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APPENDIX A

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 21-2236

JEROME REDMAN, Individually and on behalf of all others similarly situated,
Plaintiff – Appellee,
v.
JAVITCH BLOCK, LLC,
Defendant – Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, District Judge. (3:21–cv–00037–GMG)

Submitted: October 3, 2022 Decided: December 15, 2022

Before WILKINSON, RICHARDSON, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Tyler G. Lansden, Michael D. Slodov, JAVITCH BLOCK LLC, Cleveland, Ohio, for Appellant. Stephen G. Skinner, SKINNER LAW FIRM, Charles Town, West Virginia, for Appellee.

PER CURIAM:

Javitch Block, LLC appeals the district court's order granting Jerome Redman's motion to remand, in which the court determined that Javitch waived its right to remove this matter from state to federal court.

Because the district court's finding of waiver was not clearly erroneous, we affirm.

I.

This case arises out of two successive lawsuits in the Circuit Court of Berkeley County, West Virginia. The first was a debt collection action by FIA Card Services, N.A. against Jerome Redman, in which FIA eventually obtained a default judgment. J.A. 20–22. Javitch Block, LLC became involved when it filed a wage garnishment execution against Redman to collect this default judgment on FIA's behalf. J.A. 23. Redman later became aware of this default judgment and filed a motion to set it aside. J.A. 135, 464–69. The state court, Judge R. Steven Redding, granted that motion and allowed Redman to assert defenses and counterclaims against FIA and a third-party complaint against Javitch. J.A. 478–95. Redman and FIA eventually reached a settlement, and they voluntarily dismissed the original complaint and counterclaims. J.A. 118–19. After voluntarily dismissing his third-party claim against Javitch in the first action, Redman filed a class action complaint against Javitch in January 2021 in the same court, alleging violations of West Virginia law. J.A. 150, 518-543. The new case was originally assigned to a different judge. See J.A. 440.

On February 11, 2021, Redman amended the complaint to add claims under the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692–1692p. J.A. 5–24. The new FDCPA claim triggered federal court removal eligibility pursuant to 28 U.S.C. § 1441(a). Under 28 U.S.C. § 1446(b)(3), Javitch was required to file a notice of removal within 30 days of the amended complaint. However, on February 25, fourteen days after the action became removable,

Javitch filed a motion to dismiss all claims in state court. J.A. 25–50. Javitch then filed several other litigation documents before the state court, such as a notice of supplemental authority and a motion to stay discovery pending resolution of the motion to dismiss. J.A. 431–38. On March 5, the presiding judge recused himself and the case was transferred to Judge Redding. J.A. 439–40. A few hours later, Javitch filed a notice of removal, and the case was subsequently transferred to federal court. J.A. 441–46.

In federal court, Redman filed a motion to remand, arguing that Javitch waived its right to remove when it continued to litigate in state court after it had sufficient notice of removal eligibility. J.A. 450–61. The district court granted the motion, concluding that Javitch's filings in state court "demonstrate[d] [its] desire to litigate the matter in state court," thereby waiving its removal right. J.A. 607. The court found the motion to dismiss particularly evident of that intent as it "raised dispositive arguments." Id. This included a res judicata argument, in which Javitch contended that the debt collection litigation precluded Redman's new class action claims. Id. The district court believed that the state court was thus better equipped to handle the case. Id. Moreover, it found "[p]articularly interesting" the timing of defendant's removal notice as it was "just three hours after the case was reassigned to [Judge Redding,] who handled the first litigation involving these parties." Id. Javitch subsequently filed a motion to stay remand pending appeal or for expedited reconsideration. J.A. 609–28. The district court denied this motion, reasoning again that "judicial economy clearly weighs in favor of this case being decided by

the court in which it originated and was already, partially litigated." J.A. 629–31.

II.

Javitch appeals the district court's remand order. There is no dispute that Javitch timely filed its notice of removal within 30 days of receiving Redman's amended complaint raising the federal FDCPA issue. See 28 U.S.C. § 1446(b)(3). Javitch instead argues that it did not waive its right to remove this state court action to federal court.

A district court's "waiver determination involves a factual and objective inquiry as to the defendant's intent to waive." *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991) (*quoting Rothner v. City of Chicago,* 879 F.2d 1402, 1408 (7th Cir. 1989)). We thus "review this factual finding for clear error." *Northrop Grumman v. Dyncorp Int'l LLC,* 865 F.3d 181, 186 (4th Cir. 2017). Under a clear error standard of review, we determine "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety." *United States v. Thorson,* 633 F.3d 312, 317 (4th Cir. 2011). "If so, we may not reverse the district court's conclusion—even if we may have weighed the evidence differently." *Walsh v. Vinoskey*, 19 F.4th 672, 677 (4th Cir. 2021).

