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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-1965

JAMES M. PERNA, *Plaintiff-Appellant*,

v.

HEALTH ONE CREDIT UNION;
NATIONAL CREDIT UNION ADMINISTRATION;
NATIONAL CREDIT UNION ADMINISTRATION BOARD, *Defendants-Appellees*.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit,
No. 2:19-cv-10001—Arthur J. Tarnow, District Judge.

Argued: February 6, 2020.

Decided and Filed: December 21, 2020.

Before: SUHRHEINRICH, DONALD, and MURPHY, Circuit Judges

ARGUED: Cindy Rhodes Victor, KUS RYAN, PLLC, Auburn Hills, Michigan, for Appellant.

Emily C. Palacios, MILLER, CANFIELD, PADDOCK & STONE, P.L.C., Ann Arbor, Michigan, for Appellees.

ON BRIEF: Cindy Rhodes Victor, KUS RYAN, PLLC, Auburn Hills, Michigan, for Appellant.

Emily C. Palacios, Brian Schwartz, MILLER, CANFIELD, PADDOCK & STONE, P.L.C., Ann Arbor, Michigan, for Appellees.

OPINION

MURPHY, Circuit Judge. In recent decades the Supreme Court has cautioned courts not to mistake a forfeitable claims-processing rule (such as a rule that a party assert a claim within a specific time) for a non-forfeitable jurisdictional limit that deprives the court of the power to adjudicate the claim. *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848–50 (2019). Yet this cautionary note must not be overread: It does not permit us to ignore a clear jurisdictional limit that Congress has, in fact, imposed. *Id.* at 1850. And here, James Perna seeks to litigate a claim that Congress has "clearly" deprived us of jurisdiction to entertain. *Id.* (citation omitted).

Perna worked for Health One Credit Union, a federally insured but state-chartered credit union. A state regulator found that Health One had become financially unsound and appointed the National Credit Union Administration Board, a federal entity, as Health One's liquidator. The Board terminated Perna's employment. Perna has since sought damages in many ways, from filing a complaint with a state agency, to asserting a claim with the Board, to conducting an arbitration with an arbitration agency. In this suit, Perna seeks to modify the arbitration award by making the Board liable on it. But the Federal Credit Union Act provides that "no court shall have jurisdiction over" claims against covered credit unions asserted outside its exclusive framework. 12 U.S.C. § 1787(b)(13)(D). The district court thus held that it lacked jurisdiction over Perna's suit. We agree, although we clarify that

the court should have dismissed this suit for lack of subject-matter jurisdiction, not granted summary judgment to the defendants.

A complex overlay of federal law on top of state law applies to Michigan credit unions that are federally insured. First up is state law. The Michigan Credit Union Act governs most credit unions operating within the state. *See* Mich. Comp. Laws 490.101–.601. Michigan law places primary regulatory responsibility over these entities in the Director of the Department of Insurance and Financial Services (the "Director"). *Id.* §§ 490.102(n)–(o), .201(1). This law includes many rules tailored to Michigan-chartered credit unions. Among them, the Director must inspect the financial health of these state credit unions every 18 months. *Id.* § 490.207(1).

When the Director concludes that a Michigan credit union "is in an unsafe or unsound condition," the Director may appoint a conservator (to manage the credit union's affairs) or ask a state court to appoint a receiver (to liquidate the credit union). *Id.* § 490.232(1). A liquidating receiver has the power to control the credit union's property, oversee its business, and ultimately dissolve the entity. *Id.* §§ 490.231(1), .233–35. Michigan law permits the Director to appoint a federal agency as the receiver, which then incorporates "the receivership procedures of the federal agency[.]" *Id.* § 490.231(2). If the Director opts to initially appoint a conservator, the conservator has the same powers as a receiver except for the liquidation power. *Id.* § 490.242(1). After the conservator

has managed the credit union, the Director will decide whether to return it to normal operations or apply for a receiver to liquidate it. *Id.* § 490.245.

Next up is federal law. The Federal Credit Union Act governs federally chartered credit unions and state-chartered credit unions that participate in a federal insurance program like the well-known program for banks. *See* 12 U.S.C. §§ 1751–1795k. Federal law places primary regulatory responsibility for covered credit unions in the National Credit Union Administration, an agency managed by the National Credit Union Administration Board (the "Board"). *Id.* § 1752a(a). The Board has many oversight duties for federally chartered credit unions. *See*, *e.g.*, *id.* § 1766; *cf. id.* § 1771(a)(4). And once state credit unions opt to receive federal insurance, they become subject to many similar regulations. *See*, *e.g.*, *id.* §§ 1781(a)–(b)(2), 1785–86.

If a federally insured state credit union becomes financially insecure, the Board has the power to appoint itself as conservator or liquidating agent. *See id.* §§ 1786(h)(1), 1787(a)(3). Before taking that action, however, the Board must seek input from the credit union's state regulator. *See id.* §§ 1786(h)(2), 1787(a)(3), 1790d(l). When acting as a conservator or liquidating agent, the Board must manage the credit union and take control of its assets. *Id.* §§ 1786(h)(1), 1787(b)(2). Federal law also gives the Board the power to repudiate any of the credit union's contracts if the Board finds that they would be "burdensome." *Id.* § 1787(c).

When the Board acts as a credit union's "liquidating agent," it has the power to resolve "claims" against the credit union in accordance with a statutory framework. *Id.* § 1787(b)(3)(A). Creditors have a certain period to file claims from the date that the Board gives them notice, *id.* § 1787(b)(3)(B), and the Board may approve or deny them, *id.* § 1787(b)(5)(B), (D). When the Board denies a claim, the claimant has various routes to judicial review. *Id.* § 1787(b)(6)(A)(ii), (7)(A). Outside the specified routes, though, "no court shall have jurisdiction over" claims seeking the credit union's assets or challenging its actions. *Id.* § 1787(b)(13)(D).

B

This case concerns the now-defunct Health One Credit Union, a Michigan-chartered credit union that was federally insured. Initially hired in 1971, James Perna served as Health One's general manager for over 40 years. Perna signed a three-year employment agreement with Health One in 2009. This agreement contained an arbitration clause requiring Health One and Perna to arbitrate any disputes arising out of it. The parties twice renewed the contract, and it was set to expire at the end of 2015.

But Perna did not make it through that term. On May 16, 2014, the Michigan Director concluded that Health One had been operating in an "unsafe and unsound condition." *See* Mich. Comp. Laws §§ 490.232(1), .241(1). The Director appointed the federal Board as Health One's conservator. The same day, the Board

decided that Health One's contract with Perna was burdensome, repudiated his contract, and terminated his employment. *See* 12 U.S.C. § 1787(c)(1).

Health One's financial condition continued to deteriorate, so the Director asked a state court to appoint a receiver. In December 2014, the court issued an order appointing the Board as receiver. (Technically, the court appointed the National Credit Union Administration rather than its Board, as the court glossed over the distinction between this federal agency and its managing entity. 12 U.S.C. § 1752a(a). But neither party suggests that this naming difference matters to any issue in this case.) The same day that the Board was appointed as receiver, it sold Health One's assets to the New England Federal Credit Union.

C

After the Board repudiated Perna's contract, he pursued many routes seeking compensation from Health One or the National Credit Union Administration. All have come up short.

First, in October 2014, Perna filed a claim for unpaid benefits and expenses with the Michigan Department of Licensing and Regulatory Affairs. This agency dismissed Perna's claim without considering the merits. It reasoned that Perna's employment contract directed him to arbitrate disputes, and the agency's regulations required it to dismiss claims subject to arbitration.

Second, in May 2015, Perna submitted a claim to the Board under the claims-processing rules that apply when the Board acts as a credit union's liquidating agent. 12 U.S.C. § 1787(b)(5). Perna requested the benefits and expenses that he had sought with the state agency and the unpaid wages for the remainder of his contract term. The Board denied his claim as untimely because its notice to Health One's creditors required them to file claims by March 2015. *Id.* § 1787(b)(5)(C)(i). Perna moved for reconsideration, arguing that he fell within a safe harbor to this time limit for creditors who lacked notice. *Id.* § 1787(b)(5)(C)(ii). In February 2016, the Board denied Perna's claim because he had received actual notice of its appointment.

Third, over two years later in April 2018, Perna invoked his contract's arbitration clause to file a contract claim for unpaid wages and benefits with the American Arbitration Association. He named Health One and the National Credit Union Administration as defendants. Counsel for the defendants refused to participate. Because counsel had been notified, an arbitrator concluded that the arbitration could proceed. Perna and a former Health One board member testified at a hearing. The arbitrator found that Health One's firing of Perna had been "without cause" and triggered Perna's right to severance pay under the contract. The arbitrator awarded him $315,645.02. Yet this was a Pyrrhic victory. The arbitrator also found that this decision could bind only Health One (a defunct entity), not the National Credit Union Administration. He reasoned that the Board's role as Health One's

conservator at the time of Perna's firing had not made it a substitute party to the contract.

Fourth, in November 2018, Perna sued Health One and the National Credit Union Administration in state court, relying on state arbitration laws and court rules. Perna sought to confirm its award against Health One and modify the award by making the National Credit Union Administration subject to it. The defendants removed the suit to federal court, and the district court added the Board as a defendant.

The district court granted summary judgment to the defendants. *Perna v. Health One Credit Union*, 2019 WL 3081068, at *6 (E.D. Mich. July 15, 2019). It gave both a jurisdictional reason and a merits reason. As for jurisdiction, it relied on the claims-processing rules in 12 U.S.C. § 1787(b). Section 1787(b) made clear that, aside from its rules, courts lacked jurisdiction over any claim for payment from a credit union's assets. *Id.* § 1787(b)(13)(D). The court found Perna's suit to be such a claim. *Perna*, 2019 WL 3081068, at *3. As for the merits, Perna sought to modify the arbitration award on the ground that the arbitrator mistakenly ruled that the Board did not become Health One's successor. Even if the arbitrator was wrong, the court reasoned, this mistake would not provide a basis to overturn his decision. *Id.* at *4. After the court denied Perna's motion for reconsideration, Perna appealed.

II

At the outset, we must express doubt over whether the Board could remove this suit under the statutes on which it relied. Although neither side raised an objection to removal, we have an independent duty to assure ourselves of the district court's jurisdiction. *See In re DePuy Orthopaedics, Inc. ASR Hip Implant Prods. Liab. Litig.*, 953 F.3d 890, 893–94 (6th Cir. 2020); 14C Charles Alan Wright et al., *Federal Practice & Procedure* § 3739.1, at 775–76 (4th ed. 2018). A defendant may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The Board's notice of removal relied on three jurisdictional statutes: a statute for suits involving the Board, 12 U.S.C. § 1789(a)(2), the federal-question statute, 28 U.S.C. § 1331, and the federal-officer removal statute, 28 U.S.C. § 1442(a)(1). It is debatable whether these statutes apply here.

Start with the Board's specific jurisdictional statute. It contains a broad grant of jurisdiction to district courts for suits involving the Board. 12 U.S.C. § 1789(a)(2). It next allows the Board to remove any such suit to federal court. *Id.* But it then includes an exception to this removal power: A state "suit to which the Board is a party in its capacity as liquidating agent of a State-chartered credit union and which involves only the rights or obligations of members, creditors, and such State credit union under State law shall not be deemed to arise under the laws of the United States." *Id.* Perna's suit may well fall within this

exception. The Board is a party to Perna's suit "in its capacity as liquidating agent of" Health One. Perna's suit next might involve only "rights" and "obligations" under "State law" because he alleges a right to modify the arbitration award under Michigan arbitration law. Perna also might be characterized as a "creditor" of Health One in the word's "broad sense," which could cover anyone who asserts "any legal liability upon a contract" against another. *Black's Law Dictionary* 332 (5th ed. 1979). On the other hand, the word "creditor" could be defined narrowly as a "person to whom a debt is owing," *Black's, supra*, at 332, a definition that might exclude a claimant like Perna who has yet to prove his claim. *Cf. Wright v. Oakland Mun. Credit Union*, 2011 WL 2437370, at *3 (N.D. Cal. June 17, 2011); *see also Castleberry v. Goldome Credit Corp.*, 408 F.3d 773, 785 (11th Cir. 2005).

Perhaps the federal-question statute provides an easier path for removal? No. It gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It is not clear why Perna's suit "arises under" federal law. The Board argues that the suit meets this element because Perna relies on the state court's receivership order as the basis for its liability, and that order authorized the Board to use its powers under the Federal Credit Union Act. "Under the longstanding well-pleaded complaint rule, however, a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].'" *Vaden v. Discover*

Bank, 556 U.S. 49, 60 (2009) (quoting *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). Here, Perna's suit is based on *state* arbitration law. And even if the Board seeks to invoke its federal powers as a defense, such a defense would generally not show that a suit arises under federal law. *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10–11 (1983).

Maybe the federal-officer removal statute allows for easier answers? No again. It says that "[t]he United States or any agency thereof" may remove any "civil action" that is brought against it in state court "relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The Board argues that it may invoke this statute because the statute covers all federal agencies. But things are not so simple. If the Board is correct that it may rely on § 1442(a)(1) whenever 12 U.S.C. § 1789(a)(2)'s exception to removal would prevent the Board from removing a suit, what is left of that exception? Anytime a plaintiff relied on the exception, the Board could simply remove the suit under this general removal statute. But the specific typically governs the general. So perhaps § 1789(a)(2) should be read as the Board's exclusive party-based route to removal. *Cf. Preferred Care of Del., Inc. v. Estate of Hopkins*, 845 F.3d 765, 769 (6th Cir. 2017).

In the end, we only highlight these jurisdictional issues for future cases. The district court found that it lacked jurisdiction over Perna's suit for a more obvious reason: Apart from its comprehensive review scheme, the Federal Credit Union Act divests all courts of

jurisdiction over claims involving the assets of covered credit unions. And we have "discretion to address jurisdictional issues 'in any sequence we wish.'" *In re 2016 Primary Election*, 836 F.3d 584, 587 (6th Cir. 2016) (citation omitted); *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–85 (1999); 14C Wright, *supra*, § 3739.1, at 796–97. So we may safely leap ahead to the district court's jurisdictional rationale without resolving these preliminary jurisdictional questions.

III

A

After the savings and loan crisis of the 1980s, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183. This Act amended the Federal Credit Union Act (among other laws) by creating an exclusive framework through which creditors must pursue their claims against covered defunct credit unions. *See* 103 Stat. at 530–37 (adopting 12 U.S.C. § 1787(b)). This framework gets triggered when the Board acts as the liquidating agent of a "closed credit union[.]" 12 U.S.C. § 1787(b)(3)(B). The Board must "publish a notice to the credit union's creditors" and mail a similar notice to known creditors requiring them to present their claims to the Board within a certain time (which can be no shorter than 90 days from the date of the notice). *Id.* § 1787(b)(3)(B)(i), (C). Once a creditor submits a claim to the Board, the Board has 180 days to resolve it. *Id.* § 1787(b)(5)(A)(i), (B), (D). If a creditor has

already sued the credit union at the time that the Board becomes its liquidating agent, the Board may also ask the relevant court for a 90-day stay. *Id.* § 1787(b)(12).

When the Board denies a claim, a creditor may choose between two avenues of further review. The creditor may request an administrative hearing with the Board and obtain review of the Board's final decision under the Administrative Procedure Act. *Id.* § 1787(b)(6)(A)(ii), (7)(A). Or the creditor may skip this step and immediately bring suit (or continue a prior suit) on the claim. *Id.* § 1787(b)(6)(A)(ii). The creditor must choose either path quickly: It must request review within 60 days from the sooner of the Board's denial of the claim or the end of the 180-day period that the Board had to resolve it. *Id.* § 1787(b)(6)(A)(i)–(ii). If the creditor pursues neither path within that period, "the claim shall be deemed to be disallowed . . . as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim." *Id.* § 1787(b)(6)(B). (The law separately establishes an expedited review process for creditors that have security interests in the credit union's assets. *Id.* § 1787(b)(8)(C).)

Section 1787(b) creates the exclusive framework for judicial review. A subparagraph divests courts of jurisdiction to consider claims against the credit union in other ways:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent, including assets which the Board may acquire from itself as such liquidating agent; or
>
> (ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

Id. § 1787(b)(13)(D). Without this subparagraph, § 1787(b)'s framework might resemble the type of exhaustion mandate that the Supreme Court has recently treated as a nonjurisdictional (and forfeitable) claims-processing rule. *See*, *e.g.*, *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848–50 (2019); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511–12 (2014).

But § 1787(b)(13)(D)'s text shows that it is no mere claims-processing rule. Congress has "clearly" established that this restriction counts "as jurisdictional" by expressly labeling it as such. *Fort Bend County*, 139 S. Ct. at 1850 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006)).

Caselaw in an analogous context supports our jurisdictional reading of § 1787(b)(13)(D). The Financial Institutions Reform, Recovery, and Enforcement Act created a similar claims-processing framework for liquidating banks administered by the Federal Deposit Insurance Corporation ("FDIC"). 12 U.S.C. § 1821(d)(3)–(8). This similar banking framework

contains a nearly identical provision that deprives courts of "jurisdiction over" certain claims involving liquidating banks. *Id.* § 1821(d)(13)(D). And many circuit courts have read § 1821(d)(13)(D)'s text as limiting their subject-matter jurisdiction. *See Dernis v. Amos Fin.*, 701 F. App'x 449, 454–56 (6th Cir. 2017); *Village of Oakwood v. State Bank & Tr. Co.*, 539 F.3d 373, 385–86 (6th Cir. 2008); *see also MTB Enters., Inc. v. ADC Venture 2011-2, LLC*, 780 F.3d 1256, 1258–59 (9th Cir. 2015); *Miller v. FDIC*, 738 F.3d 836, 840–47 (7th Cir. 2013); *Acosta-Ramirez v. Banco Popular de Puerto Rico*, 712 F.3d 14, 20 (1st Cir. 2013); *Tellado v. IndyMac Mortg. Servs.*, 707 F.3d 275, 279–81 (3d Cir. 2013); *Home Cap. Collateral, Inc. v. FDIC*, 96 F.3d 760, 762–64 (5th Cir. 1996); *Tillman v. Resolution Tr. Corp.*, 37 F.3d 1032, 1036 (4th Cir. 1994); *Astrup v. Resolution Tr. Corp.*, 23 F.3d 1419, 1421 (8th Cir. 1994) (per curiam). The same is true of the similar provision in this case. *Compare* 12 U.S.C. § 1787(b)(13)(D), *with id.* § 1821(d)(13)(D).

Does Perna's claim fall within this jurisdiction-stripping provision? The provision's first clause fits Perna's suit like a glove. *Id.* § 1787(b)(13)(D)(i). Was the Board "appointed liquidating agent" of Health One? *Id.* Yes, it was appointed in December 2014. Is Perna's suit an "action for payment from" the "assets" of Health One? *Id.* Yes, Perna alleges that Health One owes him $315,645.02 in severance pay and related damages because it breached his contract by firing him. And Perna sued the National Credit Union

Administration because it took title to the Health One assets that he seeks. *Cf. Acosta-Ramirez*, 712 F.3d at 21.

Indeed, Perna himself believed at one time that § 1787(b)'s exclusive claims-processing framework applied to his claim against Health One. After all, he asserted a claim with the Board under that very framework in May 2015. In February 2016, the Board denied his claim because it was untimely under § 1787(b)(5)(C). If Perna sought to pursue this claim further, he could have requested administrative review or filed suit within 60 days. 12 U.S.C. § 1787(b)(6)(A)(ii). But Perna did neither. He instead waited two years to pursue arbitration. That choice came too late. *Id.* § 1787(b)(6)(B); *cf. Miller*, 738 F.3d at 845–46. And arbitration was the wrong forum. *See* 12 U.S.C. § 1787(b)(6)(A)(ii); *cf. MTB Enters.*, 780 F.3d at 1259. Because Perna pursues his claim against Health One in a manner that does not fall within § 1787(b)'s exclusive framework, the district court lacked "jurisdiction" to adjudicate the claim. 12 U.S.C. § 1787(b)(13)(D).

B

Perna's response? He does not dispute that § 1787(b)(13)(D) would bar his claim if Health One were covered by § 1787(b)'s framework. But he argues that this framework applies only when the Board liquidates a *federally chartered* credit union, not when it

liquidates a federally insured *state-chartered* credit union like Health One. Perna is mistaken.

Section 1787(b)(13)(D) covers all claims seeking "the assets of *any* credit union for which the Board has been appointed liquidating agent." *Id.* § 1787(b)(13)(D)(i) (emphasis added). Health One is such a credit union. And many surrounding provisions confirm that § 1787(b)'s framework applies when the Board acts as the liquidating agent of an insured state-chartered credit union. To name a few, § 1787(a)(3) indicates that the Board "may close any credit union for liquidation," but requires it to cooperate with state regulators "in the case of a *State-chartered* insured credit union[.]" 12 U.S.C. § 1787(a)(3) (emphasis added). Similarly, § 1786(h) allows the Board to act as a conservator of an insured state-chartered credit union in certain circumstances. *Id.* § 1786(h)(1)(A). This subsection later indicates that, "in the case of an insured State-chartered credit union," the Board may run the business as conservator "until such time" "as such credit union is liquidated in accordance with *the provisions of section 1787* of this title." *Id.* § 1786(h)(5)(C) (emphasis added). When, by contrast, subsections in § 1787 apply specifically to a "Federal credit union," they say so expressly. *See* 12 U.S.C. § 1787(a)(1)(A), (a)(2).

For his contrary view, Perna relies on two subsections in § 1787. He first cites § 1787(j), which directs the Board to accept an appointment as the liquidating agent of an insured state-chartered credit union when state regulators ask it to do so. *Id.* § 1787(j). The

subsection gives the Board "all the rights, powers, and privileges granted by State law to a liquidating agent of a State-chartered credit union." *Id.* According to Perna, when the Board accepts an appointment from state regulators (instead of appointing itself), the Board possesses only these state-law powers, not its normal federal powers. In other words, Perna reads § 1787(j) to *contract* the Board's authority. Yet the subsection could just as easily be read to *enlarge* that authority: It gives the Board both its normal federal powers and any additional state-law powers. Regardless, this argument would not help Perna. Michigan law incorporates "the receivership procedures of the federal agency" when it gets appointed as receiver. Mich. Comp. Laws § 490.231(2). Even under Perna's reading, then, § 1787(b)'s procedures apply in this case.

Perna next cites § 1787(c). It allows the Board to repudiate a contract that a credit union has entered. *Id.* § 1787(c)(1). Perna suggests that § 1787(b)'s claims-processing framework does not apply to claims brought under § 1787(c)(3) for damages from such a repudiation. Yet § 1787(c)(3) merely limits the damages available to those seeking redress for a repudiated contract. It nowhere exempts breach-of-contract claims from § 1787(b). Caselaw in the analogous banking context supports this view. That statutory scheme also gives the FDIC the ability to repudiate the contracts of liquidating banks. 12 U.S.C. § 1821(e). And another court has held that § 1821(d)'s claims-processing framework applies to breach-of-contract claims arising from a repudiation under § 1821(e). *See Battista v. FDIC*, 195

F.3d 1113, 1117–19 (9th Cir. 1999); *cf. Off. & Pro. Emps. Int'l Union, Local 2 v. FDIC*, 27 F.3d 598, 600 (D.C. Cir. 1994).

Unable to rely on § 1787, Perna turns to nearby sections. He starts with the Board's removal provision discussed above: 12 U.S.C. § 1789(a)(2). As noted, its exception excludes from the Board's removal power some state suits against the Board that involve only state-law issues. When would this provision ever allow plaintiffs to litigate in state court, Perna asks, if insured state-chartered credit unions were subject to § 1787(b)'s framework for liquidating credit unions? Fair point. But our caselaw in the analogous banking context provides the answer. Oftentimes a party might file a suit before the Board gets appointed receiver and so before § 1787(b)'s claims-processing rules get triggered. In that scenario, the preexisting court continues to have jurisdiction even after the appointment (subject to any potential stay). *Id.* § 1787(b)(12); *see In re Lewis*, 398 F.3d 735, 739–46 (6th Cir. 2005); *Holmes Fin. Assocs., Inc. v. Resolution Tr. Corp.*, 33 F.3d 561, 566–69 (6th Cir. 1994). We thus need not depart from § 1787(b)'s text to give meaning to § 1789(a)(2)'s exception to the Board's authority to remove state-law suits.

Perna also cites a provision that allows a federal credit union to become a state-chartered credit union, in which case the state-chartered credit union "shall no longer be subject to any of the provisions of this chapter." 12 U.S.C. § 1771(a)(4). This language shows that a state-chartered credit union is not *automatically* subject to the Federal Credit Union Act. But once such a

credit union decides to obtain federal insurance (as Health One did), it becomes subject to the federal laws that govern *federally insured* state credit unions, including § 1787(b).

Running out of legal points, Perna makes two factual points. He notes that his suit challenges the Board's action in repudiating his contract and that the Board took this action when it was Health One's *conservator*, not its *receiver*. That is beside the point. When the Board was later appointed as the liquidating agent, it triggered § 1787(b)'s claims-processing framework. And this framework applies to all claims against a defunct credit union whether or not the claim arose before the Board was appointed as the credit union's liquidating agent. *See*, *e.g.*, 12 U.S.C. § 1787(b)(3)(B)–(C); *cf. Tellado*, 707 F.3d at 280–81. Nothing in the text suggests that the framework applies only to claims accruing after that appointment.

Perna also argues that the Board did not send him the statutorily required notice triggering the deadline to file a claim under § 1787(b). *See* 12 U.S.C. § 1787(b)(5)(C)(ii). Maybe not. But he should have litigated his alleged lack of notice through the procedures that § 1787(b) permits—by suing within 60 days. *Id.* § 1787(b)(6)(A)(ii). Section 1787(b)(13)(D) prevents him from raising this challenge to the Board's decision years after the fact.

* * *

We conclude with two loose ends. The first: the merits. Perna spends much of his briefing explaining

why the district court should have confirmed and modified the arbitrator's award under Michigan law. Because we lack subject-matter jurisdiction over Perna's suit, however, we cannot consider his merits arguments. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). To do so would carry us "beyond the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers." *Id.*

The second: the proper judgment. When a district court finds that it lacks jurisdiction over a case that has been removed from a state court, Congress has instructed that "the case shall be remanded" to the state court. 28 U.S.C. § 1447(c). But our finding that the district court lacks jurisdiction also means that the state court does too. The Federal Credit Union Act's jurisdiction-stripping provision indicates that "no court," including a state court, has "jurisdiction" over claims subject to its framework. 12 U.S.C. § 1787(b)(13)(D). Because a remand would be futile, should we dismiss the suit outright? In another context, the Supreme Court has expressed skepticism over whether § 1447(c)'s remand requirement contains such a "futility" exception. *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991). Circuit courts have thus often rejected these sorts of futility arguments. *See Hill v. Vanderbilt Cap. Advisors, LLC*, 702 F.3d 1220, 1225–26 (10th Cir. 2012) (citing cases); 14C Wright, *supra*, § 3739.1, at 799–800. We, for example, remanded a suit to state court after we agreed with the defendants that the plaintiffs lacked Article III standing. *See Coyne v. Am. Tobacco Co.*, 183 F.3d 488,

496–97 (6th Cir. 1999). And there is something "anomalous" about the Board removing this suit to federal court on the ground that the court had jurisdiction and then arguing to the very same court that it lacks jurisdiction. *Cf. Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002).

Nevertheless, we have also held that "we should simply dismiss" a removed case when our holding conclusively establishes not just that we lack jurisdiction but also that the state court lacks jurisdiction as well. *Estate of West v. U.S. Dep't of Veterans Affs.*, 895 F.3d 432, 435 (6th Cir. 2018). In two cases involving the analogous banking regime, we upheld district-court decisions that refused to remand a suit previously removed by the FDIC because "no court had jurisdiction" over the suit. *Dernis*, 701 F. App'x at 454; *see Village of Oakwood*, 539 F.3d at 377, 384–87. Other courts have likewise refrained from ordering a remand when finding a lack of jurisdiction under that analogous banking regime. *See*, *e.g.*, *Seaway Bank & Tr. Co. v. J&A Series I, LLC*, 962 F.3d 926, 932 (7th Cir. 2020); *Acosta-Ramirez*, 712 F.3d at 17, 21; *Tellado*, 707 F.3d at 278, 281; *Tillman*, 37 F.3d at 1034, 1036. And Perna does not argue that we should remand to state court (rather than dismiss) if we conclude that we lack jurisdiction. Given these prior decisions and Perna's failure to object to a dismissal, we will dismiss (not remand) this case. Yet we remind litigants that state tribunals are adequate venues for resolving federal questions. *See Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990); U.S. Const. art. VI, cl. 2.

That said, the district court did not dismiss this suit for lack of jurisdiction; it granted summary judgment to the defendants. A summary-judgment motion generally "is an inappropriate vehicle for raising a question concerning the court's subject-matter jurisdiction[.]" 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2713, at 269 (4th ed. 2016). That motion seeks a ruling on the merits, not a ruling that the court lacks the power to resolve the merits. *See Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993) (per curiam); *see also*, *e.g.*, *Hayden v. Sec'y of Dep't of Veterans Affs.*, 1999 WL 313890, at *1 (6th Cir. May 4, 1999); *Capitol Indus.-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir. 1982). A party challenging the court's jurisdiction should instead file a motion to dismiss for lack of jurisdiction, a motion that may be filed at any time. Fed. R. Civ. P. 12(b)(1), (h)(3). But the district court's labeling error was harmless, and we may modify the judgment to clarify its nature. 28 U.S.C. § 2106; *see also*, *e.g.*, *Ednacot v. Mesa Med. Grp., PLLC*, 790 F.3d 636, 640 (6th Cir. 2015); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir.1985) (per curiam).

In sum, we agree with the district court that it lacked subject-matter jurisdiction. But we modify its judgment from a grant of summary judgment to a dismissal for lack of subject-matter jurisdiction. As modified, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 19-10001

JAMES M. PERNA,
Plaintiff,

v.

HEALTH ONE CREDIT UNION, ET AL.,
Defendants.

SENIOR U.S. DISTRICT JUDGE
ARTHUR J. TARNOW

U.S. MAGISTRATE JUDGE
ANTHONY P. PATTI

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION [25]

(Filed Aug. 5, 2019)

Plaintiff, James Perna, brought this suit to enforce an arbitration award against his former employer, Defendant Health One Credit Union ("HOCU"), and the National Credit Union Administration Board ("NCUA Board"), the federal agency that liquidated the credit union. The parties filed cross-motions for summary judgment, and, on July 15, 2019, the Court granted Defendants' motion and denied the Plaintiff's motion. [Dkt. # 23]. Plaintiff now moves the Court to reconsider its July 15 holding and judgment.

LEGAL STANDARD

The Local Rules for the Eastern District of Michigan provide as follows.

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.

L.R. 7.1(h) (3).

"A palpable defect is a defect which is obvious, clear, unmistakable, manifest or plain." *Fleck v. Titan Tire Corp.,* 177 F. Supp. 2d 605, 624 (E.D. Mich. 2001) (internal citations and quotations omitted).

ANALYSIS

The Court based its July 15, 2019 ruling on two grounds. The first was the Court's limited jurisdiction to review a claim of action for payment from the assets of a credit union over which the NCUA Board had been appointed a liquidating agent. *See* 12 U.S.C. § 1787(b)(13)(D). The second was the Court's limited power under the Federal Arbitration Act to add a party to an arbitration award and then enforce the award against that party. Plaintiff now argues that Michigan

law, not federal law, should control the outcome of this suit, and that such a choice-oflaw shift would lead to a holding in his favor.

First, the FCUA explicitly limits the Court's ability to review NCUA Board action in cases such as this. The NCUA liquidated HOCU's assets according to statute and denied Mr. Perna's administrative claim for unpaid wages and fringe benefits as untimely under § 1787(b)(5). § 1787(b)(5)(D) provides that "[t]he liquidating agent may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the liquidating agent." § 1787(b)(5)(E) continues, "[n]o court may review the Board's determination pursuant to subparagraph (D) to disallow a claim. § 1787(b)(13)(D) provides an even broader bar on judicial review of the NCUA Board's allocation of resources following a credit union liquidation.

Mr. Perna in his motion for reconsideration makes the same argument that was rejected by Mike Barton, the President of the Asset Management and Assistance Center of the NCUA. He argues now, as he argued then, that his claim under § 1787(b)(5) was untimely because he never received notice of the time to bring a claim regarding his employment contract. (Dkt. 18-13, Ex. 12). Mr. Barton denied the request for reconsideration because the exception for denial of late claims outlined in 12 U.S.C. § 1787(b)(5)(C)(ii) does not apply where the claimant had notice that a liquidating agent had been appointed. (Dkt. 18-14, Ex. 13). The Court has

no statutory jurisdiction to review this administrative determination.

Mr. Perna argues that this does not matter because the FCUA does not govern this case, as HOCU is a state-chartered, not a federally-chartered, credit union. This is irrelevant.

First, even though HOCU is a state-chartered credit union, and therefore not subject to the many provisions of Chapter 14 of Title 12 of the U.S. Code, which governs Federal Credit Unions, it is insured by the National Credit Union Administration, and therefore is subject to liquidation under the conditions outlined in 12 U.S.C. § 1787. That section provides, "[t]he board may close any credit union for liquidation, and appoint itself or another (including, in the case of a State-chartered insured credit union, the State official having jurisdiction over the credit union) as liquidating agent of that credit union" if the credit union is critically undercapitalized. 12 U.S.C. § 1787(a)(3).

Sections 1787(a)(1) and 1787(a)(3) provide the respective avenues for Board liquidation of federally-chartered and state-chartered credit unions. In the case of state-chartered, federally insured credit unions, the NCUA Board must comply with 12 U.S.C. § 1790d, which details the corrective action that the NCUA Board is empowered to make to protect its insurance fund. Plaintiff's assertion that "the only portion of 12 U.S.C. § 1787 that applies to state-chartered credit unions is § 1787(j)" is false. *See* Dkt. 25, pg. 17. The provisions of § 1787 that limit a reviewing court's authority

apply to claims arising from federally insured, state-chartered credit unions that have been liquidated by the NCUA Board.

Second, even if the FCUA did not pertain to this case at all, Plaintiffs have not provided any grounds to modify the arbitration award to add the NCUA Board as a party. Plaintiff argued in arbitration that the NCUA Board should be added as a party by virtue of its role as HOCU's conservator. *See* Dkt. 17-14, Pl. Ex. 13, pg. 9-10. As explained in the July 15, 2019 Order, the arbitrator rejected that argument, finding that the NCUA Board never consented to arbitration. *See* Dkt. 23 pg. 9. Plaintiff argues that this was a "clear error of law," but he provides no statutory grounds—under Michigan or federal arbitration law—for the Court to modify the arbitrator's decision even if it were convinced that the arbitrator erred.

Plaintiff has not pointed to any palpable defect in the Court's analysis of the Federal Arbitration Act's requirements for the modification or vacation of arbitration awards. As Plaintiff observed in his motion for summary judgment, "an arbitration award must fly in the face of established legal precedent" for the court to vacate an arbitration award." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros,* 70 F.3d 418, 421 (6th Cir. 1995). Modification of an award under 9 U.S.C. § 11(a) applies only "where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a). Plaintiff has demonstrated neither that Michigan's Uniform

Arbitration Act should apply, nor, if it did, that M.C.L. § 691.1700—which governs the modification or correction of awards—would require a result any different from that reached under the Federal Arbitration Act.

CONCLUSION

Plaintiff has not demonstrated that the Court erred by applying § 1787 of the FCUA to this case. Even if he did, Plaintiff would not be entitled to relief, for he has not articulated a legal basis to modify the arbitration award and add the NCUA or the NCUA Board as a party.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Reconsideration [25] is **DENIED**.

SO ORDERED.

s/ Arthur J. Tarnow
Arthur J. Tarnow
Senior United States
District Judge

Dated: August 5, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 19-10001

JAMES M. PERNA,
Plaintiff,

v.

HEALTH ONE CREDIT UNION, ET AL.,
Defendants.

SENIOR U.S. DISTRICT JUDGE
ARTHUR J. TARNOW

U.S. MAGISTRATE JUDGE
ANTHONY P. PATTI

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 15, 2019)

Plaintiff, James Perna, brings this suit to enforce an arbitration award against his former employer, Defendant Health One Credit Union ("HOCU"), and the National Credit Union Administration Board, the federal agency that liquidated that credit union. Though state and federal law provides courts the authority to enforce arbitration agreements, the Federal Credit Union Act ("FCUA"), which governs this suit, severely limits that authority. Because the FCUA trumps

conflicting provisions of state and federal arbitration law, Defendants will be granted summary judgment.

FACTUAL BACKGROUND

Mr. Perna began working for HOCU on January 16, 1971. (Compl. ¶ 7). His employment contract was repeatedly renewed over the course of the intervening years, and he eventually became the highest-ranking employee at HOCU. (August 27, 2018 Arbitration Hearing Tr., Dkt. 1-3, pg. 13).

On May 16, 2014, Annette Flood, the Director of the Office of Credit Unions for Michigan's Department of Insurance and Financial Services ("DIFS"), appointed the NCUA Board as the conservator of HOCU, pursuant to M.C.L. 490.241. (Dkt. 1-4, Ex. C). Director Flood based her decision on a confidential DIFS staff memorandum, and found that it was necessary to appoint a conservator "to conserve the credit union's assets, for the benefit of its members, depositors and other creditors." (*Id*.). That same day, Mr. Perna was terminated by a letter signed by L.J. Blankenberger, "Agent for the Conservator," and the Director of Region 1 of the NCUA. The letter explained that Federal Credit Union Act provided the Conservator the right to repudiate any contract that is deemed burdensome and whose repudiation would promote the orderly administration of the credit union's affairs. (Dkt. 1-5, Ex. D (citing 12 U.S.C. § 1787(c))). Mr. Perna's employment contract was deemed by the conservator to be one such contract. (*Id*.).

Following his sudden termination, Mr. Perna filed for unpaid wages and fringe benefits with the Occupational Safety and Health Administration Wage and Hours Program of the Michigan Department of Licensing and Regulatory Affairs ("LARA"). The NCUA Board's counsel, in a December 5, 2014 letter to Katherine Woods, an investigator at LARA, asserted that "Mr. Perna's tenure as CEO was not successful and ultimately led to Health One's current financial predicament." (Dkt. 18-6; Ex. 5). The letter also explained that the Federal Credit Union Act gives the NCUA, in capacity as conservator, the discretion to repudiate burdensome contracts is such repudiation "will promote the orderly administration of the credit union's affairs." (*Id.* citing 12 U.S.C. § 1787(c)(1)). Mr. Perna's claims for expenses and vacation pay, the NCUA reasoned, were barred because the contracts on which those claims were based were repudiated (*Id*.). A January 29, 2015 letter from Ms. Woods explained that LARA was rejecting Mr. Perna's claim for fringe benefits because they were not allowed under the plain language of the employee handbook. (Dkt. 18-7, Ex. 6).

On July 1, 2015, Ms. Woods sent an amended letter finding that since Mr. Perna's employment agreement with HOCU contained an arbitration clause, LARA would take no further action in the case. (Dkt. 18-10, Ex. 9). "Resolution of this claim has been preempted by the contractual assent to arbitration by the American Arbitration Association for the issues being claimed." (*Id*.).

Meanwhile, on May 14, 2015, Mr. Perna, through counsel, sent a letter to Conservator Blankenberger of the NCUA Board making claims for unpaid wages and fringe benefit pursuant to the severance agreement in his employment contract. (Dkt. 18-11, Ex. 6). The letter argued that since Mr. Perna was never apprised of time limits for filing claims under 12 U.S.C. § 1787, he was entitled to begin filing for an administrative claim pursuant to § 1787(b)(5). (*Id*.). On November 20, 2015, Mike Barton, President of the Asset Management and Assistance Center of the NCUA, denied Mr. Perna's claim as untimely. That letter cited NCUA Regulations § 709.6(a)(1) for the proposition that "failure to submit a written claim [against the liquidated credit union] within the time provided in the notice to creditors shall be deemed a waiver of said claim and the claimant shall have no further rights or remedies with respect to such claim." (Dkt. 18-12, Ex. 11).

Mr. Perna's attorney responded to the November 20, 2015 denial letter with a December 9, 2015 letter where he argued that the Repudiation of Agreement and Termination of Employment notice that Mr. Perna was given never included a notice of the time to bring a claim regarding his employment contract. (Dkt. 18-13, Ex. 12). Mr. Barton denied the request for reconsideration, observing that the exception for denial of late claims outlined in 12 U.S.C. § 1787(b)(5)(C)(ii) does not apply where the claimant had notice that a liquidating agent had been appointed. (Dkt. 1814, Ex. 13).

Mr. Perna then scheduled an arbitration with the American Association of Arbitrators ("AAA"). Neither

representatives from HOCU nor from the NCUA Board made an appearance in the arbitration, however, even after the arbitrator sent them letters that the arbitration would be held in their absence. (Arb. Hr'g Tr. 6). Rob Robine, a trial attorney with the National Credit Union Administration, responded with an email to an AAA representative explaining that "the employment agreement containing the arbitration clause was repudiated pursuant to federal law, in connection with the conservatorship of Health One Credit Union." (Dkt. 18-22, Def. Ex. 21). The email closed: "Please do not contact our office further regarding this arbitration." (*Id*.). The arbitration hearing was held on August 27, 2018, without the presence of the Defendants or briefing on their behalf. (Arb. Hr'g Tr. 6). Plaintiff paid Defendants' share of the arbitration fee. (*Id.* at 8).

On October 12, 2018, Arbitrator Samuel McCargo issued an award for Mr. Perna and against HOCU in the amount of $315,645.02. (Arbitration Award, Dkt. 1-3, Ex. 15). The Arbitrator observed that since his authority derived from the employment contract between HOCU and Mr. Perna, he would not decide the NCUA Board's obligations to Mr. Perna. (*Id*.).

PROCEDURAL HISTORY

Plaintiff filed his case on November 7, 2018 in Macomb County Circuit Court. Defendants removed the case to federal court on January 2, 2019 on the basis of the FCUA's grant of jurisdiction to civil suits in which

the NCUA is a party. 12 U.S.C. § 1789(a)(2). [Dkt. # 1]. That same day, Defendants filed their Motion to Substitute Party [3]. After receiving further briefing from both parties, the Court, on April 2, 2019, granted in part and denied in part that motion, adding the NCUA Board as a party, but declining to dismiss Defendants HOCU and NCUA. [Dkt. # 14]. The Court denied Defendants' Motion for Reconsideration on April 25, 2019. [Dkt. # 16]. On May 3, 2019, Plaintiff filed a Motion for Summary Judgment [17]. Defendants filed their own Motion for Summary Judgment on May 17, 2019 [18]. Those motions are fully briefed and will be decided without oral argument pursuant to Local Rule 7.1(f)(2).

STANDARD OF REVIEW

Both parties bring their motions under FED. R. CIV. P. 56. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Movant bears the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the non-movant lacks evidence to support an essential element of his case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Nonmovant cannot rest on the pleadings and must show more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd.,* 475 U.S. at

586-87. Non-movant must "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex Corp.,* 477 U.S. at 324 (quoting Rule 56(e)); *see also United States v. WRW Corp.,* 986 F.2d 138, 143 (6th Cir. 1993).

ANALYSIS

The Court lacks the jurisdiction to confirm the arbitration award against HOCU or enforce it against the NCUA Board. Section 1787(b)(13)(C) of the FCUA provides as follows.

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent, including assets which the Board may acquire from itself as such liquidating agent; or
> >
> > (ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

12 U.S.C. § 1787(b)(13)(C).

Creditors seeking to recoup funds owed by a liquidated credit union must proceed through the statutory mechanism provided by the FCUA. *See* 12 U.S.C.

§ 1787(b)(5)-(11). Plaintiff submitted such an administrative claim, and it was denied as untimely. (Dkt. 18-12; Def. Ex. 11).

Plaintiff argues in response that the FCUA is only "background authority" and that the "specific powers granted to the NCUA Board as conservator were based on Michigan law." (Dkt. 21, pg. 7). He bolsters this argument by a citation that to 12 U.S.C. § 1787(j), which provides that where the NCUA Board takes over a defunct credit union, "such liquidating agent shall possess all the rights, powers, and privileges granted by State law to a liquidating agent of a State chartered credit union." 12 U.S.C. § 1787(j). The FCUA certainly contemplates that the NCUA Board will act according to state legal procedures when liquidating a distressed credit union. This is not, however, a reason for the Court to privilege state contract law over provisions in the FCUA that explicitly limit its own jurisdiction. That the NCUA Board acted with the Michigan Department of Insurance and Financial Services to effectuate the liquidation of HOCU according to state law did not change the fact that the NCUA Board was exercising powers pursuant to federal statute. Both the DIFS's Order Appointing Conservator and the 30th Judicial Circuit Court's Order Appointing Receiver make clear that NCUA's appointment as conservator and receiver are accomplished pursuant to the Federal Credit Union Act, if also in addition to state law. The Court is aware of no legal authority that a federal agency loses its rights under its own enabling statute by opting to enforce its rights in state court.

The question then becomes whether, under the Federal Arbitration Act ("FAA"), Plaintiff can enforce his arbitration award against the NCUA Board, despite the FCUA.

As a starting point, this case does not create a conflict between the two statutes because the arbitration award itself provides no relief against the NCUA Board. HOCU no longer exists. If the court were to grant full enforcement against HOCU, it would still have to modify the arbitration award for Plaintiff to receive a remedy.

The Opinion of the Arbitrator begins as follows:

> First, the arbitrator notes that the National Credit Union Administration (NCUA) became the "Conservator" for Health One Credit Union on May 16, 2014; it did not become a party to the Employment Agreement between Claimant and Health One. The only parties to the Agreement before this Arbitrator are Claimant and Health One. While NCUA became authorized to act on behalf of Health One, it did not become a substituted party by virtue of its role as "Conservator" for Health One. Therefore, the Arbitrator has no authority to resolve disputes under this Employment Agreement.

Dkt. 17-14; Pl. Ex. 13, pg. 9-10.

Plaintiff attempts to reargue before this Court that NCUA is the successor-in-interest to HOCU. He provides no reason, however, for why this designation

would require modifying the award under 9 U.S.C. § 11 or vacating the award under 9 U.S.C. § 10. Only in his Response brief does Plaintiff elaborate on the importance of the successor-in-interest designation, citing to an unpublished Michigan Court of Appeals case for the unremarkable proposition that the NCUA Board, in its capacity as a liquidating agent, can sue on behalf of a liquidated credit union. *See National Credit Union Administration Board v. Woonton,* 2016 WL 6905903 (Mich. Ct. App. Nov. 22, 2016). It is not clear how the statutory authority to "sue and be sued" which *Woonton* references could cause the NCUA Board to be bound by arbitration clauses contracted by the liquidated credit union.

Even if it were a mistake for the arbitrator not to credit this argument (which it is not clear Plaintiff briefed in arbitration), such a mistake would not grounds for modification. 9 U.S.C. § 11(a), which Plaintiff cites as the statutory basis for the modification it seeks, applies only "where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." Legal error is not mentioned, and as the Plaintiff himself argued in his brief, "an arbitration award must "fly in the face of established legal precedent" for a court to find the manifest disregard for the law required to vacate an arbitration award under 9 U.S.C. § 10. (Dkt. 17, pg. 18, citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros,* 70 F.3d 418, 421 (6th Cir. 1995). No such established legal precedent is presented here.

Plaintiff advances the contradictory positions that the arbitration award is ironclad and unreviewable when resisting Defendants' attempts to vacate the award, and malleable and reviewable when attempting to add the NCUA Board as a party. His attempt to modify and then enforce the arbitration agreement must fail.

Second, even if the FAA did dictate that the arbitration award should be enforced against the NCUA Board, the FCUA would trump the FAA.

> Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes.

Shearson/Am. Exp., *Inc. v.* McMahon, 482 U.S. 220, 225-27 (1987).

Courts that have considered the relationship between the FAA and the FCUA have found that the § 1787(b)(13)(C) abrogated the FAA when the NCUA Board repudiated a contract with an arbitration provision. As one such court reasoned,

The FCUA contains a detailed administrative claims procedure, pursuant to which all creditors must submit claims. The purpose of the statute is to afford plaintiff, an arm of the executive branch of the government, with the ability to assess and quickly disburse the funds due to creditors of a defunct federal credit union. To that end, the statute precludes judicial review until after the administrative claims procedure is complete. Presumably, this enables plaintiff to assess the credit union's assets and fairly distribute any existing assets to the creditors. At the same time, the administrative claims process provides a centralized system for addressing claims so that whatever assets may remain can be preserved for the benefit of all creditors. The Court finds an inherent conflict in this statutory scheme which operates to benefit all creditors, with the FAA which would essentially serve to place the rights of creditors who have agreements containing arbitration provisions on different footing than those unable to rely on arbitration provisions. In addition, requiring plaintiff to defend creditor claims in arbitration would defeat a primary purpose of the statute, *i.e.*, centralizing the claims process and preserving the limited assets of the defunct credit union. Although it appears that defendant is the only party seeking arbitration, it is possible that many creditors of a federal credit union could pursue arbitration. The Court finds that Congress's enactment of a statute with a comprehensive administrative claims process, together with a limitation on judicial review,

> inherently conflicts with the FAA. Accordingly, claims falling within the purview of the FCUA may not be arbitrated.

Nat'l Credit Union Admin. Bd. v. Lormet Cmty. Fed. Credit Union, No. 1:10 CV 1964, 2010 WL 4806794, at *4 (N.D. Ohio Nov. 18, 2010); accord, *People's Trust Federal Credit Union v. National Credit Union Administration,* No. CR 16-0611, 2016 WL 4491635 (D. New Mexico Aug. 8, 2016).

Thus, even if Mr. Perna's arbitration clause could be modified to include the NCUA Board, the FCUA would still bar enforcement against the NCUA Board.

CONCLUSION

Mr. Perna was denied relief against the NCUA Board by LARA, by the NCUA, and by arbitration. Even if the Court disagreed with the arbitrator's decision not to exercise jurisdiction over the NCUA Board, which it does not, the FAA doesn't authorize the Court to substitute its own judgment for that of the arbitrator. Even if, despite this, the Arbitration Award were modified, the FCUA would still bar its enforcement.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment [17] is **DENIED** and Defendant's Motion for Summary Judgment [18] is **GRANTED**.

SO ORDERED.

s/ Arthur J. Tarnow
Arthur J. Tarnow
Senior United States
District Judge

Dated: July 15, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES M. PERNA,	Case No. 19-10001
Plaintiff,	SENIOR U.S. DISTRICT JUDGE ARTHUR J. TARNOW
v.	
HEALTH ONE CREDIT UNION, ET AL.,	U.S. MAGISTRATE JUDGE ANTHONY P. PATTI
Defendants. /	

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION [15]

(Filed Apr. 25, 2019)

Plaintiff, James Perna, brought this suit to enforce an arbitration award against his former employer, Defendant Health One Credit Union ("HOCU"), and the federal agency appointed as its conservator and receiver. The parties dispute whether the proper Defendants are the National Credit Union Administration ("NCUA") and Health One Credit Union ("HOCU"), which were named by the Plaintiff, or the National Credit Union Administration Board ("NCUA Board"), which Defendants moved to replace the other two defendants. Specifically, on January 2, 2019, the Defendants moved to replace HOCU and NCUA with the NCUA Board "in its capacity as liquidating agency for Health One Credit Union." [Dkt. # 3].

On April 2, 2019, the Court granted in part and denied in part Defendants' motion. [Dkt. #14]. NCUA Board was joined as a party pursuant to FED. R. CIV. P. 21, but the Court found no basis to remove the parties already named in Plaintiff's Complaint. Defendants now move the Court to reconsider its holding and modify its joinder of the NCUA Board to reflect its limited role in the lawsuit as liquidating agent of HOCU. The Local Rules of the Eastern District of Michigan provide that a motion for reconsideration must show that the court and the parties were misled by a "palpable defect." See L.R. 7.1(h)(3).

Defendants argue that since the NCUA Board was joined only by its own motion, it has the right to limit the capacity in which it is sued. They cite no authority for this proposition. Further, limiting the capacity in which the NCUA Board is sued is inappropriate at this stage of the litigation. 12 U.S.C. § 1787 provides that the NCUA Board shall act as a liquidating agent for a bankrupt or insolvent federal credit union. The Federal Credit Union Act gives the NCUA Board broad powers to dispense with credit union assets in its capacity as liquidating agent. Nevertheless, in this case, there is ambiguity as to the NCUA and/or the NCUA Board's roles as Conservator as HOCU and then as Receiver as HOCU, pursuant to Michigan state law. (See Dkt. # 14 pg. 6).

The Court's April 2, 2019 Order [14] discussed the NCUA Board's role as conservator and receiver, because those were the roles designated by Michigan's Department of Insurance and Financial Services and

Ingham County Circuit Court. (Id. at pg. 2, 6). Presumably the NCUA Board sees these state law roles (arising from M.C.L. §§ 490.233 & 490.241) as part-and-parcel of its federal statutory role as liquidating agent. Nevertheless, the interplay between these roles, and their concomitant statutory powers and obligations, reaches the merits of the case.

This suit, though still at an early stage, seems to turn on the power of one or more of the three defendants to terminate Plaintiff and then resist a contractual arbitration clause. Defendants have not shown a palpable defect with the Court's holding that the question of who possessed HOCU's assets when, and how, is better answered under a dispositive motion standard than a procedural joinder motion. (Mt. 14 pg. 8). The question is even less well-suited for a motion for reconsideration, in which the non-movant is not permitted to respond.

IT IS ORDERED that Defendants' Motion for Reconsideration [15] is **DENIED**.

SO ORDERED.

s/ Arthur J. Tarnow
Arthur J. Tarnow
Senior United States
District Judge

Dated: April 25, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES M. PERNA,	Case No. 19-10001
Plaintiff,	SENIOR U.S. DISTRICT JUDGE ARTHUR J. TARNOW
v.	
HEALTH ONE CREDIT UNION, ET AL.,	U.S. MAGISTRATE JUDGE ANTHONY P. PATTI
Defendants. /	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO SUBSTITUTE PARTY TO CORRECT NONJOINDER AND MISJOINDER [3]

(Filed Apr. 2, 2019)

Plaintiff, James Perna, brings this suit to enforce an arbitration award against his former employer, Defendant Health One Credit Union ("HOCU"), and the federal agency appointed as its conservator and receiver. The identity of that agency is in dispute, which is the subject of this motion. Plaintiff maintains that it sued the correct entity, the National Credit Union Administration ("NCUA"). Defendants contend that the correct defendant would actually be the National Credit Union Administration Board ("NCUA Board").

FACTUAL BACKGROUND

Mr. Perna began working for HOCU on January 16, 1971. (Compl. ¶ 7). His employment contract was

repeatedly renewed throughout this time, and he eventually became the highest-ranking employee at HOCU. (August 27, 2018 Arbitration Hearing Tr., Dkt. 1-3, pg. 13).

On May 16, 2014, Annette Flood, the Director of the Office of Credit Unions for Michigan's Department of Insurance and Financial Services ("DIFS"), appointed the NCUA Board as the conservator of HOCU, pursuant to M.C.L. 490.241. (Dkt. 1-4, Ex. C). Director Flood based her decision on a confidential DIFS staff memorandum, and found that it was necessary to appoint a conservator "to conserve the credit union's assets, for the benefit of its members, depositors and other creditors." (Id.). That same day, Mr. Perna was terminated by a letter signed by L.J. Blankenberger, "Agent for the Conservator," and the Director of Region 1 of the NCUA. The letter explained that Federal Credit Union Act provided the Conservator the right to repudiate any contract that is deemed burdensome and whose repudiation would promote the orderly administration of the credit union's affairs. (Dkt. 1-5, Ex. D (citing 12 U.S.C. § 1787(c))). Mr. Perna's employment contract was deemed by the conservator to be one such contract, and it was repudiated. (Id.).

Following his sudden termination, Mr. Perna filed for unpaid wages and fringe benefits with the Occupational Safety and Health Administration Wage and Hours Program of the Michigan Department of Licensing and Regulatory Affairs ("LARA"), but was told by counsel for Defendants and by LARA that the state agency could not decide the issue because it was

preempted by the arbitration clause in Mr. Perna's employment agreement. (Compl. ¶¶ 59-60).

Mr. Perna then scheduled an arbitration with the American Association of Arbitrators ("AAA"). Neither representatives from HOCU nor from NCUA responded to notices of arbitration, however, even after the arbitrator sent them letters that the arbitration would be held in their absence. (Arb. Hr'g Tr. 6). The arbitration hearing was held on August 27, 2018, without the presence of the Defendants or briefing on their behalf. (Id.). Plaintiff paid Defendants' share of the arbitration fee. (Id. at 8).

On October 12, 2018, Arbitrator Samuel McCargo issued an award for Mr. Perna in the amount of $315.645.02. (Dkt. 1-3, Ex. 15). The Arbitrator observed that since his authority derived from the employment contract between HOCU and Mr. Perna, he would not decide NCUA's obligations to Mr. Perna. (Id.).

PROCEDURAL HISTORY

Plaintiff filed his case on November 7, 2018 in Macomb County Circuit Court. Defendants removed the case to federal court on January 2, 2019 on the basis of FCUA's grant of jurisdiction to civil suits in which the NCUA is a party. 12 U.S.C. § 1789(a)(2).[1] [Dkt. 1]. That

[1] The statute technically provides such jurisdiction to the Board of the NCUA. The Court otherwise has jurisdiction under 28 U.S.C. § 1331, as the NCUA is an agency of the federal government.

same day, Defendants filed their Motion to Substitute Party [3]. That motion is now fully briefed. The Court now finds the motions suitable for determination without a hearing in accord with Local Rule 7.1(f)(2).

STANDARD OF REVIEW

Defendants bring their motion under FED. R. Civ. P. 19 & 21.

Courts evaluating motions brought under Rule 19 typically use a three-step analysis to determine whether a case can proceed in the absence of a particular party. *See Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1345 (6th Cir. 1993). First, the Court must determine if the person or entity is a necessary party under FED. R. CIV. P. 19(a), which provides as follows.

> (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.

FED. R. CIV. P. 19(a).

Second, if the entity is necessary, the Court asks whether joinder will deprive it of subject matter jurisdiction. *May v. Citimortage,* 2013 U.S. Dist. LEXIS 175448 (E.D. Mich. Dec. 13, 2013) (citing *Glancy v. Taubman Centers, Inc.* 373 F.3d 656, 666 (6th Cir. 2004). Third, if joinder is not feasible because it will eliminate the Court's ability to hear the case, it must analyze the Rule 19(b) factors to determine if dismissal is warranted. (Id.).

Rule 21 provides a remedy for the misjoinder of parties. *Harris v. Gerth,* 2008 U.S. Dist. LEXIS 104921 (E.D. Mich. Dec. 30, 2008).

> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

FED. R. CIV. P. 21.

Rule 21 was promulgated in order to obviate harsh common law rules of misjoinder and nonjoinder. *See, e.g. Halladay v. Verschoor,* 381 F.2d 100 (8th Cir. 1967) (citing *Kerr v. Compagnie De Ultramar,* 250 F.2d 860, 864 (2d Cir. 1958).

ANALYSIS

Defendants seek to replace HOCU and the NCUA with the NCUA Board. They cite no caselaw at all, and jump from Rule 21 to Rule 19 without analyzing the interplay between the two rules or the legal basis for their interpretation of the Rules. Plaintiffs in their response argue that Defendants waived their right to contest the named defendants by failing to appear at arbitration. They further argue that NCUA, not the NCUA Board, is the receiver of HUCA.

The Court must first decide if the NCUA Board is a necessary party to this action. The May 16, 2014 DIFS Order appointed the Board as the Conservator of HOCU. That appointment was confirmed by L.J. Blankenberger's letter to DIFS Director Flood, on November 26, 2014, which appears to be sent in his capacity as a Regional Director of the NCUA. (Dkt. 1-7, Ex. F). The close relationship between the two entities is confirmed by the statutory scheme. See 12 U.S.C. § 1752a(a) ("There is established in the executive branch of the Government an independent agency to be known as the National Credit Union Administration. The Administration shall be under the management of a National Credit Union Administration Board.").

The confusion between the two entities seems to have infected the procedural history of this case. The December 12, 2014 Order by the Ingham County Circuit Court plainly appointed NCUA as receiver. It did so after observing that "the DIFS Director entered an

order appointing the National Credit Union Administration (NCUA) as Conservator for Health One Credit Union based on its unsafe and unsound condition." (Dkt. 1-6, Ex. E). This observation was technically incorrect, lending credence to Defendants' theory that the Circuit Court meant to appoint the NCUA Board as Receiver (and transform the conservator into a receiver). The Circuit Court issued its order pursuant to Michigan's Credit Union Act, M.C.L. § 490.233, which requires court approval to create a receivership, and the FCUA in general. The FCUA provides that the NCUA Board is entrusted with the NCUA Insurance Fund, which is the insurance fund that subjected HOCU to the NCUA according to Director Flood's Order, and is the fund available for assisting with the liquidation of insured credit unions (like HOCU). See 12 U.S.C. § 1783(a).

Ultimately, the question of liability apportioning liability between the NCUA Board and the NCUA is a factual question ill-suited for this stage of litigation. It is apparent even at this early stage, however, that the NCUA Board is an essential party. Referencing FED. R. CIV. P. 19(a)(1)(B)(i-ii), the Court finds that the NCUA Board certainly has an interest in this litigation. The two subparts ((B)(i) and (B)(ii)) are read disjunctively, and the NCUA Board will be a necessary party if its absence either impedes its ability to protect that interest or exposes it to duplicative liability or inconsistent obligations. Both these conditions are met. The Board has a statutory interest in how its funds are allocated, whether it properly allocated exercised its powers

when it deemed Mr. Perna's contract repudiated, and the extent to which, if at all, it is subject to state or federal arbitration law. Further, it would be inefficient and unfair to sever the Board from the Administration where both could face liability for the acts of HOCU's Conservator or Receiver.

Looking to the second and third steps of a Rule 19 analysis, the Court finds that the joinder of the NCUA Board will not deprive it off subject-matter jurisdiction or deprive it of the power to hear the case. There is no need to continue to the Rule 19(b) weighing of equities at this stage. NCUA Board will be joined as a party.

NCUA Board's joinder does not provide a basis for the dismissal of the other two Defendants, however. Plaintiff has adequately pled, at least within the meaning of a technical pleading Rule, that the NCUA was involved in his termination. Whether NCUA, or the NCUA Board, possesses or possessed HOCU's assets is a question that can be answered, if necessary, under a dispositive motion standard.

Accordingly,

IT IS ORDERED that Defendant's Motion to Substitute Party [3] is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that the National Credit Union Administration Board shall be joined as a Defendant in this suit, pursuant to FED. R. Civ. P. 21.

SO ORDERED.

s/ Arthur J. Tarnow
Arthur J. Tarnow
Senior United States
District Judge

Dated: August 5, 2019

Case No. 19-1965

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
January 26, 2021
DEBORAH S. HUNT, CLERK

JAMES M. PERNA,
Plaintiff-Appellant,

v.

HEALTH ONE CREDIT UNION; NATIONAL CREDIT UNION ADMINISTRATION; NATIONAL CREDIT UNION ADMINISTRATION BOARD,
Defendants/Appellees.

ORDER

Before: SUHRHEINRICH, DONALD, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk