys' fees under Texas Civil Practice & Remedies Code Chapters 37 and 38, and Texas Insurance Code Chapter 542.

In addition, Plaintiff added the individual agent, Cass, to the declaratory judgment claim, despite making no specific allegations related to Cass, other than footnote 2, which states: "Defendants are both proper parties to this declaratory judgment action because both Defendants could be impacted by a determination that the Policy sold to Plaintiff does not in fact provide the coverages that Plaintiff sought and believe it acquired."

Cass filed an original answer and verified denial on May 21, 2020, stating that he is not a proper party to the declaratory judgment action, and was improperly joined. The answer also includes an April 21, 2020 email from Plaintiff's counsel to Plaintiff's principal Hunter Pond,

which was forwarded the next day to Cass. This email states as follows:

> Per our conversation this morning, Vandelay Hospitality is filing a litigation against its insurance company based upon its delivery of a reservation of rights letter relating to a claim for business loss due to COVID-19. The insurance company is an Ohio citizen for diversity purposes. Vandelay obtained the policy through an agent that is a Texas resident. Vandelay is a Texas citizen for diversity purposes. When we say diversity we are talking about diversity of citizenship which is one of the factors that will allow a federal district court to exercise its authority to hear a lawsuit. . . . It means that a case involving questions that must be answered according to state laws may be heard in federal court if the parties on the two sides of the case are from different states here Ohio and Texas and adding Baron as the agent (Texas resident) defeats diversity keeping us in state court which we believe is more favorable to your case. One of the claims to be asserted is for declaratory relief regarding whether the insurance policy covers the COVID-19 based claims. The issue is whether the insurance agent is a necessary party to that claim and, if so, what are the nature of the claims against the agent.
>
> There are cases that have held that an insurance agent is a proper party in a declaratory relief claim regarding insurance coverage issues, because the agent's interests could ultimately be affected by the ultimate determination. Specifically, because the insured ***could potentially*** have a claim against the agent ***if*** there is a determination that there is no coverage, the agent could be impacted by the declaratory judgment determination. ***This does not mean that the claim must be brought against the agent, but only that there is a potential claim in the future***.
>
> The declaratory judgment claim ***does not seek any monetary damages*** and, ***does not allege any wrongdoing.*** It simply asks the Court to declare the terms of the policy with respect to coverage afforded. Because we maintain that the policy does provide coverage, and only the insurance company is denying, or potentially denying, that coverage, any attorneys' fees we would seek would likewise be only against the insurance company.
>
> There is not anything antogatonistic with Barron [Cass]. In fact, given the probable number of policies out there with other insureds, Barron [Cass] could very well be advantaged by being part of the suit through a determination that the policy does afford coverage.

On May 26, 2020, Cincinnati timely removed based on the fraudulent joinder. Cass consented to the removal. *See* Notice of Removal [Doc. No. 1]. On May 29, 2020, Plaintiff served an additional defendant, Swingle Collins, with an Amended Petition which added claims against Swingle Collins for declaratory judgment and negligent misrepresentation. Cincinnati filed an

amended notice of removal [Doc. No. 11] on June 9, 2020, to clarify the citizenship of Vandelay and Cass. Swingle Collins appeared and filed a Rule 12(b)(6) Motion to Dismiss [Doc. No. 12] on June 12, 2020.

In the Amended Petition (the "Amended Complaint"), Plaintiff asserts that Swingle Collins and Cass are "all proper parties to [Plaintiff's] declaratory judgment action because all the Defendants could be impacted by a determination that the Policy sold to Plaintiff does not in fact provide the coverages that Plaintiff sought and believed it acquired." *See id.* at ¶ 53, n. 2. Plaintiff further alleges that Swingle "negligently misrepresented that the subject Policy would cover the sort of loss that [Plaintiff] has incurred. In particular, Swingle represented that business interruption insurance would kick in in the event its restaurants were ever closed." *See id.* at ¶ 90. Plaintiff further alleges that Swingle "negligently misrepresented the Policy coverages to Vandelay," that "Swingle provided the false information of the guidance of Vandelay in its business decisions," and that "Swingle did not exercise reasonable care of competence in obtaining or communicating the information to Vandelay." *See id.* Plaintiff alleges that it has suffered pecuniary loss by "justifiably relying upon the representations and omissions of Swingle." *See id.* at ¶ 91.

ARGUMENTS AND AUTHORITIES

A. Legal Standard

It is well-established that the citizenship of an improperly joined defendant is disregarded for the purpose of diversity jurisdiction. *See Griggs v. State Farm Lloyds*, 181 F.3d 694, 699-700 (5th Cir. 1999); *see also Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 323 (5th Cir. 2001), *cert. denied*, 534 U.S. 997 (2001); *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 101-02 (5th Cir. 1990). Improper joinder is established by showing: (1) actual fraud in pleading jurisdictional

facts; or (2) the inability of the plaintiff to establish a cause of action against the non-diverse defendant or defendants. *See Ross v. CitiFinancial, Inc.*, 344 F.3d 458, 461 (5th Cir. 2003). When assessing the plaintiff's inability to establish a cause of action, the court conducts "a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant." *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 309 (5th Cir. 2005) (citing *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc). If the plaintiff has stated a claim but has misstated or omitted discrete facts that would determine the propriety of joinder, "the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry." *Id.*

In *Tapscott v. MS Dealer Service Corporation*, the Eleventh Circuit recognized, in addition to actual fraud in the pleadings and inability to state a cause of action, that the fraudulent misjoinder of a non-diverse defendant may serve as an additional basis for concluding that the defendant is improperly joined. 77 F.3d at 1360 ("Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action" (footnote omitted)); *see also Palermo v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 511 (S.D. Miss. 2008). The fraudulent misjoinder doctrine has not been expressly adopted by the Fifth Circuit Court of Appeals, but the Court of Appeals has recognized the general principle in *dicta*, indicating that it could be applied under the appropriate circumstances, and several federal district courts in the Fifth Circuit have applied the doctrine. *See, e.g., In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002); *In re Benjamin Moore & Co.*, 318 F.3d 626, 631 (5th Cir. 2002); *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 & n.5 (5th Cir. 2006); *Palermo*, 542 F. Supp. 2d at 512-16 (discussing evolution of the acceptance of *Tapscott* in the Fifth Circuit); *see also, e.g., Wells Fargo Bank, N.A. v. Am. Gen. Life Ins. Co.*, 670 F. Supp. 2d 555, 559 (N.D. Tex. 2009);

Tex. Instruments Inc. v. Citigroup Global Mkts., Inc., 266 F.R.D. 143, 147 (N.D. Tex. 2010). The fraudulent joinder doctrine exists to fill in the gap where a plaintiff may be able to state a viable cause of action against a non-diverse defendant and thus could show that the non-diverse defendant is not improperly joined, but the joinder of the non-diverse defendant is not made in good faith, *see Tapscott*, 77 F.3d at 1360, because the joined parties and claims lack a "palpable connection, causing the joinder to be egregious, totally unsupported or a purposeful attempt to defeat removal." *Wells Fargo*, 670 F. Supp. 2d at 563 (citation omitted).

A two-step analysis is used to determine whether a party is fraudulently misjoined. See *Tapscott*, 77 F.3d at 1360; *see also Tex. Instruments*, 266 F.R.D. at147. First, courts consider whether a misjoinder has occurred by evaluating the appropriateness of joining the claims and parties under the governing state joinder law. *Wells Fargo*, 670 F. Supp. 2d at 563; *Tex. Instruments*, 266 F.R.D. at 147-49 & n.3. Texas Rule of Civil Procedure 40 governs the permissive joinder of claims against defendants in a suit filed in Texas and permits joinder of claims and defendants if: (1) "there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences" and (2) at least one "question of law or fact common to all of them will arise in the action." Tex. R. Civ. P. 40(a). Like the federal courts evaluating permissive joinder under Federal Rule of Civil Procedure 20, Texas courts apply a "logical relationship" test to determine whether claims arise out of the same transaction or occurrence or series of transactions or occurrences. *Tex. Instruments*, 266 F.R.D. at 148; *see also Blalock Prescription Ctr., Inc. v. Lopez-Guerra*, 986 S.W.2d 658, 663 (Tex. App.—Corpus Christi 1998, no pet.).

If the court finds that a non-diverse defendant is misjoined, it proceeds to the second step and considers whether that misjoinder is fraudulent. *Tapscott* cautioned that not every instance of

"mere misjoinder" rises to the level of a "fraudulent" misjoinder. 77 F.3d at 1360. The fraud inquiry concerns the egregiousness of the misjoinder and a joinder is considered "fraudulent" when misjoined parties and claims are "wholly distinct" with "no real connection" to each other such that their joinder is "bordering on a sham." *Id*. (quotation omitted); *see also Tex. Instruments*, 266 F.R.D. at 149.

Moreover, because jurisdiction is fixed at the time of removal, the jurisdictional facts supporting removal are examined as of the time of removal. *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000).

B. Plaintiff's Amendment to Add Swingle Collins Does Not Defeat Jurisdiction.

Plaintiff argues that the addition of Swingle Collins renders the removal deficient. Plaintiff is wrong. It is axiomatic that because Swingle Collins was not served with the Amended Complaint at the time of removal on May 26, 2020, the Court does not consider Swingle Collins' citizenship for purposes of determining remand. *See, e.g., Ott v. Consol. Freightways Corp.*, 213 F.Supp.2d 662, 663-65 (S.D. Miss. 2002) ("However, while the *Pullman* rule applies in determining whether there is complete diversity, § 1441(b), upon which defendants rely, relates to removability rather than the broader issue of whether diversity exists; and, in accordance with the plain language of § 1441(b), courts have held, virtually uniformly, that where, as here, diversity does exist between the parties, an unserved resident defendant may be ignored in determining removability under 28 U.S.C. § 1441(b)."); *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001) ("Where there is complete diversity of citizenship, . . . the inclusion of an unserved resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b)."); *Brown v. Kyle*, No. 3:01CV660BN (S.D. Miss. March 23, 2002) ("The plain language of § 1441(b) clearly indicates that improperly joined or unserved defendants do not affect the removeability of a case into a federal forum embracing their state of citizenship provided that the prerequisites for diversity

jurisdiction are otherwise satisfied."). Clearly, Swingle Collins' presence as an unnamed, unserved resident defendant at the time of removal does not defeat removal jurisdiction under 28 U.S.C. § 1441(b).[1] *See Ott*, 213 F.Supp.2d at 663-64; *Gebbia*, 233 F.3d at 883.

Swingle Collins was served with the Amended Complaint on May 29, 2020—three (3) days after the removal of this matter. Moreover, Defendants have alleged that Swingle Collins also is improperly joined in a transparent attempt to destroy diversity jurisdiction, as set forth in Swingle Collins' pending Rule 12(b)(6) Motion to Dismiss. Accordingly, the Court should disregard Swingle Collins' presence since it was served after removal.

C. Plaintiff Fraudulently Joined Baron Cass as a Defendant.

Plaintiff has fraudulently joined Baron Cass. As the April 21, 2020 proves, the addition of Cass to the state court action was solely to destroy diversity jurisdiction. That insightful and probative email suggests Swingle Collins was added for the same reason as Cass.

Plaintiff filed its claim against Cass in state court under the Texas Declaratory Judgment Act. Although, generally, "[w]hen a declaratory judgment action filed in state court is removed to federal court, that action is in effect converted into one brought under the federal Declaratory

[1] Because Defendants properly alleged that all properly joined and served defendants were diverse at the time of removal, under 28 U.S.C. § 1441(b), this matter was properly removed and this court has removal jurisdiction. *See Ott*, 213 F.Supp.2d at 665 n. 3; *see also Maple Leaf Bakery v. Raychem Corp.*, 1999 U.S. Dist. LEXIS 18744, No. 99 C 6948, 1999 WL 1101326, at *1 (N.D. Ill. 1999) (holding that "the plain language of Section 1441(b) indicates that an action may be removed unless a properly joined and served defendant is a resident of the State in which the action was initiated," and reiterating that "the plain language of § 1441(b), particularly in light of the 1948 amendment inserting the language 'and served', precludes removal on the basis of the presence of resident defendants only when those defendants were properly joined and served at the time of removal"); *Recognition Communications, Inc. v. American Automobile Assoc., Inc.*, 1998 U.S. Dist. LEXIS 3010, No. Civ. A. 3:97- CV-0945-P, 1998 WL 119528, at *3 n.3 (N.D. Tex. 1998) (where presence of complete diversity appeared from the complaint, stating, in *dicta*, that the presence of a resident defendant did not render the case unremovable, for "if Plaintiff had served one of the non-resident Defendants, this case would have been properly removed by the served Defendant under Section 1441(b), regardless of the presence of a resident defendant"); *Republic Western Ins. Co. v. International Ins. Co.*, 765 F. Supp 628, 629 (N.D. Cal. 1991) (in case where complete diversity of citizenship existed as no named defendant had the same citizenship as the plaintiff, holding that "'a resident defendant who has not been served may be ignored in determining removability'") (quoting 14A C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723, at 341 (2d ed. 1985)); *Windac Corp. v. Clarke*, 530 F. Supp. 812, 813 (D. Neb. 1982) (when a defendant has not been served, citizenship in the forum state does not defeat removal jurisdiction).

Judgment Act," *Ondova Ltd. v. Manila Indus., Inc.*, 513 F. Supp. 2d 762, 775 n.12 (N.D. Tex. 2007), where the question is improper joinder, the Court asks whether there is a reasonable basis for predicting that state law might impose liability against any non-diverse defendants, *Cantor v. Wachovia Mortg., FSB*, 641 F. Supp. 2d 602, 607 (N.D. Tex. 2009). Here, the Court must analyze the claim under the Texas Declaratory Judgment Act. *Ondova*, 513 F. Supp. 2d at 775, n.12.

Whether under the Texas or federal Declaratory Judgment Act, it is clear from the face of the Amended Complaint that Plaintiff's declaratory judgment claim does not concern or affect Cass. Plaintiff seeks a declaration that: (1) the Policy is an all-risk commercial property insurance Policy and that it provides coverage for business income losses and extra expenses. *See* Amended Complaint ¶ 54; (2) the forced closures of the insured Restaurants' premises from state and local authorities is a prohibition of access to their premises and covered as defined in the Policy, *id.* ¶ 55; (3) Plaintiff sustained a "direct loss to property" [under the Policy] because of COVID-19 and the Orders issued from state and local authorities, *id.* ¶ 56; and (4) the lost business income it sustained and continues to sustain is due to the necessary "suspension of [their] operations" following a loss of the premises, *id.* ¶ 57.

Importantly, all of the declaratory relief sought by Plaintiff relates to construing provisions under the Policy issued by Cincinnati, to which neither Cass nor Swingle Collins are a party. As this Court has previously held, a "plaintiff's joinder of formal or unnecessary parties cannot defeat diversity jurisdiction and prevent removal." *Cook v. Wells Fargo Bank, N.A.*, No. 3:10-cv-592-D, 2010 U.S. Dist. LEXIS 692392010 WL 2772445, at *4 (N.D. Tex. July 12, 2010) (Fitzwater, J.). In *Marsh v. Wells Fargo Bank, N.A.*, this Court applied *Cook* to reject the use of a declaratory judgment request under the Texas Declaratory Judgment Act to add nondiverse defendants whose rights were not actually in dispute. *See Marsh*, 760 F.Supp.2d 701, 709-10 (N.D. Tex. 2011)(Lynn,

J.) ("Although the declarations quoted above purport to determine the rights of all Defendants, in reality only the rights of Wells Fargo and/or US Bank are in dispute. That the declarations, if granted, might incidentally affect the Law Firm or Substitute Trustees is not relevant for diversity jurisdiction."). Accordingly, Vandelay's allegation that Cass (and Swingle Collins) "could be impacted" by a determination that the Policy sold to Vandelay does not provide coverage is not relevant for diversity jurisdiction.

Moreover, this Court has rejected the use of declaratory judgment claims—whether under the federal or Texas Declaratory Judgment Acts—to resolve disputes already pending before the Court. *See Xtria LLC v. Tracking Sys., Inc.*, 2007 WL 1791252, at *3 (N.D.Tex. Uune 21, 2007); *Albritton Props. v. Am. Empire Surplus Lines, Ins. Co.*, 2005 U.S. Dist. LEXIS 7330 (N.D.Tex. Apr. 25, 2005) (dismissing a declaratory judgment claim related to the "rights and obligations" under an insurance policy because the court would already "establish the parties' rights and duties" under the insurance policy in resolving a pending breach of contract claim). Plaintiff's declaratory judgment claim is duplicative of the determination of the parties' respective rights and duties under the Policy under the breach of contract claim and, accordingly, a declaratory judgment is unavailable. *See Albritton*, 2005 U.S. Dist. LEXIS 7330, *9 ("In addressing the parties' pleadings, the Court must necessarily determine the parties' rights and duties under the Policy in order to decide the breach of contract action.

As such, a declaratory judgment would simply duplicate this determination. Thus, Defendant's declaratory judgment counterclaim merely restates its defenses and has no greater ramifications than the original suit. Accordingly, a declaratory judgment is unavailable to settle the dispute over the parties' rights and duties under the Policy[.]").

Plaintiff cites no case law from the Fifth Circuit or Texas regarding the addition of an insurance agent or broker as a proper party to a declaratory judgment action regarding insurance coverage. Moreover, the two cases from federal district courts in Florida cited by Plaintiff are inapplicable and distinguishable because they involve declaratory judgment actions brought by insurers and the use of "procedural fencing" as a device to accomplish something that the plaintiff could not accomplish through removal. Neither of the cases cited by Vandelay address the issue here of why an insurance agent or broker is a proper party to a declaratory judgment action solely concerning the respective rights and duties of a policyholder and an insurer. Accordingly, Cass was fraudulently joined and Plaintiff's declaratory relief claim should be dismissed against Cass.

D. Additionally, Plaintiff Improperly Joined Swingle Collins as a Defendant.

In the unlikely event that the Court considers the allegations against Swingle Collins for purposes of removal jurisdiction, Swingle Collins also was fraudulently joined.

For the reasons stated above, Swingle Collins is not a proper party to the declaratory judgment action. Moreover, Plaintiff does not identify any misrepresentations made by Swingle Collins or its agents regarding the scope of coverage of the subject Policy. While Plaintiff argues that it is not subject to a "heightened pleading" standard for negligent misrepresentation, its formulaic recitation of elements falls woefully short of the pleading standards required to sustain the claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Indeed, Plaintiff's negligent misrepresentation claim is a "threadbare recital of the elements of a cause of action" with conclusory statements, which is insufficient to defeat a Rule 12(b)(6) Motion to Dismiss. *See Iqbal*, 129 S. Ct. at 1949. The barebones pleading does not provide Swingle Collins with any notice of a plausible claim against it, such that Swingle Collins could even investigate the purported "false information" it is alleged

to have given Plaintiff at some point in time. Accordingly, Plaintiff's claims against Swingle Collins cannot survive a 12(b)(6)-type analysis and should be dismissed and disregarded for removal jurisdiction.

E. Plaintiff is not Entitled to Attorneys' Fees Because Defendant's Removal was "Objectively Reasonable."

In the unlikely event that the Court finds that this action should be remanded, Plaintiff's fee request should be denied because Defendants had an objectively reasonable basis for removal. Cincinnati was not required to state the citizenship of Swingle Collins as a resident unnamed, unserved defendant at the time of removal. *Ott*, 213 F.Supp.2d at 663-65. Moreover, as the April 21, 2020 email makes clear, Plaintiff chose to manufacture groundless, bad faith claims against Cass and his employer in order to maintain its case in state court, which Plaintiff's counsel believed was "more favorable" to Plaintiff's case. Under no circumstance should Plaintiff be rewarded for its gamesmanship with an award of attorneys' fees and costs because there was an objectively reasonable basis for removal.

CONCLUSION

Plaintiff's Motion for Remand should be denied and the claims against Defendant Swingle Collins Company, LLC should be dismissed with prejudice pursuant to Rule 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 17, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system in compliance with Local Rule 5.1. As such, this document is being served on all counsel of record, each of whom has consented to electronic service under Local Rule 5.1(f).

/s/ Nathan D. Pearman
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