IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

EDMOND ASHER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 1:20–cv–00238
	)	
RAYTHEON TECHNOLOGIES CORPORATION f/k/a United Technologies Corporation, LEAR CORPORATION EEDS AND INTERIORS, LLC as successor to United Technologies Automotive, Inc., ANDREWS DAIRY STORE, INC., L.D. WILLIAMS, INC., CP PRODUCT, LLC, as successor to Preferred Technical Group, Inc., and LDW Development, LLC	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION TO REMAND

Plaintiffs, by counsel, respectfully submit this memorandum of law in support of their Emergency Motion to Remand.

I. INTRODUCTION

The Raytheon Defendants' removal of this case to this Court would be merely specious if the Town of Andrews, Indiana's entire municipal water supply was not at stake and a public health emergency did not exist. The Town does not currently have an adequate supply of safe drinking water, and the Town's fire department lacks an adequate supply of water to fight fires. Waiting until the evening before a hearing on Plaintiff Town of Andrews, Indiana's Verified Emergency Motion for Preliminary Injunction—which addresses the fact that Defendants' contamination has infiltrated the Town's water supply—Raytheon has filed the flimsiest of

removal notices in an effort to avoid that hearing and prolong the Town's drinking water crisis. This unsupported removal wreaks of gamesmanship and flies in the face of both Rule 11 and the case law on federal question jurisdiction

The Plaintiffs' Complaint in this case includes six state law causes of action: trespass, nuisance, negligence, negligent infliction of emotional distress, negligent failure to warn, and Environmental Legal Action ("ELA"). None of these causes of action depends, in whole or in part, on any federal statute, regulation, or question. Raytheon's removal is predicated on a warped reading of *Grable*, and argues that this Court has federal question jurisdiction under 28 U.S.C. § 1331 based upon a *single* line in the very first numbered paragraph of the introduction of Plaintiffs' Complaint, which states in part:

> Two overlapping, subsurface plumes of contamination, consisting primarily of chlorinated solvents (including trichloroethylene ("TCE")) and petroleum, have contaminated the Town's drinking water aquifer, have entered sewer and other utility lines, have caused a nuisance and considerable personal injury and property damage, and *constitute an imminent and substantial endangerment to human health and the environment* in, under, and surrounding, the Plaintiffs' properties in the Town.

(Ex. #1, at ¶ 1 (emphasis added).)[1]

Raytheon contends that because the "imminent and substantial" language mirrors the citizens' suit provision of RCRA, the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), Plaintiffs have actually raised a federal question under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005). In reality, the Plaintiffs' reference to the "imminent and substantial endangerment" was nothing more than a succinct means of describing the environmental threat posed by the Defendants' contamination. It does not appear anywhere else in the Complaint, and it is not linked to any of Plaintiffs' substantive

[1] Citations to exhibits refer to those exhibits appended to Plaintiffs' *Emergency Motion to Remand*.

state-law causes of action.

As discussed herein, the Plaintiffs' Complaint does not raise a federal question on its face, nor have Plaintiffs artfully pled their claims to avoid explicitly raising a federal question. *Grable* does not provide any federal jurisdiction because the Plaintiffs' state-law claims do not necessarily raise any actual and substantial federal issues, including RCRA, to *any* extent. This Court should, therefore, remand this cause to the Huntington County Superior Court on an expedited basis given the current public health emergency.

II. FACTUAL & PROCEDURAL BACKGROUND

A. Factual Background of Plaintiffs' Claims

The Town of Andrews is heavily contaminated with two plumes of subsurface contamination that have migrated across the Town and impacted the Plaintiffs' health and properties. (Ex. #1, Compl. ¶¶ 1, 3–4, 145–186.) One of the plumes of contamination, consisting primarily of the chlorinated solvent trichloroethylene ("TCE"), a known human carcinogen, originated at a manufacturing facility in Andrews that until 1992, was owned and operated by United Technologies Automotive, Inc. ("UTA"), a former subsidiary of defendant Raytheon Technologies Corp. (formerly known as United Technologies Corporation.) (Compl. ¶¶ 91–121.)[2] In 1999, UTA was later sold off and became Lear Corporation Eeds and Interiors. (Compl. ¶ 93.) In 1992, the operations at the UTA Facility were sold to Preferred Technology Group, whose successor in interest is Defendant CP Product, LLC. (Compl. ¶¶ 94–96.)

The second plume, consisting primarily of gasoline and its constituents, originated at a gasoline station currently owned and operated by Defendants L.D. Williams, Inc. and LDW Development, LLC, and formerly owned by defendant Andrews Dairy Store, Inc. (Compl. ¶¶

[2] TCE degrades into vinyl chloride ("VC"), also a known human carcinogen. (Ex. #4, ¶ 3.)

122–44.) That gasoline station is situated downgradient (to the southwest) of the UTA Facility (and atop the plume of chlorinated contamination).

Plaintiffs—the Town of Andrews itself and 77 current and/or former residents of the Town, filed a six-count complaint in Huntington County Superior Court on June 19, 2020. (Ex. #1.) Plaintiffs' state law claims include: trespass, nuisance, negligence, negligent infliction of emotional distress, negligent failure to warn, and Environmental Legal Action ("ELA") pursuant to Ind. Code § 13–30–9–2. (Ex. #1, ¶¶ 187–217.) Plaintiffs seek compensatory and punitive damages for personal injuries and property damage caused by exposure to the Defendants' toxic contamination, as well as injunctive relief to clean up their homes, their properties, their Town, and the groundwater upon which the Town relies for its drinking water. (Compl. ¶¶ 218–226, Prayer ¶¶ A–G.)

B. The Town Faces A Present Emergency to Its Municipal Drinking Water Supply.

On the same day the Complaint was filed, the Town filed an *Emergency Motion for Preliminary Injunctive Relief*. (Ex. #2, #3.) The Town's sole source of drinking water is groundwater, supplied through three shallow water supply wells, referenced as WH-1, WH-2, and WH-3 or MW-1, M-2, and MW-3. (Ex. #5, ¶ 10; Ex. #4, ¶ 5.) All three of these wells (but particularly Municipal Well 1 or MW-1) have been impacted at one time or another with UTC's chemicals. (Ex. 4, ¶ 11; Ex. #4, ¶ 5.) This fact has been known for many years. UTC has never tried to clean up the portion of its toxic plume that impacts the Town's wells. (Ex. #4, ¶ 5.)

The Town shut down MW-1 in 2012 because of the known contamination and in response to taste and odor complaints from residents, and had subsequently relied solely on MW-2 and MW-3. (Ex. #5, ¶ 12–14; Ex. #4, ¶ 5.) In the Spring of 2020, MW-2 and MW-3 lost capacity and were no longer able to supply the Town with an adequate amount of water. (Ex. #5,

¶ 15; Ex. #4, ¶ 15.) Because of this loss of capacity, MW-1 was turned back on in May 2020. (Ex. #5, ¶ 16; Ex. #4, ¶ 5)

Due to the presence of contamination in the Town's drinking water wells, in 1994, UTC was required by the Indiana Department of Environmental Management ("IDEM") to install a treatment system intended to strip its contaminants from the Town's drinking water (after it has been pumped from the wells but before delivery to the Town's residents). This system—known as an air stripper—has not been managed properly, such that it goes off-line without warning and with alarming frequency. (Ex. #4, ¶ 6.) Because of the high levels of contamination in MW-1, the Town is dependent on the air stripper operated by Raytheon to remove contaminants from the Town's wells before it is distributed to the public. (Ex. #5, ¶ 17.) During periods of downtime in the stripper's operation, the Town's residents are exposed to drinking water containing potentially dangerous levels of VC, as well as other chemicals such as cis-1,2-dichloroethene ("cis-1,2-DCE"). (Ex. #4, ¶ 6.)

In early June 2020, the air stripper experienced an interruption, causing the Town's clear well to overflow and sustain damage. (Ex. #5, ¶¶ 18–19; Ex. #4, ¶ 6.) Following an investigation and consultation with the Town's expert, Dr. James Wells, Ph.D., the Town filed its Emergency Motion for Preliminary Injunction on June 19. (Ex. #2; Ex. #5, ¶ 20.)

On Friday, June 19, 2020, the Huntington County Emergency Management Agency issued a "Do Not Drink" advisory for the residents of the Town of Andrews. (Ex. #5, ¶ 21.) Since that time, the Town residents have not been able to use their water, and the Town has been supplying them with bottled water. (Ex. #5, ¶ 22.)

On June 22, 2020, IDEM conducted sampling of the Town's water, collecting several samples from the Town's wells and finished drinking water. (Ex. #5, ¶ 24; Ex. #4, ¶ 7.) During

this sampling event, the air stripper had apparently been repaired, thus it was operating at the time. (Ex. #4, ¶ 7.) The sample from MW-1 contained VC at 30.3 µg/L (15 times higher that EPA and Indiana drinking water standard or maximum contaminant level [MCL] of 2.0 µg/L) and cis-1,2-DCE at 131 µg/L (nearly double the EPA and Indiana MCL of 70 µg/L). (Ex. #4, ¶ 7.) The tap (*i.e.*, finished or drinking) water collected from the lab building at the Town's Wastewater Treatment Plant contained VC at a concentration of 2.0 µg/L, equal to the MCL. (Ex. #4, ¶ 7.)

After the IDEM representatives finished obtaining their samples, IDEM instructed the Town to stop using MW-1. (Ex. #5, ¶ 25.) In response to IDEM's instructions, the Town turned off MW-1 on June 22, 2020. (*Id.* at ¶ 26.) On June 24, IDEM informed the Town that the sampling of MW-1 contained high levels of VC, and that VC at the MCL was detected in the tap water at the Town's wastewater treatment plant. (*Id.* at ¶ 28.) IDEM again reiterated that MW-1 must remain offline and may not be used to supply water to the Town. (*Id.* at ¶ 29.)

Without the use of MW-1, the Town is in an impossible situation. (Ex. #4, ¶ 9; Ex. #5, ¶ 32.) The Town does not have sufficient water to supply its residents or to adequately fight fires. (Ex. #5, ¶ 27.) The lack of water pressure from the Town's municipal water supply is precluding the Town's volunteer fire department from having sufficient water to keep its tanker trucks full of water, and reliance on fire hydrants alone may damage the town's water lines. (Ex. #6, ¶¶ 15–18.)

The Huntington Superior Court set the Town's Emergency Motion for a hearing on Thursday, June 25, 2020, at 10 a.m. (Ex. #7.) Plaintiffs were pursuing a state court order requiring the Raytheon Defendants to take immediate steps to alleviate the health emergency. (Ex. #2, at 4–5.)

C. Procedural Background on Removal.

At the request of the Raytheon Defendants' counsel, an attorneys' conference was held at 1:00 p.m. yesterday, June 24, 2020, to discuss the emergency hearing scheduled for this morning. Plaintiffs' counsel advised Defendants' counsel that Dr. Wells would testify. Raytheon Defendants' counsel made no mention of removal.

At approximately 4:20 p.m. on Wednesday, June 24, 2020, Plaintiffs' counsel received a voicemail from counsel for the Raytheon Defendants, informing them that the Raytheon Defendants would be removing the case to federal court. The Raytheon Defendants' removal papers were filed later in the evening on June 24.

Plaintiffs have now filed their Emergency Motion to Remand, so that this Court can consider whether the Raytheon Defendants' removal was improperly taken. As discussed herein, this Court should find that it is without subject matter jurisdiction, and should remand this case back to the Huntington Superior Court, where the Town's motion for preliminary injunction can be heard in an expedited manner, given the ongoing public health emergency.

III. ARGUMENT: THIS CASE DOES NOT PRESENT ANY FEDERAL QUESTION

A. Standard for Assessing Federal Question Jurisdiction

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Title 28 U.S.C. § 1441(a) governs federal removal jurisdiction, allowing the removal of "any civil action brought in a State court of which" the district court would "have original jurisdiction." 28 U.S.C. § 1441(a).

A case filed in state can be removed if it could have originally been filed in federal court.

28 U.S.C. § 1441(a); *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, Inc., 707 F.3d 883, 890 (7th Cir. 2013). The party seeking removal has the burden of establishing federal jurisdiction, and federal courts should interpret the removal statute narrowly, resolving any doubt in favor of the plaintiff's choice of forum in state court. *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 758 (7th Cir. 2009) (citing *Doe v. Allied–Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)).

Federal courts have original jurisdiction over two general types of civil actions: (1) cases "arising under the Constitution, laws, or treaties of the United States" (*i.e.*, "federal question jurisdiction"), 28 U.S.C. § 1331; and (2) cases in which there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000 (*i.e.*, "diversity jurisdiction"), 28 U.S.C. § 1332(a). *Home Depot U. S. A., Inc. v. Jackson*, --- U.S. ---, 139 S. Ct. 1743, 1746 (2019).

Federal question jurisdiction applies in "cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27–28 (1983). The Raytheon Defendants do not deny that Plaintiffs have not expressly alleged a cause of action based on federal statutory or common law. Rather, they argue that this Court's jurisdiction is derived from the second jurisdictional category. However, they are incorrect that Plaintiffs have either artfully pled their claims around federal claims, or that jurisdiction exists based on *Grable.*

B. Plaintiffs' Well-Pleaded Complaint Raises Only State Law Claims.

In general, a claim arises under federal law if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily

depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006). Importantly, it is the plaintiff's complaint that determines whether the case arises under federal law: "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax*, 463 U.S. at 10. "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70 (1936). This preserves the plaintiff's role as "master of the complaint," and "the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Hart v. Wal-Mart Stores, Inc. Associates' Health & Welfare Plan*, 360 F.3d 674, 678 (7th Cir. 2004) (quoting *Caterpillar*, 482 U.S. at 398–99.)

On the face of Plaintiffs' Complaint, the causes of action set forth—trespass, nuisance, negligence (including negligent infliction of emotional distress and negligent failure to warn) and ELA—sound wholly in state, not federal, law. The Complaint does not explicitly state any federal causes of action. (*See* Ex. #1, at ¶¶ 187–217.) *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (noting that the "vast majority" of cases brought under federal-question jurisdiction are those in which federal law creates the cause of action). The Raytheon Defendants do not argue that Plaintiffs' Complaint raises any federal claims on its face. (*See* DE #1, at ¶¶ 7–8.)

C. The Raytheon Defendants' Removal Under *Grable* Was Clearly Improper, If Not Frivolous.

Raytheon's sole basis, and sole case cited for removal is *Grable & Sons Metal Prod., Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308 (2005). *Grable* finds no application here, and the question is

not close. As noted, Plaintiffs' Complaint is based solely on state law claims, and falls well outside the narrow confines of the *Grable* exception to federal question jurisdiction.

In *Grable,* the IRS had seized Grable's property and given notice of its sale to the defendant only by certified mail. 545 U.S. at 310. After the property seizure, the IRS sold the property to a third-party. *Id.* Years later Grable filed a quite-title action under state law, contending that Grable should be confirmed as the parcel's rightful owner because the IRS's notice did not satisfy federal requirements. *Id.* at 311. The Court held that Grable's claim arose under federal law because, "apart from the procedural device (a quite-title action), there was *nothing* in it but federal law, with the potential to affect the national government's revenues." *Bennett v. Southwest Airlines Co.,* 484 F.3d 907, 910 (7th Cir. 2007) (original emphasis); *see also Grable*, 545 U.S. at 315 ("Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case.").

Following *Grable,* the Court in *Gunn v. Minton,* 568 U.S. 251 (2013), observed that the category of cases based on state law claims, which are found to arise under federal question jurisdiction, is a "special and small category." *Id.* at 258. The Court restated the four-part test by stating that federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised; (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal –state balance approved by Congress. *Id.* Raytheon fails to even establish the first element; no federal issue is "necessarily raised" by Plaintiffs' Complaint.

In the environmental context, Plaintiffs have located no reported decision with the United States in which a state law complaint referencing the Resource Conservation Recovery Act

("RCRA") has been successfully removed under the *Grable* doctrine. To the contrary, courts have found no federal jurisdiction over state law claims even when such claims necessarily require interpretation of federal environmental statutes. For example, in *Giles v. Chicago Drum, Inc.*, 631 F.Supp.2d 981 (N.D. Ill. 2009), plaintiffs filed claims in state court alleging a civil conspiracy to violate the RCRA. Citing *Grable*, defendants removed the cases contending that the complaint implicates "significant federal issues." *Id.* at 983. Recognizing that courts "generally disfavor removal, and recognize that the 'removal statute should be construed narrowly against removal,'" the court found that *Grable* did not apply. In remanding the cases, the court observed that the *Grable* standard is stringently applied, and "[c]ourts have uniformly held that a reference to federal environmental statutes, including RCRA, in plaintiffs' negligence claims is insufficient to confer federal question jurisdiction." *Id.* at 983. The court concluded that that "Plaintiffs' claims do not hinge on the interpretation of a single federal statute," and did not present the kind of "pure issue of law" present in *Grable* "that could be settled once and for all" with a decision by the court. *Id.* at 989-90.

Similarly, in *DeLuca v. Tonawanda Coke Corp.*, No. 10-cv-859S, 2011 WL 3799985 (W.D.N.Y. Aug. 26, 2011), the plaintiffs filed a putative class action complaint under state law for damages arising due to environmental contamination. Plaintiffs alleged that defendants had violated numerous federal environmental statutes, including RCRA. Citing *Grable,* defendants removed and argued that the claims were "arising under" federal question jurisdiction. The court disagreed and remanded the case. The court found that even allegations by plaintiffs of violations of RCRA and other federal statutes, as negligence *per se,* do not create a "necessary" federal-law question. *Id.* at *5. *See also County of LeHigh v. Atlantic Richfield Co*., No. 18-5140, 2019 WL 2371783, *3 (E.D.Pa. June 5, 2019) ("Mere references in a complaint to federal law and/or

regulations or violations of such, however, do not give rise to jurisdiction under § 1331.") (citing cases); *Rodriguez v. Hovensa, L.L.C.*, No. 2012-100, 2014 WL 1308836 (D.V.I. Mr. 31, 2014) (references to RCRA and other federal environmental statutes in state complaint did not create federal question under § 1331); *Abbo-Bradley v. City of Niagara Falls*, No. 13-cv-487, 2013 WL 4505454, *8–10 (W.D.N.Y. Aug. 22, 2013) (propriety of the relief sought would be determined according to state-law tort principles, and would not require an evaluation of CERCLA compliance).

Most recently, in *West Virginia State University Bd. Of Gov'rs v. Dow Chemical Co.,* No. 2:17-cv-3558, 2020 WL 2842057 (S.D.W.V. June 1, 2020), the plaintiff university filed a complaint in state court seeking remedial measures and injunctive relief to remove environmental contamination. Defendants removed, arguing—just as Raytheon asserts here—that the university's complaint was "artfully pleaded " to avoid federal question jurisdiction, and was tantamount to a challenge of a RCRA cleanup being supervised by the EPA. *Id.* at *5. In remanding the case, the court noted the university asserted only state law claims for negligence, public nuisance, trespass, strict liability and unjust enrichment, seeking declaratory judgment, injunctive relief, and punitive damages. Importantly, the court noted that state law claims for remediation were not inconsistent with RCRA, stating in pertinent part:

> RCRA explicitly preserved other causes of action including state law causes of action, stating that "nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief." 42 U.S.C. § 6972(f). RCRA imposes the minimum standard of remediation and corrective action with which defendants must comply, see 40 C.F.R. § 264.100, but WVSU is free to seek and obtain additional or alternative relief to the extent it is entitled to that relief under state law.

Id. at *6.

In the instant case, Plaintiffs assert claims for trespass, nuisance, negligence, negligent infliction of emotional distress, negligent failure to warn and ELA. The Complaint makes no reference to any federal statute, does not depend on the resolution of any issue of federal law, and clearly does not meet the *Grable* test. The Complaint therefore falls further outside the *Grable* category than those complaints, cited above, that specifically allege RCRA violations as a basis for negligence *per se* liability. *See Giles*, 631 F. Supp. 2d at 983 ("Courts have uniformly held that a reference to federal environmental statutes, including RCRA, in plaintiffs' negligence claims is insufficient to confer federal question jurisdiction."); *see also Mississippi ex. Rel. Hood v. Meritor, Inc.*, No. 4:17cv74, 2018 WL 1309722 (N.D. Miss. Mar. 13, 2018); *Cooper v. Int'l Paper Co.*, 912 F.Supp.2d 1307, 1313–18 (S.D. Ala. 2012). Stated differently, if negligence *per se* claims expressly referring to RCRA do not constitute removable claims then, *a fortiori*, Plaintiffs' claims in this case do not either.

Raytheon hangs its *Grable* hat on the Complaint's language, in the initial introductory paragraph, referencing an "imminent and substantial endangerment to human health and the environment." *See* Defs.' Not. of Removal, ¶¶ 7, 13–14. This is plainly insufficient where Plaintiffs' relief under state law does not "necessarily" raise a federal issue. For example, liability under the ELA is determined under a different standard than RCRA, requiring only that the defendant have caused or contributed to the release of a hazardous substance or petroleum that "poses a risk to human health and the environment." *Compare* Ind. Code § 13–30–9–2 *with* 42 U.S.C. § 6972(a)(1)(B).

The fact that the Plaintiffs in this case seek similar injunctive relief as the different plaintiffs in the *Millman* matter is of no consequence. *Cf.* Defs.' Not. of Remand, ¶ 7, 15–17.[3]

[3] No Plaintiff in the instant case is a plaintiff in *Millman*.

The *Asher* Plaintiffs' claims under the ELA can be resolved without reference to RCRA and therefore do not necessarily raise a federal question. *See Dow Chem. Co.*, 2020 WL 2842057, at *6.

Respectfully, this Court should not be the first to hold that state-law claims that do not refer to, or depend on federal statutes or issues, nevertheless fall within the narrow *Grable* category simply through the use of the phrase "imminent and substantial endangerment to human health and the environment." To do so would improperly expand federal question jurisdiction and would be unsupportable under any reasonable interpretation of *Grable.*

II. THE COURT SHOULD AWARD FEES

This Court should award Plaintiffs their fees and costs associated with this motion to remand pursuant to 28 U.S.C. § 1447(c), which provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." A fee award is appropriate "where the removing party lacked an objectively reasonable basis for seeking removal." *Wells Fargo Bank, N.A. v. Younan Properties, Inc.*, 737 F.3d 465, 469 (7th Cir. 2013) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)).

In *Martin*, the Supreme Court recognized that "[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*, 546 U.S. at 140. As described above, the Raytheon Defendants' removal of this case the evening before the Huntington Superior Court's hearing on the Town's Emergency Motion for Preliminary Injunction was motivated by a nefarious purpose—to wrongfully avoid the state court's scheduled hearing despite the emergency now faced by the Town.

The Seventh Circuit has affirmed an award of attorney fees when the removal was "clearly improper, but not necessarily frivolous." *Jackson County Bank v. DuSablon*, 915 F.3d 422, 424 (7th Cir. 2019). Where the complaint was based entirely on state law, with no potential federal defense, the court agreed with the district court that the defendant lacked an "objectively reasonable basis to remove" the case. *Id.*

The Raytheon Defendants' eleventh-hour removal in this case is far more egregious than in *DuSablon*. Raytheon Defendants lacked any objectively reasonable basis to remove this case, failed to cite any of the above-referenced RCRA cases, failed to mention their intent to remove during an attorneys' conference, yet removed the case last evening in order to block the state court's hearing on the Town's emergency motion for preliminary injunction. This case, like that in *DuSablon*, is entirely based on state law claims, and in no way raises any federal question. This removal has improperly and unnecessarily created a delay and exacerbated the health emergency now faced by the Town. The Court should award fees.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court enter an Order remanding this case to the Huntington Superior Court on an expedited basis, and permit the application of Plaintiffs' attorneys' fees in remanding this case to its proper forum.

Respectfully submitted,

/s/ Thomas A. Barnard

Thomas A. Barnard, Attorney No. 4011-49
Rodney L. Michael, Jr., Attorney No. 23681-49
Benjamin A. Wolowski, Attorney No. 33733-49
TAFT STETTINIUS & HOLLISTER LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204
tbarnard@taftlaw.com
rmichael@taftlaw.com
bwolowski@taftlaw.com
Telephone: 317.713.3500
Facsimile: 317.713.3699

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 25, 2020, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which sent notification of such filing to all counsel of record. Paper copies were sent by US Mail, postage prepaid, to:

L.D. Williams, Inc. & LDW Development LLC
c/o Richard Delaney
533 Warren St.
Huntington, IN 46750

Andrews Dairy Store, Inc.
c/o Michael Burton
138 Snowden Street
Andrews, IN 46702

/s/ Thomas A. Barnard

27443789.2