UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN GILDING, Plaintiff and Appellee, v. NATIONAL AIR TRAFFIC CONTROLLERS' ASSOCIATION, AFL-CIO, et al. Defendants and Appellants.	**No.** 09-15883 **CIV:** 08-2137-PHX-GMS (Dist. of Arizona) **APPELLEE'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HONORABLE G. MURRAY SNOW, PRESIDING

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INTRODUCTION

The maxim *divide and conquer* is often attributed to Julius Caesar. The Union attempts this strategy now, although without the skill or success of a Caesar. The Union asks this Court to divide each element of the complete preemption test into separate and distinct preemption defenses, so that the Union can artificially manufacture a series of *Clorox*/*Pelleport* exceptions and conquer the prohibition on appealing remand orders.

At no point in its Response does the Union dispute that the District Court's remand order is unappealable. Instead, the Union claims that the District Court's findings regarding the individual elements of the complete preemption test are independently appealable as substantive determinations on the merits.

Attempts to bifurcate a complete preemption analysis from a preemption defense issue have previously been rejected by this Court on at least three occasions. This Court should follow circuit precedent and grant Gilding's Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction.

LEGAL ARGUMENT

I. CIRCUIT RULES DO NOT PROHIBIT GRANTING MOTIONS TO DISMISS PRIOR TO FULL APPELLATE BRIEFING.

The Union's east coast counsel misunderstands Ninth Circuit Rule 3-6. The Union cites Rule 3-6(b) for the proposition that this Court cannot adjudicate a motion to dismiss prior to full briefing of the substantive merits of the appeal.[1]

[1] Similarly, the Union erroneously cites *Taxpayer's Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987) for the proposition that Gilding's motion to dismiss is premature. Yet, that case involved a motion for summary judgment, not a motion to dismiss for lack of jurisdiction. Moreover, that case did not rely on any rule similar in nature to Ninth Circuit Rule 3-6, which is the dispositive rule in this case.

Incredibly, the Union completely ignores the provision of the rule that immediately follows Rule 3-6(b). The un-cited provision states:

> "At any time prior to the disposition of a civil appeal if the Court determines that the appeal is not within its jurisdiction, the court may issue an order dismissing the appeal without notice or further proceedings."

The Supreme Court similarly holds that federal jurisdiction may be challenged at any stage of the litigation.[2] Since a party may file a motion to dismiss for lack of jurisdiction at any time, "a party may challenge the court's jurisdiction either by filing a motion to dismiss or by raising the issue in its brief."[3]

As this Court is well aware, motions to dismiss for lack of jurisdiction are regularly heard and adjudicated by the Motions Panel prior to full briefing of the substantive merits of the appeal.[4] For that reason, Ninth Circuit Rule 27-11 grants an automatic stay to record preparation and briefing once a motion to dismiss is filed.[5] Similarly, Fed.R.App. 11(g) assumes that preliminary motions to dismiss will often be filed prior to briefing, and the rule provides a record preparation procedure to be followed in such cases.

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[2] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-507, 126 S.Ct. 1235, 1240 (2006).

[3] Goelz, Christopher, and Meredith Watts. *Federal Ninth Circuit Civil Appellate Practice*. San Francisco: Rutter Group, 2009. 6:325. (emphasis added).

[4] *e.g. In re Coleman*, 539 F.3d 1168, 1169 (9th Cir. 2008) ("Upon issuance of the district court's ruling on remand, we will determine whether to dismiss this appeal for lack of jurisdiction or to grant permission to file the interlocutory appeal.")

[5] "(a) Motions requesting [various forms of relief, including dismissal] shall stay the schedule for record preparation and briefing pending the court's disposition of the motion … (b) The schedule for record preparation and briefing shall be reset as necessary upon the court's disposition of the motion."

II. THE *CLOROX*/*PELLEPORT* EXCEPTION DOES NOT APPLY.

A. What the *Clorox*/*Pelleport* Exception Is and Is Not.

The remand statute prohibits appeals of orders remanding a case to state court for lack of federal subject matter jurisdiction; however, there are unique cases in which the district court may make substantive rulings apart from the jurisdictional ruling. In such cases, the *Clorox*/*Pelleport* exception may apply to permit review of these substantive non-jurisdictional rulings.

What the *Clorox*/*Pelleport* exception can do is permit limited review of substantive rulings by the District Court, so long as those rulings are separate and distinct from the unappealable remand order. A substantive issue decided by the District Court in conjunction with its remand order may be reviewable—even though the remand itself is not—if the substantive ruling: (1) precedes the remand order in "logic and fact," (2) is "functionally unreviewable in state courts," and (3) is a final order pursuant to the collateral order doctrine.[6]

What the *Clorox*/*Pelleport* exception cannot do is permit a backdoor means of appealing otherwise non-reviewable remand orders. Courts applying the *Clorox*/*Pelleport* exception have repeatedly cautioned that the exception cannot be applied to overcome a remand order like the one here, which is predicated on lack of federal subject matter jurisdiction.[7]

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[6] Goelz, Christopher, and Meredith Watts. *Federal Ninth Circuit Civil Appellate Practice*. San Francisco: Rutter Group, 2009. 2:351, *citing and quoting Stevens v. Brink's Home Security, Inc.*, 378 F.3d 944, 946-47 (9th Cir. 2004).

[7] *e.g. Powerex Corp. v. Reliant Energy Serv. Inc.*, 551 U.S. 224, --, 127 S.Ct. 2411, 2419 (2007) ("[In *Waco*] we held that appellate jurisdiction existed to review the order of dismissal, although we repeatedly cautioned that the remand order itself could not be set aside."); *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993), *overruled on other grounds* ("We have held 'where a remand order is based on a substantive determination on the merits apart from any jurisdictional decision, the order is reviewable on appeal as a collateral order.' However, the general rule

B. The *Clorox*/*Pelleport* Exception Does Not Permit Review of a District Court's Rejection of Preemption Defenses.

The Union mis-cites *Meadows* for the proposition that appellate review of remand orders exists, despite the effect of 28 U.S.C. § 1447, where the remand is based on the rejection of a complete preemption argument. There is one glaring problem with the Union's position: *Meadows* did not involve a remand pursuant to 28 U.S.C. § 1447. Instead, *Meadows* was decided based on the very different preemption statute contained in ERISA itself, specifically 29 U.S.C. § 1144.[8] In *Meadows*, "the remand order was reviewed because it was clear that the remand was not based on lack of jurisdiction, thus the bar to appellate review found in § 1447(d) was inapplicable."[9]

Not only does the Union mischaracterize the ruling in *Meadows*, it also overlooks Ninth Circuit rulings in *Whitman*, *Hansen*, and *Lyons*. Each of those cases explicitly reject the notion that denial of a preemption defense can be segregated from the remand order and appealed as a separate substantive ruling.

In *Whitman*, the defendant removed the case to federal court based on a complete preemption claim, and the case was subsequently remanded to state court.[10] The Ninth Circuit recognized that there is a distinction between a complete preemption argument and a mere preemption defense.[11] Yet, the Court ultimately concluded that the appeal must be dismissed for lack of jurisdiction.[12]

[of nonreviewability of remand orders] still applies to remand orders based on jurisdictional decisions.") (citations omitted).

[8] *The Meadows v. Employers Health Ins.*, 47 F.3d 1006, 1008 (9th Cir. 1995).

[9] *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d 1170, 1173 (9th Cir. 1999).

[10] *Whitman v. Rayley's Inc.*, 886 F.2d 1177, 1178 (9th Cir. 1989).

[11] *Id.* at 1180-81.

[12] *Id.* at 1182.

Hansen involved a case that had been removed to federal court and subsequently remanded based on lack of complete preemption.[13] The defendant argued that the District Court made appealable substantive errors during its analysis of the complete preemption claim.[14] The Ninth Circuit concluded that these rulings were "related to" the overall jurisdictional analysis.[15] As a result, the Ninth Circuit held that it lacked jurisdiction to review the District Court's rulings.[16]

Lyons involved a similar procedural scenario.[17] On appeal, the defendant argued that the District Court's resolution of the complete preemption argument necessarily involved substantive rulings on the merits of the defendant's preemption defenses.[18] The Ninth Circuit dismissed the appeal:

> "In deciding whether subject matter jurisdiction exists [in the context of a claim of complete preemption], the district court is required to reach certain substantive legal conclusions, but because these conclusions are not apart from the question of subject matter jurisdiction, but rather related to it, the *Clorox*/*Pelleport* exception does not apply."

As in *Whitman*, *Hansen*, and *Lyons*, the Union asserts that it may appeal the District Court's rejection of its "preemption defenses," even though the remand order itself is unreviewable. There are two problems with the Union's position. First and foremost, the District Court did not reject any preemption defenses. Instead, the District Court enterred findings pertaining to each element of the

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[13] *Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1385-86 (9th Cir. 1989).
[14] *Id.* at 1388.
[15] *Id.* ("[I]n this case, the district court's decision was not apart from the question of subject matter jurisdiction, but rather was related to it.")
[16] *Id.* at 1390.
[17] *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d 1170, 1171 (9th Cir. 1999).
[18] *Id.* at 1173.

complete preemption claim. These elements do not constitute separate and segregable preemption defenses.[19]

Second, even if the elements of the complete preemption issue could be construed as independent preemption defenses, Ninth Circuit precedent clearly establishes that the District Court's rejection of such defenses is not reviewable on appeal. The reason is that rejection of those defenses is too closely related to the overall jurisdictional analysis.

C. A *Clorox*/*Pelleport* Exception Cannot be Manufactured by Parsing the Elements of the Complete Preemption Test.

In *Beneficial Bank*, the Supreme Court set forth a two-pronged test for determining whether a case may be removed to federal court under the Complete Preemption Doctrine. Under the *Beneficial Bank* test, a case may only be removed when: (1) federal law completely preempts the plaintiff's claims, and (2) Congress intended for the federal statute in question to "provide the exclusive cause of action for the claim asserted."[20]

For the first prong of the *Beneficial Bank* test to be satisfied in the context of complete preemption by federal labor law, the tortious conduct at issue:

(1) "[M]ust constitute a 'prohibited personnel practice' as enumerated in the statute,

(2) must be committed by an employee who has the authority to take, recommend, or approve a personnel action against the plaintiff, and

(3) it must constitute 'personnel action' as defined in the statute."[21]

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[19] *See infra*.

[20] *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11, 123 S.Ct. 2058, 2068 (2003).

[21] *Gilding v. Carr*, 608 F.Supp.2d 1147, -- (D.Ariz. 2009).

Gilding argued before the District Court that, for the complete preemption test to be satisfied, the Union would have to establish each of those elements. Instead of treating each of these factors as what they actually are—namely, elements of the overall complete preemption test—the Union now alleges that each of those factors are actually independent preemption defenses. In doing so, the Union hopes to shoehorn its appeal into the *Clorox*/*Pelleport* exception.

Ironically, even if the Union were correct in arguing that the elements of the complete preemption doctrine are themselves independent preemption defenses, this would not provide a basis for overturning the remand order. It is well established that a mere preemption defense is not sufficient to secure removal of a case to federal court.[22]

D. The Union's Position is Undermined By the Cases it Cites.

The Union's response cites *Schmitt*, *Lyons*, *Whitman*, *Abada*, and *United Investors* for the proposition that this Court may exercise jurisdiction over the Union's appeal under the *Clorox*/*Pelleport* progeny. Yet, those cases actually support Gilding's position completely.

In *Lyons*, the Ninth Circuit concluded that it did not have jurisdiction to review the District Court's resolution of a complete preemption argument. Since a "substantive preemption analysis [is] part of the jurisdictional determination, [the Court of Appeals] lacks jurisdiction to review the remand order…"[23] In *Schmitt*, the Ninth Circuit held that a remand order is not reviewable on appeal, even when the District Court's remand ruling is clearly erroneous.[24] *Abada*, *Whitman*, and *United Investors* similarly concluded that the Ninth Circuit does not have

[22] *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392-93, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)

[23] *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d at 1174.

[24] *Schmitt v. Ins. Co. of North America*, 845 F.2d 1546, 1549 (9th Cir. 1988).

jurisdiction to review the District Court's resolution of a complete preemption argument.[25]

As a result, the Union's position is undermined by the very cases it cites for support. Unsurprisingly, the Union fails to locate and cite a single case in which the Ninth Circuit granted review over a remand order predicated on lack of complete preemption.

E. The *Clorox*/*Pelleport* Exception is Unavailable Where There is No Order Separate From the Unappealable Remand.

The Union cites *Reddam v. KPMG L.L.P.* for the proposition that it may appeal substantive rulings contained in the context of a remand order.[26] There are two problems with the Union's position. First, *Reddam* does not stand for the proposition that a party may appeal substantive rulings contained within an unappealable remand order. In fact, *Reddam* did not involve such a fact scenario.

The second problem with the Union's position is that *Reddam* predates the Supreme Court's ruling in *Powerex*. There, the Supreme Court held that a substantive ruling cannot be appealed if it is not contained in an order separate and distinct from the unappealable remand order.[27] Similarly, the Ninth Circuit reasoned in *Stevens* that *Clorox*/*Pelleport* will not permit appellate review where the otherwise appealable substantive ruling is not properly segregated from the unreviewable remand order.[28]

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[25] *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d at 1112; *Whitman v. Raley's, Inc.*, 886 F.2d at 1180-81; *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004).

[26] NATCA's Response to Gilding's Motion to Dismiss, p. 7, n. 4.

[27] *Powerex Corp. v. Reliant Energy Serv. Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2419 (2007).

[28] *Stevens v. Brink's Home Security*, 378 F.3d 944 (9th Cir. 2004) ("The concept of separableness of remand orders originated in *City of Waco v. United States Fidelity*

Reddam simply does not stand for the proposition for which the Union cites it. In fact, Ninth Circuit cases repeatedly caution that *Clorox*/*Pelleport* will not permit review of substantive determinations on the merits unless those determinations are separate and distinct from the overall jurisdictional analysis.[29]

F. The Collateral Order Rule is Not Established Here.

The Union claims that it need not set forth the elements of the collateral order rule in order to obtain review under the *Clorox*/*Pelleport* exception.[30] The Ninth Circuit's ruling in *Stevens* refutes the Union's position.

There, the Ninth Circuit clearly set forth the three prongs that must be met before review will be permitted under the *Clorox*/*Pelleport* exception:

> "First the decision must have preceded the remand order in logic and fact. Second, the decision must be conclusive, i.e., functionally

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& Guaranty Company, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934) … In a string of recent decisions, the Fifth Circuit has restated *City of Waco's* separable order concept as a two-part inquiry. 'To be separable, the decision [here the amendment order] must meet two criteria. First the decision must have preceded the remand order in logic and fact. Second, the decision must be conclusive, i.e., functionally unreviewable in state courts.'").

[29] *e.g. Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d at 1172 (1999) ("[T]here is a narrow exception to the general bar on appellate review where a remand order is based on a substantive determination on the merits apart from any jurisdictional decision."); *Lee v. City of Beaumont*, 12 F.3d 933, 936 (1993) ("[W]here a remand order is based on a substantive determination on the merits apart from any jurisdiction decision, the order is reviewable on appeal..."); *Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1388 (9th Cir. 1989) (reasoning that the resolution of a complete preemption claim was not a substantive issue subject to appeal, because "Blue Cross fails to demonstrate how the District Court's legal decision [regarding complete preemption] was apart from the question of subject matter jurisdiction..."); *Schmitt v. Ins. Co. of North America*, 845 F.2d at 1549 (1988) ("We have held that a remand order may be reviewed on appeal as a final collateral order...if the order resolves the merits of substantive law apart from any jurisdictional decision.")

[30] NATCA's Response to Gilding's Motion to Dismiss, p. 7, n. 3.

> unreviewable in state courts. [Third] the order still must be appealable as a final order under 28 U.S.C. § 1291 or under the collateral order exception."[31]

A "collateral order" is one that: (1) conclusively determines the disputed question; (2) resolves important issues completely separate from action's merits; and (3) is effectively unreviewable on appeal from final judgment.[32]

The District Court's ruling in this case does not meet the criteria for being a collateral order. In fact, the Union does not even bother to argue the contrary. Instead, the Union simply claims that it need not establish the elements of the collateral order rule.

III. CONCLUSION

This Court may certainly resolve Gilding's Motion to Dismiss at this time, without ordering further briefing. The Union does not dispute that the District Court's remand order is unappealable. Instead, the Union dissects the complete preemption test into its individual elements and then asserts that it may appeal each of these elements as separate substantive rulings on the merits. This exact argument has repeatedly been rejected in the Ninth Circuit, most recently in *Whitman*, *Hansen*, and *Lyons*. Finally, the Union fails to argue any of the elements of the collateral order rule.

For the reasons expressed above, this Court should grant Gilding's Motion to Dismiss and reserve jurisdiction only for the purpose of resolving the Motion for Attorney Fees and Costs that Gilding intends to file in response to the Union's frivolous appeal.

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[31] *Stevens v. Brink's Home Security, Inc.*, 378 F.3d at 946-47. (citations omitted).
[32] *Calif. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d at 1094.

RESPECTFULLY SUBMITTED this 11th day of June, 2009.

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CERTIFICATE OF MAILING

U.S. Court of Appeals Docket Number: 09-15883.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2009. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), the foregoing is proportionately spaced, has a typeface of 14 points or more, and consists of 10 pages.

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