The district court was not clearly erroneous in determining that Javitch waived its right to remove. Javitch disputes that the standard of review is one of clear error, but we would uphold the district court's determination under any standard. We have found that "a defendant may yet waive its 30-day right to removal by demonstrating a 'clear and unequivocal'

intent to remain in state court." *Grubb*, 935 F.2d at 57 (*quoting Rothner*, 879 F.2d at 1416). Waiver of this right is only appropriate "in extreme situations, when judicial economy, fairness, and comity demand it." *Northrop Grumman*, 865 F.3d at 186 (internal quotations omitted). In past cases, we have looked to see whether a defendant has taken substantial defensive action in state court before petitioning for removal. *See Aqualon Co. v. MAC Equipment, Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); *see also Northrop Grumman,* 865 F.3d at 188.

Here, Javitch took several actions which expressed the requisite intent to remain in state court. First, Javitch filed a motion to dismiss in which it raised substantive arguments before the state court. Under West Virginia law, a ruling on a motion to dismiss amounts to an adjudication on the merits. *See Sprouse v. Clay Comm., Inc.,* 211 S.E.2d 674, 696 (W. Va. 1975). Thus, Javitch opened itself up to a complete merits determination in state court. Further, Javitch filed this motion a full two weeks after receiving notice that the case was removable. Instead of proceeding straight to federal court, Javitch decided to avail itself of state court. Then, before removing the case, Javitch supplemented its motion to dismiss with additional authority, further demonstrating an intent to receive a merits determination on the matter in state court. And finally, Javitch moved to stay discovery pending resolution on the motion to dismiss. These actions show Javitch "actively engage[d] in defensive litigation in the state court[.]" *Northrop Grumman*, 865 F.3d at 188.

As for the "extreme situations" determination, the district court was also not clearly erroneous in

finding this satisfied. It found that "judicial economy clearly weighs in favor of this case being decided by the court in which it originated and was already, partially litigated." J.A. 630. We note that Javitch waited 22 days before removing the complaint, and only did so three hours after the case was reassigned to Judge Redding. Javitch cannot "be allowed to test the waters in state court . . . and finding the temperature not to its liking, beat a swift retreat to federal court." *Northrop Grumman*, 865 F.3d at 188 (*quoting Estate of Krasnow v. Texaco, Inc.*, 773 F.Supp. 806, 809 (E.D. Va. 1991)). Javitch sought to use the state court proceedings to its advantage several times over, and only changed its mind once Judge Redding was assigned to the case. Under these circumstances, the district court was not clearly erroneous in finding Javitch waived its right to removal, and we affirm.

AFFIRMED

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

**JEROME REDMAN,
Plaintiff,
v. CIVIL ACTION NO.: 3:21-CV-37 (GROH)**

**JAVITCH BLOCK, LLC,
Defendant.**

ORDER GRANTING MOTION TO REMAND

This matter is before the Court on Plaintiff's Motion to Remand. ECF No. 5. The Plaintiff contends that the Defendant waived its right to remove this case by filing a dispositive motion in state court prior to removal. The Defendant argues that its state court filings were required by the rules, and therefore do not constitute waiver. The Plaintiff's Motion to Remand shall be granted for the reasons that follow.

I. Procedural History

This litigation has a particularly lengthy history; however, its origins are somewhat relevant to the Court's inquiry. Prior to the instant case, there was a lawsuit in the Circuit Court of Berkeley County, West Virginia filed by FIA Card Services, N.A., against Jerome Redman, the current plaintiff. Javitch Block became involved in the earlier matter when it filed a sugestee execution to collect a default judgment

against Redman on behalf of FIA. As a result, Redman's wages were garnished. Redman, by counsel, eventually had the default judgment against him set aside.

Redman then sought relief against FIA Card Services and Javitch Block. Ultimately, Redman reached a settlement with FIA and filed a notice of voluntary dismissal without prejudice as to Javitch Block. Redman apparently dismissed the earlier action against Javitch Block (as a third-party defendant) in favor of a new, standalone complaint.

Redman filed a complaint against Javitch Block in state court on January 14, 2021, and an amended complaint was filed on February 11, 2021. Significantly, the amended complaint contained a count alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). This inclusion triggered the case's removability—which neither party contests.

On February 25, 2021, Javitch Block filed a motion to dismiss the amended complaint. Its motion sought to dismiss all claims, including the FDCPA claim giving rise to federal jurisdiction. The motion was 23 pages, and it sought relief under 12(b)(1) and 12(b)(6). On March 1, 2021, Javitch Block filed a letter with supplemental authority for its motion to dismiss. Two days later, Javitch Block filed a motion to stay discovery. On March 5, 2021, the state court judge assigned to the case entered an Order of recusal and transferred the case to the judge who handled the original proceedings involving Redman, FIA Card and Javitch Block. Within three hours of the original judge's reassignment, Javitch Block filed its notice of removal. ECF No. 1.

II. Applicable Law

A defendant may remove a case from state to federal court if the federal court has original jurisdiction over the plaintiff's claims. 28 U.S.C. § 1441(a). Federal courts have original jurisdiction over two types of cases: (1) cases involving federal questions under 28 U.S.C. § 1331 and (2) cases involving diversity of citizenship under 28 U.S.C. § 1332.

Under 28 U.S.C. § 1446(b), a defendant may file a notice of removal "within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

The party seeking removal has "[t]he burden of establishing federal jurisdiction." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (*citing Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)). Courts strictly construe removal jurisdiction, thus, "[i]f federal jurisdiction is doubtful, a remand is necessary." *Mulcahey*, 29 F.3d at 151. Moreover, the court must "resolve all doubts about the propriety of removal in favor of retained state court jurisdiction." *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993).

III. Discussion

When a defendant demonstrates original jurisdiction, it enjoys generally unhindered access to

federal courts. However, removal under § 1446 is not without limitation. This District previously explained that a "defendant may waive its right to remove a state court action to federal court if it submits to the state court's jurisdiction, such as by seeking some form of affirmative relief from the state court when it is not compelled to take such action." *Wolfe v. Wal-Mart Corp.*, 133 F. Supp 2d 889, 892 (N.D. W.Va. Mar. 19, 2001) (citing Moore's Fed. Prac. § 107.18[3][a]).

In this case, the Defendant timely filed its notice of removal within thirty days of Plaintiff filing his amended complaint, which for the first time included a claim giving rise to federal jurisdiction. Timeliness is not the issue before the Court. Instead, the Plaintiff contends that Defendant waived its ability to remove under the statute. Specifically, the Plaintiff argues that the Defendant waived its right to remove by filing a motion to dismiss the amended complaint on the merits in state court—prior to filing the notice of removal.

Moreover, the Court's factual inquiry is particularly relevant to determining the instant motion. Between February 25 and March 3, 2021, the Defendant filed a motion to dismiss, a letter with supplemental authority to the judge, and a motion to stay discovery pending resolution of the motion to dismiss. These filings demonstrate the Defendant's desire to litigate the matter in state court. The motion to dismiss was filed pursuant to 12(b)(1) and 12(b)(6) and raised dispositive arguments. Particularly interesting is that the Defendant filed its notice of removal just over three hours after the case was reassigned to the judge who handled the first litigation involving these parties.

The Court further notes that one of the Defendant's arguments in its motion to dismiss was res judicata. The Defendant argued that the first litigation precludes the Plaintiff's claims in the instant case. Who better to consider and decide that question than the judge who handled the first litigation? Yet, the Defendant fled to federal court within a few hours of that judge's assignment to the case.

Upon review of the Defendant's filings in state court and the entire record, this Court finds that the Defendant manifested an intent to litigate in state court, thereby waiving its right to remove. *See Wolfe*, 133 F.Supp.2d at 892; *Heafitz v. Interfirst Bank of Dallas*, 711 F.Supp. 92 (S.D.N.Y. 1989).

IV. Conclusion

Based upon the foregoing, the Plaintiff's Motion to Remand is GRANTED [ECF No. 5], and the above-styled civil action shall be and is hereby REMANDED to the Circuit Court of Berkeley County, West Virginia, for all further proceedings.

The Clerk of Court is DIRECTED to transmit copies of this Order to all counsel of record and to the Circuit Clerk of Berkeley County, West Virginia. The Clerk is further DIRECTED to terminate all pending motions as moot and remove this civil action from the Court's active docket.

DATED: October 12, 2021

/s/ Gina M. Groh
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARTINSBURG

JEROME REDMAN,
Plaintiff,
v. **CIVIL ACTION NO.: 3:21-CV-37 (GROH)**

JAVITCH BLOCK, LLC,
Defendant.

ORDER DENYING MOTION TO STAY REMAND ORDER

Now before the Court is the Defendant's Motion to Stay Execution of Remand Order pending Appeal and Motion for Expedited Consideration. ECF No. 18. However, for the reasons that follow, the Motion to Stay the Court's Order of Remand is **DENIED**.

The Supreme Court's discussion of the legal boundaries governing lower courts' decisions to stay pending appeal in *Nken v. Holder* is informative, so it is incorporated verbatim herein:

> "A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, 272 U.S., at 672, 47 S.Ct. 222. It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case."

> *Id*., at 672–673, 47 S.Ct. 222; *see Hilton, supra*, at 777, 107 S.Ct. 2113 ("[T]he traditional stay factors contemplate individualized judgments in each case"). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 708, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *Landis v. North American Co*., 299 U.S. 248, 255, 57 S.Ct. 163, 81 L.Ed. 153 (1936).
>
> The fact that the issuance of a stay is left to the court's discretion "does not mean that no legal standard governs that discretion .... '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " *Martin v. Franklin Capital Corp*., 546 U.S. 132, 139, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (*quoting United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)). As noted earlier, those legal principles have been distilled into consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton, supra*, at 776, 107 S.Ct. 2113.

Nken v. Holder, 556 U.S. 418, 433–34 (2009).

Regarding the first factor, the Defendant argues that "it is likely to prevail on the merits." ECF

No. 18 at 8. The Court finds that the Defendant has failed to make a strong showing that it is likely to succeed on the merits. *Nken*, at 434. In support, the Defendant avers that this Court failed to apply the correct standard in its Order remanding this case to the Circuit Court of Berkeley County. See ECF No. 18 at 6. To the extent the Court did not explicitly include the "extreme situations" language from *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991), it is no less apparent to the Court that this case should be remanded.

The Defendant filed substantive motions seeking dismissal of the plaintiff's claims in state court and removed the case hours after it was reassigned to the judge who handled the first litigation involving these parties. In other words, judicial economy clearly weighs in favor of this case being decided by the court in which it originated and was already, partially litigated. Nonetheless, there is nothing in the Defendant's instant motion that provides a strong showing that it is likely to succeed on appeal.

Although the Defendant may have to simultaneously defend its suit in state court and take up its appeal, the Defendant will not be irreparably injured absent a stay. Similarly, the Court finds that issuance of a stay would not substantially injure the Plaintiff in this case. Finally, the public interest lies in judicial economy and avoiding forum, or judge, shopping, which is best served by the Court's Order remanding the case to state court and not issuing a stay of that Order.

Therefore, the Defendant's Motion to Stay Execution of Remand Order pending Appeal and Motion for Expedited Consideration is DENIED. ECF No. 18. The Clerk of Court is DIRECTED to transmit copies of this Order to all counsel of record herein.

DATED: November 2, 2021

/s/ Gina M. Groh
Chief United States District Judge

APPENDIX D

In the Circuit Court of Berkeley County, West Virginia

Jerome Redman,
Plaintiff,

v. Case No. CC-02-2021-C-11
Judge Steven Redding

Javitch Block, LLC,
Defendant

ORDER DENYING MOTION TO DISMISS

This motion comes on for consideration (after several procedural delays) upon the Defendant Javitch Block, LLC's Motion to Dismiss [filed Feb. 25, 2021], in which Javitch moves the Court to dismiss this case for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Having considered the briefing on the Motion and all arguments for and against, the Court **DENIES** the Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jerome Redman's Amended Complaint alleges that, at some point prior to 2012, an individual acquired a credit card in Mr. Redman's name, incurred a debt, and never paid the debt. Subsequently, FIA Card Services ("FIA") filed a debt collection action against Mr. Redman in Berkeley County, West Virginia (Civil Action No. 2012-C-1011), but Mr. Redman, again according to the Amended Complaint,

never received service of process. He did not appear in the debt collection action, so ultimately, FIA obtained a default judgment against Mr. Redman. At this point Mr. Redman maintains that he remained unaware of the debt and the judgment. The Court file of the 2012 case reflects an attempt at collection (suggestee execution, apparently unsuccessful) in 2016 and also long periods of no activity. In October 2019, however, Javitch filed a suggestee execution in the Circuit Court of Berkeley County to collect FIA's judgment by garnishing Mr. Redman's wages. Mr. Redman worked for a Virginia company, Southland Concrete. Southland Concrete paid Mr. Redman in Virginia. Javitch served Southland Concrete with the suggestee execution but did not domesticate the debt collection action in Virginia.

According to the Amended Complaint, the first Mr. Redman learned of the debt or the judgment against him was when he received a reduced paycheck from Southland Concrete due to garnishment of his wages. When the wage garnishment alerted Mr. Redman to FIA's judgment against him, Mr. Redman moved to set aside the default judgment. When this Court granted that motion, Mr. Redman filed his Answers and Counterclaims to the debt collection action, naming Javitch as a third-party defendant.

Mr. Redman served his Answer, Counterclaims and Third-Party Complaint on July 15, 2020. Javitch did not answer the Third-Party Complaint within the thirty days deadline (August 21, 2020). In the interim, Mr. Redman and FIA reached a settlement and

voluntarily dismissed, with prejudice, FIA from the Complaint and Counterclaims on August 28, 2020.

After the time for responsive pleading had passed, on September 1, 2020, Javitch moved to strike Mr. Redman's third-party complaint. In the alternative, Javitch requested an extension of time to "answer, move, or otherwise plead." On September 8, 2020, Mr. Redman filed a Motion for Entry of Default Against Third-Party Defendant Javitch Block. The Court denied Javitch's Motion to Strike on September 25, 2020, retaining jurisdiction over the third-party action.

On October 7, Javitch filed Notice of Intent to File a Writ of Prohibition. Ultimately, Mr. Redman chose to bring the claims against Javitch independently of his now-settled claims against FIA, so on October 13, 2020, Mr. Redman filed a Notice of Voluntary Dismissal Without Prejudice.

Mr. Redman then filed the instant case on January 14, 2021. Javitch filed this Motion to Dismiss, and then removed the case to the federal district court for the Northern District of West Virginia. The case has been remanded back to this Court. Accordingly, the Motion to Dismiss is ripe for judgment.

DISCUSSION

I. Dismissal of this case is not appropriate under Rule 12(b)(1), which requires dismissal where the court lacks personal jurisdiction.

For the reasons stated below, this Court DENIES Defendant's Motion to Dismiss pursuant to W. Va. R. Civ. P. 12(b)(1).

A. Plaintiff has standing to challenge the suggestee execution served on his employer.

Javitch argues that this Court lacks personal jurisdiction because Mr. Redman has no standing to challenge the suggestee execution Javitch served on his employer.

Generally, standing is defined as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002). "It is quite generally held, and reason dictates, that the judgment debtor who is vitally interested because his property is being taken by this ancillary and summary process for appropriation of his property by another, may appear and protect his interests especially where jurisdiction is involved." *Bank v. Beatty*, 107 W. Va. 135, 147 S.E. 475 (1929). As one Texas court has stated, "Because the judgment debtor's property is at stake in a garnishment proceeding, the judgment debtor has standing to participate in the proceeding." *Brown v. Wells Fargo Bank*, NO. 01-18-01002-CV, at *2, fn.1 (Tex. App. Sep. 1, 2020). Accordingly, this Court finds that Mr. Redman has standing to bring this case.

B. The settlement of Redman I does not deprive the Plaintiff of standing in this action.

Javitch has not met its burden of proving that the settlement of Redman I released it from liability. Mr. Redman and FIA settled this case, and Mr. Redman dismissed the case against FIA with prejudice on August 28, 2020. Subsequently, Mr. Redman dismissed his claims against Javitch without prejudice on October 13, 2020.

Javitch having not been a party to the settlement or the settlement negotiations, can only assert in its Motion to Dismiss that "upon information and belief," settlement agreement released the claims against Javitch. In response, Mr. Redman submitted the affidavit of his attorney, stating that the confidential settlement agreement specifically excepted Mr. Redman's claims against Javitch from release.

The mere existence of the settlement does not support Javitch's claim. West Virginia law specifically allows plaintiffs to settle with one defendant while maintaining an action against another:

> A release to, or an accord and satisfaction with, one or more joint trespassers, or tort-feasors, shall not inure to the benefit of another such trespasser, or tort-feasor, and shall be no bar to an action or suit against such other joint trespasser, or tort-feasor, for the same cause of action to which the release or accord and satisfaction relates.

W. Va. Code § 55-7-12. The rule is that nothing short of full satisfaction by one defendant can foreclose a plaintiff's cause of action against another defendant who is jointly and severally liable. *See, State ex rel, Bumgarner v. Sims*, 139 W. Va. 92, 114, 79 S.E.2d 277 (1953).

Here, Javitch has offered no evidence that Mr. Redman's claims against it were fully satisfied by the settlement with FIA. To say that Mr. Redman's claims were fully satisfied, at this stage in the litigation, this Court would have to presume the extent of Javitch's responsibility and its relation to Mr. Redman's harms. This runs contrary to the presumption in favor of the plaintiff at the motion to dismiss stage. Syl. Pt. 3 *Copley v. Mingo County Board of Education*, 195 W.Va. 480, 466 S.E.2d 139 (1995). The Court finds that the Motion is not well taken in this regard.

What is more, dismissal is inappropriate because Count III of Mr. Redman's First Amended Class Action Complaint asserts claims under the Fair Debt Collection Practices Act. *Redman I* also included claims under the FDCPA, but those claims could not have been settled in that case, because the FDCPA only applies to those collecting debts owed to another and not to those collecting their own debts. *See* 15 U.S.C. § 1692(a)(6). Because of this statutory provision, Plaintiff's FDCPA Counterclaims in *Redman I* included claims against Javitch only, not FIA. Therefore, any settlement between Mr. Redman and FIA did not resolve Mr. Redman's FDCPA claims.

In the absence of complete satisfaction of those claims, dismissal under Rule 12(b)(1) is not warranted.

II. Dismissal of this Case under Rule 12(b)(6) is not appropriate.

The burden to prevail under a Rule 12(b)(6) motion is extremely high. "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Co. Com'n,* 221 W.Va. 468, 470, (2007). The West Virginia Supreme Court has held that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977).

"For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605 (1978). In other words, "a trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief." "The motion to dismiss for failure to state a claim [is] viewed with disfavor and [should be] rarely granted." *Cantley*, 221 W.Va. at 470. "[I]f the complaint states a claim upon which relief can be granted under any legal theory, a motion under

Rule 12(b)(6) must be denied." *John W. Lodge*, 161 W.Va. at 605.

A. Res judicata does not apply here, where there was no final judgment on the merits against Defendant in Redman I.

Plaintiff's claims are not barred by res judicata. Res judicata operates to "preclude the expense and vexation attending relitigation of causes of action which have been fully and fairly decided" and to conserve judicial resources and minimize the risk of inconsistent decisions. *Antolini v. W. Va. Div. of Natural Res*, 220 W. Va. 255, 257-58, 647 S.E.2d 535, 538 (2007) (*citing Sattler v. Bailey*, 184 W. Va. 212, 217, 400 S.E.2d 220, 225 (1990)).

The test for the application of res judicata, or claim preclusion, is set forth in *Blake v. Charleston Area Med. Ctr., Inc.*:

> Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been

> resolved, had it been presented in the prior action.

Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

Where a case is dismissed without prejudice, there has been no final judgment on the merits, and res judicata does not apply. *See B.R. v. W. Va. Dep't of Health & Human Res.,* 2020 W. Va. LEXIS 689 (W. Va. 2020). In B.R., the Supreme Court of this State reiterated that a dismissal without prejudice does not trigger res judicata:

> In 1975, this Court adopted the view that a "prior dismissal under 12(b)(6) is a final judgment unless the Court specifically dismisses without prejudice." *Sprouse v. Clay Communication, Inc.,* 158 W. Va. 427, 460, 211 S.E.2d 674, 696 (1975). B. R. I. was dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and the circuit court in that case expressly noted that the case was dismissed without prejudice. Therefore, petitioner's claims are not barred by res judicata or collateral estoppel.

Id., at 8 (emphasis in original). Because Javitch was dismissed without prejudice from Redman I, no final judgment has been reached and res judicata does not act as a bar to this case.

Further, because Mr. Redman's FDCPA claims are solely against Javitch, these claims certainly did not reach final judgment in Redman I. An FDCPA claim cannot lie against a party like FIA engaged in collection of a debt owed directly to that party. 15 U.S.C. § 1692(a)(6). An FDCPA claim is only valid against a third-party debt collector like Javitch. Therefore, Javitch cannot show that a final judgment was rendered on the FDCPA claim.

Here, only the claims against FIA were dismissed with prejudice in Redman I. The claims against Javitch were dismissed without prejudice. There has been no final judgment on any of Mr. Redman's claims against the Javitcch, so res judicata cannot apply in this case.

B. Claim splitting does not bar litigation of claims where, as here, the claims are against a different party.

Javitch argues that this Court must dismiss Mr. Redman's claims under the doctrine of claim splitting. Claim splitting is a subset of res judicata:

> Like res judicata, claim splitting 'prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action.' *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 561, 803 S.E.2d 519, 531 (2017) (*quoting Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, 452 F. Supp. 2d 621, 626 (D. Md.

> 2006)). Cf. Syl. pt. 1, in part, *State Farm Mut. Auto. Ins. Co. v. De Wees*, 143 W. Va. 75, 101 S.E.2d 273 (1957) ("'[D]amages resulting from a single tort suffered by one person, consisting partly of property damages and partly personal injury damages, are the subject of only one action against a tort-feasor.'" (quoting Syl. pt. 1, *Mills v. De Wees*, 141 W. Va. 782, 93 S.E.2d 484 (1956))).

Estate of Jones v. City of Martinsburg, 2020 W. Va. LEXIS 709, 21-22 (W. Va. 2020).

Javitch's argument misapprehends the doctrine. Claim splitting does not "preclude a plaintiff from bringing an action based on the same nexus of facts against another defendant." *McCormick v. City of McAlester*, 2012 U.S. Dist. LEXIS 64147, 10- 11 (E.D. Ok. May 8, 2012). It is an appropriate and common practice for a plaintiff "to sue different defendants in different suits for the same injury." *Collins v. Cook Cty.*, 2019 U.S. Dist. LEXIS 16309, 7-8 (N.D. Ill. February 1, 2019). This action does not result in piecemeal litigation between Mr. Redman and a single party and is not barred by the doctrine of claim splitting. Accordingly, dismissal on this ground is inappropriate.

C. Counts I-VI do not fail as a matter of law.

Javitch argues that its undisputed failure to domesticate the Berkeley County judgment in Virginia was lawful under W. Va. Code §§ 38-5A-3(a)

and 38-5A-5(a), and therefore all Mr. Redman's claims fail. Although these statutes require the judgment debtor to apply for the suggestee execution in the court in which the judgment was recovered, these same statutes do not touch on the issue of foreign suggestees.

Javitch's argument stretches the language of these statutes, which never explicitly contemplate foreign suggestees, only suggestees from different intra-state counties.

Javitch argues that because W. Va. Code § 38-5A-5(a) allows service to a suggestee through the Secretary of State, the statute must contemplate foreign suggestees. However, this interpretation would lead to odd results, where a judgment debtor would need to domesticate a judgment for non-registered foreign suggestee, but not for a registered foreign suggestee.

What is more, W. Va. Code §§ 38-5A-3(a) and 38-5A-5(a) do not grant West Virginia Circuit Courts jurisdiction beyond what is constitutionally permissible. *United States Coal & Coke v. Kitts*, 126 W. Va. 13, 15-16, 27 S.E.2d 65, 66 (1943) ("a Justice of the [Peace has no jurisdiction to issue any write, including a suggestee execution, operative beyond the geographical boundary of his County.") Garnishment is a dual proceeding, requiring jurisdiction over the suggestee and the property itself. *Pennsylvania R.R. v. Rogers*, 52 W. Va. 450, 452, 44 S.E. 300, 300 (1903). Personal jurisdiction over a suggestee requires more

than "that process may be served upon it." *Id*. at 464. In rem jurisdiction over the wages exists when they are (1) located within the state, (2) in possession of the garnishee while transitorily in the state, or (3) the garnishee owes a debt payable in the state. *Id*. at 456.

Here, the suggestee, Southland Concrete, was located outside of Berkeley County. Although Javitch points to the ability to serve process upon Southland Concrete through the West Virginia Secretary of State, this is not the higher required level of personal jurisdiction. Personal jurisdiction over the suggestee aside, jurisdiction over the property, the wages, did not exist. Those wages were due on account of wages earned in Virginia and give rise to the legal presumption that the wages were payable in Virginia. Therefore, W. Va. Code §§ 38-5A-3(a) and 38-5A-5(a) do not offer a legal shield for Javitch's actions.

The presence of Virginia's Uniform Enforcement of Foreign Judgments Act, which lays down the specific procedures on how to domesticate a foreign judgment respecting our federal system while also affording relief to defendants amplifies this point.

D. The litigation privilege does not bar Redman's FDCPA and malicious prosecution claims.

Javitch argues that litigation privilege protects it from suit. However, the West Virginia Supreme Court of Appeals in *Clark v. Druckman*, 218 W. Va. 427, 433-34, 624 S.E.2d 864, 870-71 (2005), held that

the litigation privilege does not apply to malicious prosecution claims.

Furthermore, this Court will follow the path of other courts in uniformly rejecting litigation immunity as a defense to FDCPA liability for the conduct of third party debt collectors in their state court collection litigation. *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). This is furthered by the text of the FDCPA, which prohibits certain litigation activities, such as limiting collection suits to convenient forums (15 U.S.C. § 1692i.) and prohibiting collection lawyer misrepresentations about legal process and the need to file a written answer to avoid default judgment. 15 U.S.C. § 1692e(15). Other FDCPA provisions exempt from liability certain litigation conduct. See, e.g., 15 U.S.C. §§ 1692a(6)(D), 1692c(a), 1692c(b)(3), 1692f(6), 1692i(b). To grant Javitch blanket litigation privilege would render these provisions null.

E. Plaintiff has properly stated a claim for malicious prosecution upon which relief can be granted (Count II)

Javitch argues that Mr. Redman's malicious prosecution claim fails to state the "probable cause" element as required by *Clark v. Druckman*, 218 W. Va. 427, 433 (2005). However, the West Virginia Supreme Court has rejected the requirement that a plaintiff use "the magic words." *See Kessel v. Leavitt*, 204 W. Va. 95, 132 (1998); *In re Lacey P.* 189 W. Va. 580, 586-87 (1993). Mr. Redman plead the probable cause element

in ¶34 of the Complaint when he stated Javitch instigated "unjustifiable and unreasonable" civil action. A justified action is merely one with probable cause, by stating this action was unjustified Mr. Redman points to its lack of probable cause. Mr. Redman has therefore satisfied the requirements of 12(b)(6).

F. Plaintiff has properly stated a claim for a violation of the FDCPA upon which relief can be granted (Count III)

Javitch's argument for dismissal of Mr. Redman's FDCPA fails. Javitch's argument turns on its interpretation of a statute not relevant to this case. The FDCPA includes a venue statute that specifies that venue for a debt collection action (other than an action to enforce an interest in real property) lies in the judicial district where the consumer resides or where the consumer signed the contract sued upon. 15 U.S.C. §1692i(a)(2) (A-B).

Mr. Redman does not argue that the debt collection action or the suggestee execution issued from the wrong venue. Instead, he argues that Javitch served the suggestee execution outside of the issuing court's jurisdictional reach.

Further, Section 1692i does not subject post-judgment proceedings to its venue requirements. *Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1112 (11th Cir. 2016). In fact, other courts have specifically held post-judgment proceedings subject to

15 U.S.C. §1692e's prohibition against false or misleading representations. *Hiday & Ricke, P.A.,* 2018 U.S. Dist. LEXIS 160116 (S.D. Fla. September 18, 2018) (finding defendants violated 15 U.S.C. §1692e by misrepresenting the effect of the writ of garnishment in connection with collecting plaintiff's debt); *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1306 (11th Cir. 2015) (noting that a misrepresentation of the nature or effect of a writ of garnishment would be "misleading or deceptive in the traditional sense" under § 1692e). Therefore, Mr. Redman's FDCPA claim survives this ground for the Motion to Dismiss.

G. Plaintiff has properly stated a claim of conversion upon which relief can be granted (Count IV)

Defendant Javitch states that Mr. Redman's claim fails because the funds were never in the dominion and use of Javitch. However, in West Virginia, conversion of funds does not require that the property be reduced to the defendant's use or benefit. *Miami Coal Co., Inc. v. Hudson,* 175 W. Va. 153, 160 (W. Va. 1985) (citing Syl. Pt. 3 of *Pine and Cyprus Manufacturing Co. v. American Engineering and Construction Co,* 97 W. Va. 471, 472 (1924)). Rather, the wrongful denial of the plaintiff's property rights may be treated as conversion. *Rodgers v. Rodgers*, 184 W. Va. 82, 95, 399 S.E.2d 664, 667 (1990). Therefore, the fact that the funds at issue were not converted to Javitch's use does not bar Mr. Redman's conversion claim.

H. Plaintiff has properly stated a claim of negligence (Count VI)

The elements of a claim for negligence are well known. To succeed on such a claim, a plaintiff must prove, duty, breach, causation, and damages. *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016) (*citing Webb v. Brown & Williamson Tobacco Co.,* 121 W. Va. 115, 118, 2 S.E.2d 898, 899 (1939)).

Javitch argues that Mr. Redman's negligence claim cannot survive because Javitch had a duty of care to its client, FIA, but no duty of care towards Mr. Redman, a third-party.

However, Mr. Redman points to two sources of duty: the West Virginia Rules of Professional Conduct and the FDCPA. The Court agrees that these are valid sources of duty.

In West Virginia, violation of a statute or regulation is prima facie evidence of negligence. Syl. Pt. 2, *Waugh v. Traxler,* 186 W. Va. 355, 412 S.E.2d 756 (1991). Rule 4.1 of the West Virginia Rules of Professional Conduct prohibits a lawyer from knowingly making a false statement of fact or law to a third person. Mr. Redman's pleadings state that Javitch knowingly served an undomesticated suggestee execution on Southland Concrete. Thus, Mr. Redman alleges sufficient facts that state a claim for negligence against Javitch.

Further, as a debt collector under the FDCPA, Javitch owed a duty to Mr. Redman separate from the duty he owed to FIA. The FDCPA defines "debt collectors" as anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owned by another." 15 U.S.C. § 1692a(6). The United States Supreme Court has held that this definition encompasses attorneys. *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

> In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e.g., Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings").

Heintz, 514 U.S. at 295-96.

Under the terms of the FDCPA, it appears to the Court that, as a third party debt collector, Javitch would have a duty to consumers such as Mr. Redman.

RULING

Accordingly, it is ADJUDGED and ORDERED that this Court DENIES the Defendant's Motion to Dismiss [filed Feb. 25, 2021].

The Clerk shall furnish attested copies of this Order to all counsel of record.

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit