UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, LANGDON D. NEAL, RICHARD A. COWEN, and THERESA M. PETRONE, Plaintiffs, v. HANS BERNHARD, LUZIUS A. BERNHARD, OSKAR OBEREDER, CHRISTOPH JOHANNES MUTTER, JAMES BAUMGARTNER and DOMAIN BANK, INC., Defendants.	No. 00 C 6813 Judge William J. Hibbler Magistrate Judge Sidney I. Schenkier

DEFENDANT BAUMGARTNER'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' AMENDED SUPPLEMENTAL MOTION TO REMAND TO STATE COURT

This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. §§ 1332 and 1441(a)[1] because the parties are diverse and the amount-in-controversy exceeds $75,000. The jurisdictional amount is met because aggregation of damages is appropriate under Counts III and IV since Plaintiffs and the putative class ("all citizens of the State of Illinois") are seeking to redeem a right in which they have a common and undivided interest.[2] Also, every

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[1] It is Baumgartner's position that, based on the unequivocal law of this Circuit, jurisdiction is also proper under 28 U.S.C. §§ 1331 and 1441(a) because Plaintiffs' complaint presents significant questions of federal law.

[2] Baumgartner's good-faith belief is that an individual's right to free and equal elections and damages suffered by that individual in a conspiracy to encourage illegal voting, exceed $75,000. Thus, should this Court find that aggregation is not appropriate under the circumstances of this case, Plaintiffs should be prepared to state whether the claims of an individual class member in Counts III and IV exceed $75,000.

practical consideration weighs against remand for not following Local Rule ("LR") 81.2, a non-mandatory rule that is simply a procedural device to ascertain the amount-in-controversy.

I. Aggregation of Claims in Counts III and IV is Appropriate Because the Class Seeks to Enforce a Common and Undivided Interest.

When "'several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.'" Loss v. Blankenship, 673 F.2d 942, 949 n.9 (7th Cir. 1982) (quoting Zahn v. Int'l Paper Co., 414 U.S. 291, 294 (1973)). The corollary is that "separate and distinct claims [can] not be aggregated to meet the required jurisdictional amount." Snyder v. Harris, 394 U.S. 332, 336 (1969). The doctrine of not aggregating separate and distinct claims is not derived from the Federal Rules of Civil Procedure, but from the Supreme "Court's interpretation of the statutory phrase 'matter in controversy.'" Id. at 336.[3] The Supreme Court's concern was that aggregating separate and distinct claims would "allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action." Id. at 340.

Thus, determining whether a common and undivided interest is at stake can approached by asking if the right being enforced is a collective right, or asking if the claims are

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[3] As a result, the determination of whether claims can be aggregated requires the application of current facts to outdated legal terminology. As Snyder, 394 U.S. at 335-36, observes, aggregation was not allowed when the class action was "spurious," as that term was defined prior to the 1966 amendment to the Rule 23 of the Federal Rules. Collins v. Bolton, 287 F.Supp. 393, 397 (N.D. Ill. 1968) (citations omitted) elaborates:

> Under the old Rule 23, aggregation was permitted in "true" class actions where the asserted claim was "joint" or "common" and concerned the interests of the plaintiffs as a body, rather than the interests of the individual plaintiffs. But where the parties asserted "hybrid" or "spurious" class actions, where the claims were in reality only those relating separately to individual members of the "class", aggregation was disallowed. The language of the insurance contracts at bar makes clear that each policyholder's liability is several, rather than joint or common. Hence, under the pre-amendment Rule 23 these claims would have constituted a "spurious" class action, and aggregation would not have been permitted.

separate and distinct. Both perspectives demonstrate that aggregation in this case is appropriate. First, Counts III and IV involve collective rights. Loizon v. SMH Societe Suisse de Microelectronics, et Horologerie SA, 950 F.Supp. 250, 253 (N.D. Ill. 1996) (quotations and citation omitted) says that "[t]o establish a common and undivided interest, the moving party must show that the plaintiffs' claims derive from rights which they hold in group status." As Eagle v. American Tel. and Tel. Co., 769 F.2d 541, 546 (9th Cir. 1985) teaches:

> The character of the interest asserted depends on the source of plaintiffs' claims. If the claims are derived from rights that they hold in group status, then the claims are common and undivided. If not, the claims are separate and distinct.

