

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2939

[Filed October 10, 2019]

Keilee Fant, individually and)
on behalf of all others similarly)
situated; Roelif Carter; Allison)
Nelson; Herbert Nelson, Jr.;)
Alfred Morris; Anthony Kimble;)
Donyale Thomas; Shameika)
Morris; Daniel Jenkins; Ronnie)
Tucker)
)
Plaintiffs - Appellees)
)
Tonya DeBerry)
)
Plaintiff)
)
John R. Narayan, personal)
representative of the estate of)
Tony DeBerry, Deceased)
)
Plaintiff - Appellee)
)
v.)

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 4:15-CV-00253-AGF

[Filed August 6, 2019]

KEILEE FANT, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
THE CITY OF FERGUSON,)
)
 Defendant.)
)

MEMORANDUM AND ORDER

Plaintiffs in this putative class action claim that they have been jailed by Defendant, the City of Ferguson (the “City”), on numerous occasions because they were unable to pay cash bonds or other debts resulting from their traffic and other minor offenses. Plaintiffs allege that, in violation of the United States Constitution and as a matter of the City’s policies and practices, they were not afforded counsel, any inquiry into their ability to pay, or a neutral finding of probable cause in a prompt manner; and they were held in jail

indefinitely, in overcrowded and unsanitary conditions, until they or their friends or family members could make a monetary payment sufficient to satisfy the City, as part of a broad, revenue-generating scheme. Plaintiffs' amended complaint asserts seven claims pursuant to 42 U.S.C. § 1983, under the Fourth, Sixth, and Fourteenth Amendments. They seek compensatory damages as well as declaratory and injunctive relief.

The City moves to dismiss, for failure to join a party under Federal Rule of Civil Procedure 19, all claims in Plaintiffs' first amended complaint except the claim relating to conditions of confinement (Count IV). This is the fourth motion to dismiss filed by the City in this now four-year-old case. This motion asserts arguments similar to those raised in prior motions but reframes them in terms of Rule 19. In short, the City argues that Plaintiffs' constitutional challenges are directed solely to the conduct of the Ferguson Municipal Court (the "municipal court"), which the City argues is a separate entity, and that the municipal court is therefore required to be joined as a co-defendant under Rule 19(a). But the City argues that joinder is not feasible because the municipal court is an arm of the state under Missouri law and, as such, entitled to sovereign immunity. The City contends that because there is a potential for injury to the interests of the municipal court and because the municipal court is immune from suit, dismissal of the claims at issue is required under Rule 19(b). For the reasons set forth below, the Court will deny the City's motion.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(7) permits dismissal of a claim for failure to join a party under Rule 19. Rule 19, in turn, sets forth a two-part inquiry. First, the Court must determine whether the absent person's presence is "required." Fed. R. Civ. P. 19(a)(1). Joinder is required when:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

"[T]he focus of Rule 19(a)(1) is on relief between the parties and not on the speculative possibility of further litigation between a party and an absent person." *Cedar Rapids Bank & Tr. Co. v. Mako One Corp.*, 919 F.3d 529, 534–35 (8th Cir. 2019) (citation omitted). When joinder is not required under Rule 19(a), "the inquiry is at an end, and the motion to dismiss for failure to join the party in question must be denied."

App. 6

Rochester Methodist Hosp. v. Travelers Ins. Co., 728 F.2d 1006, 1016 (8th Cir. 1984).

If joinder is required but not feasible, the Court must proceed to the second step and “determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed,” considering several enumerated factors. Fed. R. Civ. P. 19(b). Factors to consider include (1) the extent to which a judgment in the required person’s absence might prejudice that person or the existing parties; (2) the extent to which such prejudice could be lessened or avoided by protective provisions or otherwise shaping the relief to be granted; (3) the adequacy of a judgment rendered in the person’s absence; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(b). In analyzing these factors in the context of a claim of sovereign immunity, the Court must give sufficient weight to the sovereign status of the absent person, which “in some instances, [will mean] that the plaintiffs will be left without a forum for definitive resolution of their claims.” *Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008).

The Rule 19 inquiry is a “highly-practical, fact-based endeavor,” and courts are “generally reluctant to grant motions to dismiss of this type.” *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 671 (8th Cir. 2015). “A decision under Rule 19 *not* to decide a case otherwise properly before the court is a power to be exercised only in rare instances.” *Nanko*

Shipping, USA v. Alcoa, Inc., 850 F.3d 461, 465 (D.C. Cir. 2017) (emphasis in original) (citation omitted).