See also Cohen v. Office Depot, Inc., 204 F.3d 1069, 1075 (11th Cir. Feb. 24, 2000) (The phrase "'[c]ommon and undivided interest' is simply the standard used to decide which, if any, claims by multiple plaintiffs may be considered in the aggregate for jurisdictional purposes, and which must be divided among the class members"); 1 James W. Moore, Moore's Federal Practice ¶ 0.97[3], at 917 (2d ed. 1995) ("Basically, aggregation is allowed when the plaintiffs unite to assert a 'common,' 'joint,' 'integrated' or undivided right."). As Chief Judge Posner observed, in determining whether certain claims could be aggregated, the rule by some courts that "punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct," might "have to be qualified...[because] the Supreme Court has [since] held that excessive awards of punitive damages violate the due process clause." In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 609 (7th Cir. 1997).

One need look no further than the complaint to determine that Counts III and IV seek to enforce asserted group rights. Those claims are class actions that seek to collect damages on behalf of all Illinois citizens for an alleged deprivation of their right to "free and equal

elections"[4] and for an alleged conspiracy to encourage illegal voting. The class members--"all citizens of the State of Illinois"--are unified to enforce a right in which they have a common and undivided interest because both claims allege that Defendants "owe a duty" to the class, that the duty was breached, and the entire class was harmed and entitled to damages as a result. See Complaint, Count III ¶¶ 61, 65-68, 69A, Count IV ¶¶ 61, 63, 65, 66A. Because the rights as alleged by Plaintiffs create a duty owed to all Illinois citizens, the right must necessarily be a group right.[5] Indeed, Plaintiffs are not alleging that there was any individualized harm, but that the group was harmed by the alleged conduct of Defendants. See, e.g., Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F.2d 245, 252 (7th Cir. 1945) (Allowing aggregation of claims because the "plaintiffs have an undivided interest, though separable as between themselves" since "[t]he relief demanded [by the plaintiffs] is identical. If any one plaintiff should in a single suit recover on the demand here made by it or him, that judgment would of itself immediately furnish all the relief which the other plaintiffs are here demanding for themselves...."). As Complaint, Count III ¶ 62 states; "When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed."

The collective nature of those rights is also demonstrated by applying Rule 19(a) of the Federal Rules of Civil Procedure to determine if this is a case in which joinder for a just

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[4] Count III asserts a cause of action for the deprivation of "rights, privileges, or immunities secured by the Constitution or laws of the United States or the State of Illinois, relating to...the conduct of elections, voting, or the nomination or election of candidates for public...office." Complaint, Count III ¶ 64 (quoting 10 ILCS 5/29-17). Two rights are cited, one under Article 3, Section 3 of the Constitution of the State of Illinois, which simply states that "All elections shall be free and equal," the other under 42 U.S.C. § 1973gg-10, which secures the right of voters in a State to have fair and impartially conducted elections." Complaint, Count III ¶ 63. Because Baumgartner views those rights (right of voters to "free and equal" elections and to "fair and impartially conducted elections") as synonymous, this memorandum will simply use "free and equal" to refer to both rights collectively.

[5] It is no surprise that the named plaintiffs are not random citizens, but are all on the Board of Election Commissioners of the City of Chicago. Plaintiffs are thus really proponents for all Illinois citizens in trying to enforce the collective rights at issue in Claims III and IV.

adjudication is necessary. See Snyder, 394 U.S. at 335 (Declaring "spurious" class actions to be merely a form of "permissive joinder"). Rule 19(a) provides that if joining a party is essential for complete relief and if the party has not been joined, "the court shall order that the person be made a party." Under Rule 19(a) each class member in Plaintiffs' complaint:

> [Has] an interest relating to the subject of the action and [are] so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede [their] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Both parts of that test are met in this case, though only one is necessary.[6] Application of this rule demonstrates that the putative class has a common and undivided interest because "the class as a whole is entitled to the relief requested." Poindexter v. National Mortgage Corp., 1991 WL 278454, *2 (N.D. Ill. Dec. 23, 1991). Hence, joinder under Rule 19(a) would be required and the rights involved are common and undivided among the class.

Another way of determining the appropriateness of aggregation is to ascertain whether the class action claims are several and distinct. If not, then aggregation is allowed. Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990) (citing 1 Freeman on Judgments, § 100, at 174 (1925)) observed that traditionally:

> [W]here the rights of the parties in the relief to which they are entitled are different, the judgment may not be joint but should be several. If several plaintiffs properly join, but their causes of action are separate and distinct and their damages may be different,

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[6] As Plaintiffs' complaint states, all Illinois citizens have an interest in damages because the harm is to Illinois citizens as a group. Thus, if only the named plaintiffs were involved in this matter and they prevailed in the litigation:
(i) it is highly doubtful that Defendants would have any money for subsequent claims and the named plaintiffs' action "might," as a "practical matter," impede other Illinois citizens from getting compensation, and
(ii) a damage award in a subsequent action would leave Defendants "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations...." because subsequent plaintiffs would be seeking damages for the exact same action of Defendants.

> the judgment should not be for an aggregate sum but should segregate and award to each the damages or relief to which he is properly entitled.

Furthermore:

> More current case law continues to follow these precedents. Multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount; they cannot aggregate claims where none of the claimants satisfies the jurisdictional amount. Because the underlying causes of action which plaintiffs brought...were separate and distinct, we find that they cannot aggregate their respective awards to satisfy the jurisdictional amount.

Id. See also Poindexter, 1991 WL 278454, *2 ("Where relief is sought for the breach of separately negotiated instruments, it is difficult, if not impossible, to imagine how the interest to be vindicated could be characterized as a common interest belonging to the group alone rather than to the individual plaintiffs."); Loizon, 950 F.Supp. at 253 (quoting Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990)) ("If the parties claim individual injuries from the underlying causes of action, the claims are separate and distinct and aggregation is not allowed.").

Here the claims are not separate and distinct because resolving this matter only involves determining whether the Defendants breached a duty owed to the group (all Illinois citizens) and what any potential damages would be.[7] No "separate and distinct" inquiries need to be made because no distinction can be made between any Illinois citizen in determining Defendants' liability or in ascertaining damages. As alleged by Plaintiffs, if Defendants are liable to anyone, they are liable to everyone.

In sum, the putative class actions in this case are ones of the kind in which aggregation of claims has been allowed. Indeed, this case presents a clear and prototypical example of when aggregation is appropriate, and any way it is viewed, the complaint alleges

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[7] And Baumgartner once again assures the Court that he did not enable the selling or buying of votes in Illinois or anywhere else.

claims for the "common and undivided" rights of Illinois citizens that can not, in anyway, be viewed as separate and distinct. Aggregation of damages is therefore appropriate in determining the amount-in-controversy.[8]

II. The Purpose of Local Rule 81.2(a) is to Clarify the Amount-in-Controversy

Local Rule ("LR") 81.2(a) "establishes a procedure for establishing the amount in controversy, but it is not the exclusive way." Huntsman Chemical Corp. v Whitehorse Technologies, Inc., 1997 WL 548043, at *6 (N.D. Ill. Sept. 2, 1997). That is because the purpose of the rule "is to clarify the parties' position as to the amount-in-controversy." Ibrahim v. Old Kent Bank, 1999 WL 259944, at *4 (N.D. Ill. April 8, 1999). See also International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332, at *4 (N.D. Ill. Dec. 23, 1998) (LR 81.2 "was enacted so the laborious task of evaluating the amount in controversy could be avoided."). To this end, the procedures established by LR 81.2(a) seek (1) a good faith statement by the defendant that the amount meets the jurisdictional standard, and (2) a statement by the plaintiff as to the damages it seeks.[9] Through its Second Amended Notice of

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[8] Also, "[a] claim is more likely to be characterized as joint if the defendant has no interest in the apportionment of an award among the plaintiffs." 15 Moore's Federal Practice, 3d 102.108[3][b], at 194 (3d ed. 2000). Needless to say, Baumgartner does not care how any potential damages are apportioned.

[9] LR 81.2(a) asks that a party removing a case from state court provide:

> (1) a statement by each of the defendants previously served in the state court action that it is his, her or its good faith belief that the amount in controversy exceeds the jurisdictional amount; and
> (2) with respect to at least one plaintiff in the Illinois action, either—
> (A) a response by such plaintiff to an interrogatory or interrogatories (see Ill.S.Ct. Rule 213) as to the amount in controversy, either (i) stating that the damages actually sought by that plaintiff exceed the jurisdictional amounts or (ii) declining to agree that the damage award to that plaintiff will in no event exceed the jurisdictional amount; or
> (B) an admission by such plaintiff in response to a request for admissions (see Ill.S.Ct. Rule 216(a)), or a showing as to the deemed admission by such plaintiff by reason of plaintiff's failure to serve a timely denial to such a request (see

Removal, and now through this memorandum, Baumgartner states that it is his good faith belief that the amount-in-controversy (whether aggregated or not) exceeds $75,000.

Notably, Plaintiffs do not deny that this is the case. Indeed, they refused to take a position when this issue was first raised before the Court. Even if Plaintiffs ultimately (and oddly) do take the position that the voting rights they avowedly sue to safeguard are not worth enough to satisfy the jurisdictional amount, Plaintiffs' insistence that Rule 81.2(a) be mechanically followed is not justified by any good reason; or for that matter any reason at all. Plaintiffs can easily tell the Court and Baumgartner now whether Plaintiffs believe their damage claims satisfy the jurisdictional amount. Nothing would be served by forcing Baumgartner to go to state court, propound discovery and wait 30 days for an answer that Plaintiffs should be able to furnish now.[10] As Plaintiffs' concede, the rule is not mandatory and whether it is to be enforced depends upon considerations of judicial economy. Plaintiffs' Mem. at 5-6. See International Test, 1998 WL 957332, at *4 (In determining whether to remand, the court's primary concern was "the interest of judicial economy."). Yet Plaintiffs' seek a result that will only disserve judicial economy.

Plaintiffs also suggest that Baumgartner is improperly shifting his burden of demonstrating that diversity jurisdiction exists. While that is certainly the burden of the removing party, LR 81.2(a) and the state procedural rules it employs obligate Plaintiffs to provide the amount of damages it seeks. Plaintiffs cannot prevent Baumgartner from meeting his burden by suggesting that, because the burden is his, Plaintiffs have the right to remain mute.

Ill.S.Ct. Rule 216(c)), in either event conforming to the statement or declination to agree described in subparagraph (2)(A) of this rule.

[10] If the case was remanded and Plaintiffs responded to discovery requests by stating that the amount is greater than $75,000, then Baumgartner would simply remove the case once again. See Benson v. SI Handling Systems, Inc., 188 F.3d 780, 782 (7th Cir. 1999) ("Neither [28 U.S.C.] § 1447(c) nor anything else in the sections of the Judicial Code devoted to removal forbids successive removals.").

III. Conclusion.

Aggregation is appropriate because Counts III and IV are paradigmatic examples of plaintiffs uniting to enforce a single right "in which they have a common and undivided interest...." Zahn, 414 U.S. at 294. And no logical case can be made, when looking at the complaint at the time of removal, that any separate interests or claims exist among the putative class in Counts III and IV. Because that class comprises all Illinois citizens, the amount of damages must surely exceed $75,000. Instead of admitting that point, Plaintiffs criticize Baumgartner for not following the procedure outlined in LR 81.2(a). But given the nature of this case and the wasted time and effort that would result from remand, the least burdensome and most efficient means of determining the amount-in-controversy is for Plaintiffs to simply state whether they are seeking more than $75,000.

Respectfully submitted,

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