The Court concludes that the municipal court (perhaps more properly referenced as the municipal division) is not a required party under Rule 19(a). Rule 19(a)(1)(A)'s condition that a court be able to accord complete relief "does not mean that every type of relief sought must be available, only that meaningful relief be available." *Henne v. Wright*, 904 F.2d 1208, 1212 n.4 (8th Cir. 1990) (internal citations omitted). Here, the Court is able to accord meaningful relief to Plaintiffs without joinder of the municipal court. Plaintiffs seek money damages from the City, a declaration that the City violated their constitutional rights, and an injunction enjoining the City from enacting and enforcing its allegedly unlawful policies and customs. The Court may provide such relief to the extent that Plaintiffs' claims prove to be viable and meritorious. The City's argument that the municipal court, and not the City, caused the alleged constitutional violations may be a reason to deny relief on Plaintiffs' claims,¹ but

¹ Plaintiffs' claims arise out of arrests dating back to 2010. Although the City cites to Missouri Supreme Court Rule 37.04, governing supervision of courts hearing ordinance violations, in support of its argument, the current version of that Rule was not adopted until 2016. The 2016 amendment required, for the first time, that municipal courts operate in substantial compliance with certain minimum operating standards, which were not made effective until July 1, 2017. *See* Mo. S. Ct. R. 37.04 & 37.04 app. A (amended Sept. 20, 2016, eff. July 1, 2017). Moreover, although the City argues that Plaintiffs' allegations concern solely municipal court functions, Plaintiffs also allege, for example, that the City's chief of police negotiated cash payments from Plaintiffs directly in

it does not support a finding under Rule 19(a)(1) that joinder of the municipal court is required. *See, e.g., Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1429 (8th Cir. 1994) (“Whether the asserted facts support claims other than the ones before the court or whether the complaint here adequately states [the plaintiffs’] claims . . . are not the issues under Rule 19(a)(1).”).

Likewise, under Rule 19(a)(1)(B), even assuming that the municipal court has an interest relating to the subject of the action, disposition of the action in the municipal court’s absence will not as a practical matter impair or impede the municipal court’s ability to protect its interest. *See Fed. R. Civ. P. 19(a)(1)(B)(i)*. In support of its argument to the contrary, the City relies primarily on the Eighth Circuit’s opinion in *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015). In that case, the plaintiffs claimed that the named defendants induced an absent sovereign, the United States, to breach its fiduciary duty by approving leases for interests in land held in trust. *Id.* at 792-93. In other words, in order to prevail on their claims against the named defendants, the plaintiffs were required to prove that the absent sovereign acted illegally. *Id.* at 796. A judgment entered in the sovereign’s absence would thus “potentially cloud the validity of many of the land grants approved by the government.” *Id.* For this reason, the Eighth Circuit found that the United States’ ability to protect its interest would be impaired

exchange for their release from jail, without the involvement of the municipal court. *E.g.*, ECF No. 53 ¶¶ 29-30.

or impeded by its absence from the litigation. *Id.* at 797.

By contrast, here, none of Plaintiffs' claims requires a showing that the municipal court acted illegally. Rather, for Plaintiffs to succeed on their claims, they must demonstrate that the City acted unlawfully.² See *Fochtman v. Darp, Inc.*, No. 5:18-CV-5047, 2018 WL 3148113, at *6–7 (W.D. Ark. June 27, 2018) (distinguishing *Two Shields* on this ground and holding that an absent sovereign's more remote interest in the outcome of a case was insufficient to require joinder).

Nor would the municipal court's absence subject the City to a substantial risk of incurring double or otherwise inconsistent obligations. See Fed. R. Civ. P. 19(a)(1)(B)(ii). The City's own argument supports such a holding. The City asserts that, as a matter of law, it cannot be held liable for the municipal court's conduct. If the City is correct, and if the actions complained of were caused by the municipal court, then as explained above, Plaintiffs' claims may fail on the merits. But resolution of these issues does not require the municipal court's joinder. See *Gwartz*, 23 F.3d at 1430.

² The other cases relied upon by the City are even more readily distinguishable. *Pimentel* was an interpleader action in which the parties *conceded* that the absent sovereign claiming an interest in the assets at issue was a required party under Rule 19(a). 553 U.S. at 864. And *Ray v. Judicial Corrections Services, Inc.*, No. 2:12-CV-02819-RDP, 2017 WL 660842 (N.D. Ala. Feb. 17, 2017) and *McMillian v. Johnson*, No. CV-93-A-699-N, 1994 WL 904652 (M.D. Ala. Feb. 18, 1994), were not Rule 19 cases at all but involved motions for summary judgment and to dismiss for failure to state a claim, respectively, which are more appropriate vehicles for resolving merits arguments like the ones the City raises.

App. 10

Because the municipal court is not a required party under Rule 19(a), the Court need not address whether dismissal is required under Rule 19(b). The City's motion must be denied. In light of the extensive briefing submitted on these issues, oral argument is unnecessary.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendant's motion to dismiss Counts I through III and V through VII, and motion for a hearing, are both **DENIED**. ECF Nos. 223 & 226.

/s/Audrey G. Fleissig
AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this 6th day of August, 2019.

App. 11

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-1472

[Filed January 10, 2019]

Keilee Fant, individually and)
on behalf of all others similarly)
situated; Roelif Carter; Allison)
Nelson; Herbert Nelson, Jr.;)
Alfred Morris; Anthony Kimble;)
Donyale Thomas; Shameika)
Morris; Daniel Jenkins; Ronnie)
Tucker; Tonya DeBerry,)
)
<i>Plaintiffs - Appellees,</i>)
)
v.)
)
City of Ferguson, Missouri,)
)
<i>Defendant - Appellant.</i>)

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: September 28, 2018

Filed: January 10, 2019

Before COLLOTON, GRUENDER, and GRASZ, Circuit Judges.

COLLOTON, Circuit Judge.

Keilee Fant and ten others brought a putative class action against the City of Ferguson, alleging several constitutional violations under 42 U.S.C. § 1983. The City moved to dismiss six of seven counts based on sovereign immunity. The district court¹ denied the motion, and the City seeks interlocutory review of this decision. Because the City disclaims any sovereign immunity for itself, and seeks only to invoke the sovereign immunity of a nonparty, we dismiss the appeal for lack of jurisdiction.

The six counts at issue stem from the City's alleged detention of plaintiffs for their inability to pay traffic fines. The City's motion to dismiss argued that sovereign immunity barred those claims because the alleged injuries are attributable to the Ferguson Municipal Court, which the City says is an arm of the State of Missouri. The district court denied the motion, concluding the City is not entitled to sovereign immunity, and that the amended complaint sufficiently alleges that the plaintiffs' injuries are attributable to the City.

Given that the litigation continues in the district court, the parties dispute whether there is a "final decision" over which this court has appellate

¹ The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

jurisdiction. *See* 28 U.S.C. § 1291. The City invokes the well-established principle that an order denying a claim of sovereign immunity is subject to interlocutory appeal under the collateral order doctrine. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993). That principle, however, does not apply where the party appealing disclaims any immunity of its own and instead seeks to invoke the immunity of a nonparty. Sovereign immunity protects certain entities against the indignity of suit and the burdens of litigation, *see id.* at 143-44, 146, but this justification for an exception to the final order rule is inapplicable where the claimed sovereign is not a party to the action. The City here does not claim an immunity of its own and instead asserts immunity of the Ferguson Municipal Court. The municipal court is not a party to the action, and we lack jurisdiction on this appeal to address any potential claim of immunity by the municipal court that might arise in future litigation.

The City points out that this court exercised jurisdiction in *Webb v. City of Maplewood*, 889 F.3d 483 (8th Cir. 2018), where a city claimed sovereign immunity on the ground that a municipal court—allegedly an arm of the State—was the real party in interest. *Id.* at 485-86. In *Webb*, however, the city asserted its *own* alleged sovereign immunity. We exercised jurisdiction to determine whether there was merit to the city's claim that it was immune from suit. Here, by contrast, the City does not assert sovereign immunity of its own.

App. 14

For these reasons, the City's interlocutory appeal is dismissed for lack of jurisdiction. The City's motion for judicial notice and conditional motion to remand are denied.

App. 15

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 18-1472

[Filed January 10, 2019]

Keilee Fant, individually and)
on behalf of all others similarly)
situated; Roelif Carter; Allison)
Nelson; Herbert Nelson, Jr.;)
Alfred Morris; Anthony Kimble;)
Donyale Thomas; Shameika)
Morris; Daniel Jenkins; Ronnie)
Tucker; Tonya DeBerry,)
)
Plaintiffs - Appellees,)
)
v.)
)
City of Ferguson, Missouri,)
)
Defendant - Appellant.)

Appeal from U.S. District Court for the Eastern
District of Missouri - St. Louis
(4:15-cv-00253-AGF)

JUDGMENT

Before COLLOTON, GRUENDER and GRASZ, Circuit
Judges.

App. 16

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed for lack of jurisdiction in accordance with the opinion of this Court.

January 10, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 4:15-CV-00253-AGF

[Filed February 13, 2018]

KEILEE FANT, et al.,)
)
Plaintiffs,)
)
vs.)
)
THE CITY OF FERGUSON,)
)
Defendant.)

MEMORANDUM AND ORDER

Plaintiffs in this putative class action claim that they have been jailed by Defendant, the City of Ferguson (the “City”), on numerous occasions because they were unable to pay cash bonds or other debts owed to the City resulting from their traffic and other minor offenses. Plaintiffs allege that, in violation of the United States Constitution and as a matter of the City’s policies and practices, they were not afforded counsel, any inquiry into their ability to pay, or a neutral finding of probable cause in a prompt manner;

and they were held in jail indefinitely, in overcrowded and unsanitary conditions, until they or their friends or family members could make a monetary payment sufficient to satisfy the City. Plaintiffs' amended complaint asserts seven claims pursuant to 42 U.S.C. § 1983, under the Fourth, Sixth, and Fourteenth Amendments.

The City moves to dismiss, on sovereign immunity grounds, all claims in Plaintiffs' first amended complaint except the claim relating to conditions of confinement (Count IV). For the reasons set forth below, the Court will deny the City's motion.

To survive a motion to dismiss for failure to state a claim, a plaintiff's allegations must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly*, 550 U.S. at 556. The reviewing court must accept the plaintiff's factual allegations as true and construe them in plaintiff's favor, but it is not required to accept the legal conclusions the plaintiff draws from the facts alleged. *Iqbal*, 556 U.S. at 678; *Retro Television Network, Inc. v. Luken Commc'ns, LLC*, 696 F.3d 766, 768-69 (8th Cir. 2012). A court must "draw on its judicial experience and common sense," and consider the plausibility of the plaintiff's claim as a whole, not the plausibility of each individual allegation. *Zoltek Corp. v. Structural Polymer Grp.*, 592

F.3d 893, 896 n.4 (8th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

This is the third motion to dismiss filed by the City, and this motion asserts arguments similar to the ones raised in a prior motion (ECF No. 57), but reframes them in terms of sovereign immunity. In short, the City argues that Plaintiffs' constitutional challenges are directed to the conduct of the municipal court only, and that, therefore, their claims are barred by the Eleventh Amendment's sovereign immunity doctrine because the municipal court is an arm of the state under Missouri law. As the undersigned has held in this case, and as other judges in this District have held with respect to nearly identical complaints and motions to dismiss, the complaint here alleges that the challenged conduct was and is driven by policies and practices implemented by the City for the purpose of increasing revenue. In addition to conduct undertaken by the municipal court, the complaint alleges that the City's unlawful policies and practices are executed through its clerk, police department, and city attorney, all of whom act under the authority of the city council. Thus, the complaint sufficiently claims that Plaintiffs were subjected to unlawful conduct carried out pursuant to the unconstitutional policies and practices of the City, which is not entitled to Eleventh Amendment protection. *See, e.g.*, ECF No. 79; *Webb v. City of Maplewood, Mo.*, No. 4:16-CV-1703 CDP, 2017 WL 2418011, at *6 (E.D. Mo. June 5, 2017); *Baker v. City of Florissant*, No. 4:16-CV-1693 NAB, 2017 WL 6316736, at *6 (E.D. Mo. Dec. 11, 2017).

The City's argument that the doctrines of absolute judicial, prosecutorial, and quasi-judicial immunity bar Plaintiffs' municipal liability claims likewise fails. Although the City attempts to limit potential liability to individual actors, such as the municipal judge, court clerk, prosecutor, and police officers to whom these immunity doctrines may apply, the amended complaint alleges that it was the City's unconstitutional policies, practices, and procedures that drove the unlawful conduct. Unlike government officials, municipalities do not enjoy absolute or qualified immunity from constitutional claims brought under 42 U.S.C. § 1983. *Sample v. City of Woodbury*, 836 F.3d 913, 917 (8th Cir. 2016) (citing *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980)).

Finally, the City correctly asserts that, where a plaintiff brings his § 1983 claims under a theory of municipal liability based on the decision of an official responsible for establishing final policy, the identification of the final policymaker "is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." *Soltesz v. Rushmore Plaza Civic Ctr.*, 847 F.3d 941, 946 (8th Cir. 2017). But even if identification of the policymaker is ultimately required in this case based on the theories of municipal liability asserted, the Court does not believe that it is required at this stage. *See, e.g., Hoefling v. City of Miami*, 811 F.3d 1271, 1279–80 (11th Cir. 2016) (holding that "not all theories of municipal liability under § 1983 require (or depend on) a single final policymaker," and identification of a final policymaker

is not required at the pleading stage, provided that the complaint sufficiently alleges "a policy, practice, or custom of the City" that caused the constitutional violation).

In light of the extensive briefing submitted on these issues, the Court finds that oral argument is unnecessary.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendant's corrected motion to dismiss Plaintiffs' first amended complaint, and motion for a hearing, are both **DENIED**. ECF Nos. 150 & 165.

IT IS FURTHER ORDERED that the stay previously entered is lifted, and, no later than **seven days** from the date of this Memorandum and Order, the parties shall submit a joint proposed scheduling plan for the remainder of this litigation, which addresses the filing deadline and briefing schedule for any motion for class certification; the parties' positions concerning the referral of this action to mediation and when such a referral would be most productive; and any other appropriate deadlines and dates in the current Case Management Order, including a proposed trial date.

IT IS FURTHER ORDERED that the current trial setting of April 9, 2018, is **VACATED**, to be reset as appropriate in accordance with the parties' joint proposed scheduling plan.

App. 22

/s/Audrey G. Fleissig
AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this 13th day of February, 2018.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2939

[Filed November 15, 2019]

Keilee Fant, individually and)
on behalf of all others similarly)
situated, et al.)

Appellees)

Tonya DeBerry)

John R. Narayan, personal)
representative of the estate of)
Tony DeBerry, Deceased)

Appellee)

v.)

City of Ferguson, Missouri)

Appellant)

Appeal from U.S. District Court for the Eastern
District of Missouri - St. Louis
(4:15-cv-00253-AGF)

App. 24

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 15, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

U.S. Const. Amend. XI

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Notes of Decisions (5513)

U.S.C.A. Const. Amend. XI, USCA CONST Amend. XI
Current through P.L. 116-91. Some statute sections
may be more current, see credits for details.

APPENDIX G

42 U.S.C.A. § 1983. Civil action for deprivation of rights

Effective: October 19, 1996

<Notes of Decisions for 42 USCA § 1983 are displayed in six separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For additional Notes of Decisions, see 42 § 1983, ante.>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

App. 27

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Notes of Decisions (5997)

42 U.S.C.A. § 1983, 42 USCA § 1983

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

APPENDIX H

Fed. R. Civ. Proc. 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cause No.: 18-1472

[Filed July 26, 2018]

KEILEE FANT,)
et al.)
)
Appellees,)
)
vs.)
)
THE CITY OF FERGUSON,)
)
Appellant.)

**FERGUSON'S CONDITIONAL MOTION UNDER FED. R.
CIV. P. 19 TO REMAND WITH INSTRUCTIONS TO
DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY**

Introduction

Currently pending in this Court is Ferguson's appeal asking it to rule that sovereign immunity bars the lawsuit of appellees Keilee Fant, et al. (collectively "Motorists") since, in its view, the municipal court division within Ferguson is the real party in interest. In response, Motorists contend that Ferguson as a municipal corporation, rather than the municipal court

division, is the real party in interest, and that because they have not sued the municipal court division, sovereign immunity does not bar their lawsuit against Ferguson as a municipal corporation.

Should this Court agree with Motorists and reject Ferguson's primary arguments by concluding that the municipal court division is not, in fact, the real party in interest in this matter – and consequently is not included within Motorists' definition of "the City of Ferguson" – this Court should nevertheless decide the issue of whether the municipal court is a required party which cannot be joined under Fed. R. Civ. P. 19, and if in fact it cannot be joined, remand with instructions that the district court dismiss this matter for failure to join a required party. At the very least, this Court should instruct the district court to order briefing on this issue and dispose of it prior to allowing this litigation to proceed any further.

Joinder under Rule 19 is a question that may be raised at any time, even for the first time on appeal. *See, e.g., Davis v. U.S.*, 192 F.3d 951, 962 n. 13 (10th Cir. 1999). Nor is that all – the Supreme Court has also instructed that Rule 19's concerns are particularly critical where the litigation may implicate a non-joined party's sovereign immunity. *See Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008). Given these concerns – along with expediency and judicial efficiency – this issue of joinder under Rule 19 is one that can and should be decided by the Court at this stage – particularly if it agrees with Motorists' position. If needed, this Court should also order supplemental briefing on this question.

Overview of Rule 19

Under Fed. R. Civ. P. 19,¹ a court must dismiss an action if a required party to the lawsuit has not been joined, and the party is unable to be joined for jurisdictional reasons. This issue is not waivable, and a defendant may raise it at any time, even – as in this case – for the first time on appeal. See, e.g., *Davis v. U.S.*, 192 F.3d 951, 962 n. 13 (10th Cir. 1999). A court should also consider sua sponte whether such dismissal is mandated. See *Pimentel*, 553 U.S. 851, 862 (2008); see *Thiophlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1241 (10th Cir. 2014).

The Supreme Court has concluded that Rule 19's concerns are of particular importance where a non-party's sovereign immunity may be implicated by the litigation. "A case may not proceed when a required-entity sovereign is not amenable to suit." *Pimentel*, 553 U.S. at 867. A non-sovereign party formally named to the lawsuit, furthermore, may argue for dismissal on the ground that the absent party's sovereign immunity is implicated. See *id.* at 862 (ruling that non-sovereign bank could move for dismissal under Rule 19 on grounds that the litigation implicated the sovereign immunity concerns of the Republic of the Philippines). Indeed, "[t]he burden is on the moving party to show the nature of the unprotected interests of the absent party." *H.S. Resources, Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003) (quoting Wright & Miller, *Federal Practice & Procedure* § 1359 at 426).

¹ For this Court's convenience, Ferguson has attached the entire text of Fed. R. Civ. P. 19 as an exhibit to this motion.

Whether Rule 19 mandates dismissal consists of a two-step inquiry. First, the court must examine whether the unnamed party's joinder is required. Rule 19(a)(1). Joinder is required when complete relief cannot be accorded among the existing parties in the non-joined party's absence. Rule 19(a)(1)(A). Alternatively, joinder is required if evidence exists demonstrating the absent party claims an interest relating to the subject of the litigation, and is situated in such a manner that disposing of the case in that party's absence will impede its ability to protect that interest. See Rule 19(a)(1)(B)(i); see *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001).

If the court determines that an absent party's joinder is required under one of the above conditions, but that it nevertheless cannot be joined, it must then "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b). Factors for a court to consider in making this determination include "(1) the nature to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by [protective provisions, shaping the relief, or other measures]," as well as "(3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." *Id.* But these factors are not exclusive. *Pimentel*, 553 U.S. at 862. This Court, furthermore, has strongly suggested that *Pimentel's* emphasis on the importance of sovereign immunity under Rule 19 "appear[s] to diminish the significance of the other

Rule 19(b) factors....” *Two Shields v. Wilkinson*, 790 F.3d 791, 798 (8th Cir. 2015).

The Municipal Court Division Is a Required Party Under Rule 19(a)

A. In the municipal court division’s absence, Motorists cannot obtain complete relief. (Rule 19(a)(1)(A)).

Rule 19 mandates the joinder of parties “who should or must take part in the litigation to achieve a just adjudication.” *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90 (2005) (internal quotation marks and brackets omitted). If the plaintiffs cannot recover their claimed damages without the absent party, that party’s joinder is required under Rule 19(a)(1). See *Yankee Supply Co. v. Steven Cox, Inc.*, 2007 WL 892416 at *2 (E.D. Mo. March 22, 2007); see also *Wilkinson*, 790 F.3d at 796 (ruling dismissal was required where the plaintiffs sought monetary damages and could only prevail if they showed the United States, an unnamed party, breached its fiduciary duty). While Rule 19 is procedural, and does not affect the merits of a lawsuit, determining whether complete relief can be accorded among the existing parties without the absent party “may require some preliminary assessment of the merits of certain claims.” See *Pimentel*, 553 U.S. at 867; see also *Mitchell v. Forsyth*, 472 U.S. 511, 528-529 (1985) (“[T]he Court has recognized that a question of immunity is separate from the merits of the underlying actions for purposes of [the collateral order doctrine] even though a reviewing court must consider the plaintiff’s factual allegations in resolving the immunity issue.”).

Motorists and the Class they purport to represent cannot recover the relief they seek in the absence of the municipal division as a joined party because recovery cannot be had against a governmental entity – be it state or local – for alleged unconstitutional deprivations in the absence of an unlawful policy or custom. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); see *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978). A local government, furthermore, can only be liable for deprivations resulting from an unlawful policy or custom where it is a final policymaker “in a particular area, or on a particular issue.” See *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997). This analysis is dependent upon state law and the function in question, not upon an “all-or-nothing” approach that would make the official in question part of the State or the relevant local entity in every single circumstance. See *id.* at 785-786.

Motorists seek monetary damages resulting from the issuance of arrest warrants for failure to appear at court proceedings, the alleged refusal to appoint counsel, the setting or revoking of bonds on arrest warrants, the imposition of fines on ordinance violations, and the setting of payment plans on such fines. But as copiously discussed in Ferguson’s opening brief (“App.Br.”), Ferguson as a municipal corporation has no legal control over the judicial or quasi-judicial functions of the municipal court division. (App.Br. at 49-56). Furthermore, “[t]here are no de facto policymakers – only de jure.” *Soltész v. Rushmore Plaza Civic Ctr.*, 847 F.3d 941, 948 F.3d 941, 948 (8th Cir. 2017). Accordingly, Motorists cannot obtain the

monetary damages they are seeking absent the joinder of the municipal court division, rendering it a required party under Rule 19(a)(1)(A). The question of whether the municipal court division violated Motorists' constitutional rights "cannot be tried behind its back." See *Wilkinson*, 790 F.3d at 769 (internal quotation marks omitted).

The inability of Motorists to be accorded complete relief in the municipal court division's absence is particularly apparent in light of their requested injunctive relief. Motorists seek a declaratory judgment that Ferguson violates their rights through the above judicial and quasi-judicial actions, along with an injunction barring the City from taking such actions in the future without taking into consideration their status as indigents. (1 J.A. at 319-323). But the only entity with the legal authority to change these actions is the municipal court division, not Ferguson as a municipal corporation. Consequently, the municipal division is a required party to this lawsuit if Motorists are to obtain the injunctive relief they desire.

The Eleventh Circuit held as much in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263 (11th Cir. 2003). There, the plaintiffs sought injunctive relief directing that a particular advertisement be run in a group of bus shelters, but the formally-named defendant had no legal authority to put up the advertisement in question. *Id.* at 1279-1280. The court concluded that the plaintiffs could not be accorded complete relief without the absent private company being a defendant, and consequently ordered it joined to the lawsuit. *Id.* at 1280. Likewise, since the

municipal court division alone has the legal authority over the judicial and quasi-judicial actions at issue, Motorists cannot be accorded complete relief in the absence of that entity, it a required party under Rule 19(a)(1)(A).

B. Proceeding with this litigation in the municipal court division's absence will implicate its interest in controlling its own judicial and quasi-judicial actions and decisions. (Rule 19(a)(1)(B)(i)).

An unnamed party's joinder is also required if disposing of the litigation in its absence may implicate its claimed interests in the subject of the litigation. Rule 19(a)(1)(B)(i). Presumably, even Motorists would concede that the municipal court division has an interest the subject giving rise to this lawsuit. After all, their complaint is centered entirely around the subject of that entity's judicial and quasi-judicial actions – that is, the issuance of arrest warrants for failure to appear at court proceedings, the alleged refusal to appoint counsel, the setting or revoking of bonds on arrest warrants, the imposition of fines on ordinance violations, and the setting of payment plans on such fines. The municipal court division isn't merely vested under Missouri law with an interest in the subject of this lawsuit – that court division is the subject of this lawsuit.

This Court held as much in *Wilkinson*. There, two Native Americans had interests in lands allotted to them by the United States. *Wilkinson*, 790 F.3d at 792. Several private entities submitted bids for oil and gas mining rights to the land in question, and the United

States awarded those rights to the private entities. *Id.* The Native Americans brought a class action lawsuit only against the private entities, and not the United States. *Id.* at 792-793. They claimed that the private entities induced the United States to breach its fiduciary duties to Native Americans by illegally awarding the gas and mining rights to the private entities. *Id.*

On appeal, this Court ruled that the district court properly dismissed the lawsuit for failure to join the United States as required party, and that because sovereign immunity barred suit against the United States, the litigation could not go forward. *Id.* It noted that the United States plainly had an interest in the subject giving rise to the litigation, since the only way the plaintiffs could prevail would be by finding that the United States breached its fiduciary duty to them. *Id.* at 796. Adjudicating this issue without its participation, furthermore, would mean that “any determination that particular lands had been illegally titled would potentially cloud the validity of many of the land grants approved by the government.” *Id.* “The potentially far reaching effects of any decision absent governmental participation show how different the interests of the United State are from those of a typical third party which claims no interest beyond contesting allegations about its own improper conduct.” *Id.* This issue about the United States’ liability could not “be tried behind its back.” *Id.* (internal quotation mark omitted).

The position of the municipal court division here is no different than that of the United States in

Wilkinson. Motorists allege that Ferguson controls the municipal court division and pressured it to take unconstitutional judicial and quasi-judicial actions, just as the plaintiffs in *Wilkinson* alleged the private entities induced the United States to take illegal actions and breach its fiduciary duty to them. Without the participation of the municipal court division, any determination that that entity's judicial or quasi-judicial actions were illegal will cloud the validity of how it adjudicates and rules in the cases on its docket. Just as the plaintiffs in *Wilkinson* could not litigate the liability of the United States behind its back by naming the private entities as the sole defendants, so too Motorists cannot litigate the liability of the municipal court division behind its back by naming the municipal corporation of Ferguson as the sole defendant. The municipal court division's interests in overseeing the carrying out of its judicial and quasi-judicial actions make it a required party in this lawsuit.

**Because Sovereign Immunity Bars the
Municipal Court Division's Joinder, Motorists'
Lawsuit Must be Dismissed**

If a party is required to be joined under Rule 19(a), but nevertheless cannot be joined, the court must then proceed to Rule 19(b) to determine whether the lawsuit nevertheless may continue "in equity and good conscience." *Pimentel*, 553 U.S. at 862-863. "A case may not proceed when a required-entity sovereign is not amenable to suit." *Id.* at 867. "[D]ismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.*

Having determined in *Wilkinson* that the United States was a required party under Rule 19(a), this Court went on to rule that because sovereign immunity barred the United States from being joined, and its joinder was required for the lawsuit to proceed, the suit had to be dismissed. *Wilkinson*, 790 F.3d at 797-798. What's more, this Court rejected the plaintiffs' argument that because the United States had never moved to intervene in the lawsuit, the non-sovereign defendants had failed to demonstrate the United States would suffer any prejudice if the litigation proceeded. *Id.* at 799. "The United States enjoys sovereign immunity for appellants' claims and can decide itself when and where it wants to intervene." *Id.*

In a sentence that could be applied almost verbatim to Motorists' lawsuit, this Court concluded in *Wilkinson* that, given the United States' sovereign immunity, grounds for dismissal under Rule 19(b) were "particularly strong here, where the wrongful conduct the [private entities] are alleged to have committed was inducing the United States to breach its fiduciary duty to ensure that all leases are in the Indians' best interest; all liability is therefore contingent upon evaluation of the actions of the United States." *See id.* at 798.

One could easily rewrite this holding to say the following for this lawsuit: given the sovereign immunity of the municipal court division, dismissal under Rule 19(b) "is particularly strong here, where the wrongful conduct that Ferguson as a municipal corporation is alleged to have committed was inducing the municipal court division to violate Motorists'

constitutional rights by issuing arrest warrants for failing to appear at court hearings, refusing to appoint them counsel, imposing excessive fines or bonds on them, and jailing them for failing to pay such bonds or fines; all liability is therefore contingent upon an evaluation of the actions of the municipal court division.”

Opposing counsel might attempt to argue that dismissal is not mandated because, following a suggestion made in *Webb v. Maplewood*, any sovereign party could object to a third party subpoena on the ground of sovereign immunity, and the district court could “address in the first instance whether the subpoena can be quashed on that ground.” *Webb v. Maplewood*, 889 F.3d 483, 488 (8th Cir. 2018). But this Court’s own precedent plainly demonstrates that any such objection would be futile, as it has ruled that “[t]here is simply no authority for the position that the Eleventh Amendment shields government entities [as third parties] from discovery in federal court.” *In re Missouri DNR*, 105 F.3d 434, 436 (8th Cir. 1997) (citing *Alltel Comn., LLC v. DeJordy*, 675 F.3d 1100, 1104-1105 (8th Cir. 2012).

Indeed, *Dejordy* – the very case *Webb* cited in support of its suggestion that the district court could decide on remand whether to sustain a sovereign immunity objection to a third party subpoena – supports this conclusion. In *DeJordy*, this Court ruled that the tribe’s objection should have been sustained on sovereign immunity grounds, but only because “tribal immunity is not congruent with that which the Federal Government, or the States, enjoy.” *Dejordy*, 675 F.3d at

1104 (internal quotation marks omitted). It then concluded that *Missouri DNR* was not controlling in the context of tribal sovereign immunity, as opposed to a state's assertion of sovereign immunity. *See id.* at 1104. In light of these holdings, it is difficult to see how the district court, on remand, would be willing to sustain any sovereign immunity objection to a third party subpoena issued to the municipal court division.

There is no question that the municipal court division is a required party under Rule 19(a). But, because it is entitled to sovereign immunity, it cannot be joined, mandating dismissal of this case under Rule 19(b).²

² A strong argument can be made that a district court's denial of a Rule 19 motion to dismiss for failure to join a required, absent party entitled to sovereign immunity satisfies the collateral order doctrine's three-part test for an interlocutory appeal. *See Sanford v. Maid-Rite Corporation*, 816 F.3d 546, 549 (8th Cir. 2016) (ruling that to be eligible for an interlocutory appeal an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of an action, and [3] be effectively unreviewable on appeal from a final judgment.") (internal quotation marks omitted).

This is so because (1) the denial of a motion to dismiss under Rule 19 conclusively determines whether the lawsuit can proceed in the absence of the non-joined party; (2) whether Rule 19 mandates dismissal is a procedural issue separate from a lawsuit's merits, *Pimentel*, 553 U.S. at 862; and (3) *Pimentel* held that merely allowing that case to proceed on the merits violated the absent parties' sovereign immunity and interests, *see id.* at 867 ("[The lower court's] decision to *proceed* in the absence of the [sovereign entities] ignored the substantial prejudice those entities would likely incur.") (Emphasis added).

Conclusion

Accordingly, in the event this Court rejects Ferguson's primary arguments in its briefing about the municipal court division being the real party in interest, Ferguson moves that this Court remand this matter to the district court with instructions that it dismiss for failure to join a required party under Rule 19 or, at the very least, direct the district court to order briefing on this matter and dispose of it prior to this litigation proceeding any further.

Respectfully submitted,

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* * *

*[Certificate of Compliance and Certificate of Service
Omitted in the Printing of this Appendix]*

APPENDIX J

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-1472

[Filed August 8, 2018]

Keilee Fant, individually and)
on behalf of all others similarly)
situated, et al.)
)
Appellees)
)
v.)
)
City of Ferguson, Missouri)
)
Appellant)
)

Appeal from U.S. District Court for the Eastern
District of Missouri - St. Louis
(4:15-cv-00253-AGF)

ORDER

The City's Conditional Motion to Remand will be taken with the case for consideration by the panel after oral argument.

August 08, 2018

App. 46

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans