INDEX Exhibits

Slip Copy, 2010 WL 2933559 (E.D.N.C.)
(Cite as: 2010 WL 2933559 (E.D.N.C.))

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This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, E.D. North Carolina, Western Division.
Larry K. GREEN, a/k/a Said Abdullah Hakim, Plaintiff,
v.
Theodis BECK, et al., Defendants.

No. 5:10-CT-3003-D.
July 26, 2010.

Larry K. Green, Lillington, NC, pro se.

Oliver G. Wheeler, N.C. Department of Justice, Raleigh, NC, for Defendants.

ORDER

JAMES C. DEVER III, District Judge.

*1 On January 6, 2010, Larry K. Green, a/k/a Said Abdullah Hakim ("Hakim" or "plaintiff"), a state inmate, filed this action under 42 U.S.C. § 1983 ("section 1983") [D.E. 1].[FN1] On February 8, 2010, Hakim filed a motion for a temporary restraining order and preliminary injunction [D.E. 9]. On April 13, 2010, Hakim filed a second motion for a temporary restraining order and preliminary injunction [D.E. 13], and on April 19, 2010, Hakim filed a motion to amend his motions for injunctive relief [D.E. 15]. The court construes the motion as a third motion for a temporary restraining order and preliminary injunction. On April 30, 2010, Hakim filed a motion for a show cause hearing on his request for immediate injunctive relief [D.E. 16]. On May 3, 2010, Hakim filed a motion for leave to amend his complaint [D.E. 17]. On May 14, 2010, Hakim filed a motion for entry of default or, in the alternative, for summary judgment [D.E. 18]. The court construes the motion as a motion for entry of default. *See* Fed.R.Civ.P. 55(a). On May 14, 2010, North Carolina Prisoner Legal Services, Inc. ("NCPLS") filed a motion for an extension of time nunc pro tunc [D.E. 19]. On June 30, 2010, Hakim filed a motion for sanctions [D.E. 23].

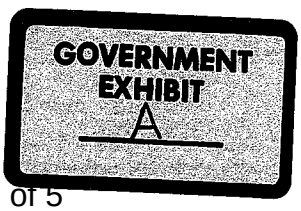
FN1. The court uses "Hakim" to identify plaintiff for brevity purposes only.

For the reasons explained below, the court grants NCPLS' motion for an extension of time nunc pro tunc [D.E. 19] and deems timely filed the response to the order of investigation [D.E. 20]. The court denies plaintiff's motions for a temporary restraining order and preliminary injunction [D.E. 9, 13, 15] and denies as moot plaintiff's motion for a show cause hearing on his request for immediate injunctive relief [D.E. 16]. The court denies plaintiff's motion for entry of default [D.E. 18] and motion for sanctions [D.E. 23]. The court allows plaintiff's motion for leave to amend his complaint [D.E. 17] and orders plaintiff to file an amended complaint to particularize his claims no later than August 6, 2010.

I.

Hakim asserts that defendants discriminate against him by refusing to recognize his alleged legal name, Said Abdullah Hakim, and asks the court to order the North Carolina Department of Correction ("DOC") to identify and address him correctly. Compl. 3-10. Hakim also complains that defendants were deliberately indifferent to his serious medical needs and tampered with his legal mail. *Id.* at 6-10. Hakim seeks compensatory and punitive damages and injunctive relief. *Id.* at 10.[FN2]

FN2. When Hakim initiated this action, he was imprisoned at Lumberton Correctional Institution ("Lumberton"). *See* Compl. 2. Hakim asserts claims involving his imprisonment at Lumberton, Pender Correctional Institution ("Pender"), and Craven Correctional Institution ("Craven"). *Id.* at 2-3.



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Hakim is presently incarcerated at Tabor Correctional Institution ("Tabor") and now brings claims involving his confinement at that facility. *See* N.C. Dep't of Corr. Offender Pub. Info., http://webapps.doc . state.nc.us/opi/offendersearch.do?method= view (last visited July 16, 2010); *see also* Mot. Amend 1.

On February 8, 2010, Hakim filed a motion for immediate injunctive relief under Rule 65 of the Federal Rules of Civil Procedure ("Rule 65") [D.E. 9]. Plaintiff claims that Lumberton medical staff have failed to respond to his sick-call or medicine-refill requests. Mot. Prelim. Inj. 1, 3-4. Hakim also alleges that he has "endured almost 2 years of religious disparity, racism and discrimination" at Lumberton and Pender. *Id.* at 2. Hakim "sincerely feels his health, safety and very life are all in jeopardy" and requests an immediate transfer to a prison located closer to his family. *Id.* Hakim's additional complaints include the failure of defendants to provide carbon paper, ink pens, and copies, the rejection of his grievances, interference with his mail, and the continued refusal to identify him by his legal name. *Id.* at 3, 12-13. Hakim also alleges that prison staff allow contraband at Lumberton, and as a result, another inmate threatened him with a knife. *Id.* at 4. Hakim seeks an order requiring the DOC to issue an identification card with his legal name and prohibiting interference with his mail. *Id.* at 14. Hakim also asks the court to order medical staff to provide his "fish oil pills, Zantac, Naprosen, skin cream, CTM pills, Footstone, and Dr. 2 Shoes" and to provide medications timely. *Id.* Furthermore, Hakim requests an order directing the DOC to transfer him immediately from Lumberton to Eastern or Nash Correctional Institution. *Id.*

***2** On April 13, 2010, Hakim filed a second motion for immediate injunctive relief under Rule 65 [D.E. 13]. Hakim claims that he is subject to racial and religious discrimination and retaliation. Second Mot. Prelim. Inj. 1. Hakim also alleges that he experiences "constant agonizing pain," which defendants fail to diagnose and treat. *Id.* at 1-2. Following his transfer to Tabor, Hakim claims that his pain has increased "under constant air conditioning ." *Id.* at 2-3. Hakim's complaints also include the alleged interference with his mail, failure to respond to his inmate grievances, a retaliatory transfer from Lumberton to Tabor, and an incident of excessive use of force. *Id.* Hakim asks the court to order the DOC to include his legal name on his identification card, provide magnetic resonance imaging, and transfer him to Wayne, Nash, or Eastern Correctional Institutions or back to Lumberton. *Id.* at 4.

On April 19, 2010, Hakim filed a third Rule 65 motion for a temporary restraining order and preliminary injunction [D.E. 15]. Hakim asserts more claims against Lumberton defendants including "intimidation, falsifying/concealing facts, obstructing justice, misuses of federal assistance, and neglecting to prevent [ ] conspiracies." Third Mot. Prelim. Inj. 1. Hakim also appears to allege that Tabor correctional officers wrongfully charged him with a disciplinary infraction and placed him in segregation. *See id.* at 1-2. Hakim complains of alleged interference with his mail, deliberate indifference to his serious medical needs, and the failure of the DOC and correctional staff to use his legal name. *Id.* at 2-3.

On April 30, 2010, Hakim filed a motion for a hearing to show cause for a preliminary injunction [D.E. 16]. Hakim lists additional, alleged examples of retaliation, denial of "access to the courts," improper transfer, and deliberate indifference to his serious medical needs. Mot. Hearing 1-4.

The substantive standard for granting a temporary restraining order is the same as the standard for entering a preliminary injunction. *See, e.g., U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n. 1 (4th Cir.2006). A court may grant a temporary restraining order or a preliminary injunction if the moving party demonstrates "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of prelimin-

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ary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *See Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008). In *Winter*, the Supreme Court rejected the Fourth Circuit's "standard that allowed the plaintiff to demonstrate only a 'possibility' of irreparable harm because that standard was 'inconsistent with [the Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.' " *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir .2009), vacated on *other grounds*. 130 S.Ct. 2371 (2010) (quoting *Winter*, 129 S.Ct. at 375-76).

***3** Hakim has not established that he is likely to succeed on the merits, that he is likely to suffer irreparable harm absent injunctive relief, that the balance of equities tips in his favor, or that an injunction is in the public interest. Thus, Hakim has failed to meet his burden of proof. Accordingly, the court denies plaintiff's motions for a temporary restraining order and a preliminary injunction [D.E. 9, 13, 15] and denies as moot plaintiff's motion for a show cause hearing on his request for immediate injunctive relief [D.E. 16].

On May 3, 2010, Hakim filed a motion for leave to file an amended complaint naming Tabor Superintendent George Kenworthy ("Kenworthy") as an additional defendant [D.E. 17]. Hakim may amend his pleading as a matter of course because defendants have not served a responsive pleading. *See* Fed.R.Civ.P. 15(a)(1)(B). Thus, the court allows plaintiff's motion for leave to file an amended complaint to name Kenworthy as an additional defendant [D.E. 17].

It does not clearly appear from the face of the amended complaint that plaintiff is not entitled to relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i). Accordingly, the court directs the Clerk of Court to maintain management of the action including the issuance of summons as to Kenworthy.

Next, the court addresses Hakim's failure to comply with the general rules of pleading. Under Rule 8(a) of the Federal Rules of Civil Procedure, a claim for relief must contain a short and plain statement showing that the pleader is entitled to relief. *See* Fed.R.Civ.P. 8(a); *see also Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346-47 (4th Cir.2005). In addition, Rule 15 of the Federal Rules of Civil Procedure prescribes the manner in which a party may amend his pleading. *See* Fed.R.Civ.P. 15. Here, Hakim purports to assert new allegations in every filing, and his allegations do not adequately specify the claims that he is attempting to make against each named defendant. As such, plaintiff violates Rules 8(a) and 15 of the Federal Rules of Civil Procedure. Simply put, Hakim fails to "give [each] defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quotation omitted).

The court permits Hakim until August 6, 2010, to amend his complaint to cure any defects and particularize his claims. *See Coleman v. Peyton*, 340 F.2d 603, 604 (4th Cir.1965) (per curiam). The amended complaint must state precisely whom plaintiff seeks to name as defendants and avoid unnecessary details. Hakim must describe briefly the specific events and correlating dates which are the bases for the action, the constitutional rights purportedly violated, and each defendant's personal participation in the process. The amended complaint also must focus on how the alleged events affected plaintiff, the injury he allegedly sustained, and the person (or people) who inflicted the injury. The amended complaint will supplant Hakim's previous complaints. In other words, the amended complaint will constitute the complaint in its entirety, and the court will not review plaintiff's other filings to glean any misplaced claims. The court will review any amended complaint to determine whether severance of plaintiff's claims is appropriate. *See* Fed.R.Civ.P. 18(a), 20(a)(2). The court warns Hakim that if he does not file an amended complaint which complies with the Federal Rules

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of Civil Procedure and this order by August 6, 2010, the court may dismiss the action without prejudice. *See* Fed.R.Civ.P. 16(f)(1)(C), 41(b).

***4** Hakim also asks the court to provide a copy of the docket sheet. *See* Mot. Amend 2-3. The Clerk of Court processes requests for copies of the docket sheet and any filings for a fee of fifty cents per page. *See* 28 U.S.C. § 1914 note (Judicial Conference Schedule of Fees, District Court Miscellaneous Fee Schedule). This fee is not waived for in forma pauperis litigants. *See, e.g., In re Richard,* 914 F.2d 1526, 1527 (6th Cir.1990); *Douglas v. Green,* 327 F.2d 661, 662 (6th Cir.1964) (per curiam); *Daniel v. Craig,* No. 5:07-CV-465, 2008 WL 644883, at *3 (S.D.W.Va. Mar. 7, 2008) (unpublished); *Souser v. Robinson,* No. 2:05-CV-481-RAJ, 2005 WL 6070214, at *1 (E.D.Va. Dec. 7, 2005) (unpublished); *Fulgham v. Parker,* No. 2:05-CV-401, 2005 WL 5545032, at *2 (E.D.Va. Nov. 10, 2005) (unpublished).

In this case, the cost for a current copy of plaintiff's docket sheet is $2.00, excluding postage. Hakim does not offer to pay for the copies or set forth exceptional and compelling circumstances to justify why a free copy should be provided to him. Courts are under no obligation to provide free copies of documents to litigants. *See, e.g., United States v. Carpenter,* 271 Fed. Appx. 371, 372 (4th Cir.2008) (per curiam) (unpublished); *Garabedian v. Lanteiene* , No. 1:08-CV-1221 (AJT/TRJ), 2009 WL 1032774, at *5 (E.D.Va. Apr. 15, 2009) (unpublished). Hakim may send $2.00 to the Clerk of Court, who will then provide him with a copy of the docket sheet.

On May 14, 2010, Hakim filed a motion for entry of default [D.E. 18]. Hakim's motion for entry of default is premature. An entry of default shall be made when "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend" as provided by the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 55(a). The responsive pleading of defendants Bell, O'Neal, Taylor, and Thomas is not due until July 21, 2010 [D.E. 22]. [FN3] Because defendants' answer or responsive pleading is not yet due, the court denies plaintiff's motion for entry of default [D.E. 18].

FN3. Hakim has failed to obtain service of process on defendant Theodis Beck [D.E. 11].

On May 14, 2010, NCPLS requested an extension of time nunc pro tunc to file its response to the January 11, 2010 order to investigate plaintiff's claims [D.E. 19]. Also on May 14, 2010, NCPLS filed its response to the order to investigate [D.E. 20]. For good cause shown, the court grants the request [D.E. 19] and deems timely filed the response to the order of investigation by NCPLS [D.E. 20].

On June 30, 2010, Hakim filed a motion for sanctions [D.E. 23]. Hakim objects to the extension of time to respond to the complaint provided nunc pro tunc to defendants Bell, O'Neal, Taylor, and Thomas. Mot. Sanctions 1-2. A court may order sanctions upon a failure to respond to discovery or failure to comply with a court order. *See* Fed.R.Civ.P. 37; *see also* Fed.R.Civ.P. 16(f). Defendants have not failed to respond to discovery or to comply with a court order. Accordingly, the court denies plaintiff's motion for sanctions [D.E. 23].

II.

***5** In sum, the court DENIES plaintiff's motions for a temporary restraining order and preliminary injunction [D.E. 9, 13, 15] and DENIES as moot plaintiff's motion for a show cause hearing [D.E. 16]. The court DENIES plaintiff's motion for entry of default [D.E. 18] and motion for sanctions [D.E. 23]. The court GRANTS the motion for an extension of time nunc pro tunc to file a response to the order of investigation [D.E. 19] and deems the May 14, 2010 response of NCPLS [D.E. 20] filed timely. The court ALLOWS plaintiff's motion for leave to file an amended complaint adding Superintendent George Kenworthy as an additional defendant [D.E. 17]. It does not clearly appear from the face of the amended complaint that plaintiff is not

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entitled to relief. *See* 28 U.S.C. § 1915(e)(2)(B)(i). The court DIRECTS the Clerk of Court to maintain management of the action including the issuance of summons as to Kenworthy. The court DENIES plaintiff's request for a free copy of the docket sheet [D.E. 17]. The court ORDERS plaintiff to file an amended complaint to particularize his claims, as directed by the court, no later than August 6, 2010. *See* Fed.R.Civ.P. 8(a). The amended complaint shall serve as the complaint in its entirety. The court WARNS plaintiff that his failure to file an amended complaint may result in the dismissal of this action. *See* Fed.R.Civ.P. 16(f)(1)(C), 41(b).

SO ORDERED.

E.D.N.C.,2010.
Green v. Beck
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United States District Court, E.D. North Carolina, Western Division.
CVM HOLINGS, LLC, Plaintiff,
v.
GAMMA ENTERPRISES, INC. d/b/a Oriental Express, Defendant.

No. 5:10-CV-103-BO.
June 22, 2010.

West KeySummary**Antitrust and Trade Regulation 29T ⚿198**

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk198 k. Real Property in General. Most Cited Cases

A commercial lessee's allegations were sufficient to state claims against lessor for negligent misrepresentation and unfair and deceptive trade practices under North Carolina law. The lessee alleged that the lessor induced the lessee to make substantial improvements to realty by the promise of a new lease and by affirmatively approving the lessee's plans for substantial improvements to the realty while secretly negotiating with another party to lease the premises. Further, the lessee pled that these misrepresentations were intended to deceive and induce reliance and that they resulted in injury to the lessee. West's N.C.G.S.A. § 75-1.1.

D. Kyle Deak, Troutman Sanders, LLP, Raleigh, NC, for Plaintiff.

Stephen A. Dunn, Emanuel & Dunn, PLLC, Raleigh, NC, for Defendant.

ORDER

TERRENCE W. BOYLE, District Judge.

***1** This matter is before the Court on Plaintiff's Motion for Preliminary Injunction and Plaintiff's Motion to Dismiss Counterclaims. Plaintiff CVM Holdings, LLC, requests preliminary equitable relief directing Defendant Gamma Enterprises to vacate real property. Gamma Enterprise's counterclaims allege the right to remain in the property and the right to damages for improvements to the property. For the reasons set forth herein, Plaintiff's Motions for Preliminary Injunction is DENIED, and Plaintiff's Motion to Dismiss is GRANTED in part and DENIED in part.

INTRODUCTION

Plaintiff CVM Holdings, LLC, (hereinafter "CVM") is the owner and operator of the Crabtree Valley Mall in Raleigh, North Carolina. Defendant Gamma Enterprises, Inc., (hereinafter "Gamma") operates the Oriental Express restaurant in space leased from CVM in the food court of the Crabtree Valley Mall.

On October 1, 1984, CVM and Gamma first entered into a lease agreement for Space # 2035, also known as Space No. U203 (the "Premises"), which consists of a restaurant storefront and food preparation space. On October 3, 2001, CVM and Gamma entered into a Fourth Amendment of the Lease, providing for a lease term to expire in March 31, 2010. In 2005, CVM and Gamma began negotiations for further extension of the lease, but no extended lease agreement was eventually executed.

CVM originally brought this action in Wake County Superior Court. By an Order dated February 25, 2010, the Wake County Superior Court denied CVM's Motion for a Temporary Restraining Order. Gamma removed this action on March 17, 2010, and CVM moved for a preliminary injunction in this Court on March 23, 2010. Gamma responded on April 18, 2010. CVM replied on April 26, 2010. A hearing was held in Raleigh, North Carolina, on the Motion for Preliminary Injunction on April 27,

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2010. CVM filed the instant Motion to Dismiss on April 7,2010. Gamma responded on May 3, 2010. CVM replied on April 15, 2010. These Motions are now ripe for ruling.

DISCUSSION

I. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ----, ----, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008); *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342 (4th Cir.2009), *vacated on other grounds*, --- U.S. ----, 130 S.Ct. 2371, 176 L.Ed.2d 764, 2010 WL 1641299 (U.S. April 26, 2010) (recognizing that the standard set forth in *Winter* supplants the previous standard in the 4th Circuit set forth in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir.1977)).

"[W]hile *Winter* articulates four requirements, each of which must be satisfied as articulated, *Blackwelder* allows requirements to be conditionally redefined as other requirements are more fully satisfied so that 'grant[ing] or deny[ing] a preliminary injunction depends upon a 'flexible interplay' among all the factors considered ... for all four [factors] are intertwined and each affects in degree all the others.' " *The Real Truth About Obama*, 575 F.3d at 347 (quoting *Blackwelder*, 550 F.2d at 196). Thus, CVM must show that it has independently satisfied each of the four conditions for obtaining preliminary relief set forth in *Winter* in order to obtain preliminary injunctive relief.

***2** CVM is likely to succeed on the merits and obtain the remedy of ejectment in this case. The parties agree that the current lease on the Premises expired on March 31, 2010. Gamma claims that it has the right to remain on the premises based on a series of letters and negotiations for the formation of a new lease. In order to create a binding contract, the parties "must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692 (1974). Gamma urges the Court to interpret these exchanges between CVM and Gamma as a contract for lease of the Premises. But "a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness." *Id.* And Gamma is unlikely to prevail in light of the opinion of the North Carolina Court of Appeals in *Computer Decisions, Inc. v. Rouse Office Management of North Carolina*, 124 N.C.App. 383, 477 S.E.2d 262, (1996), holding that an oral agreement that had settled the material terms of a lease and an exchange of draft leases did not amount to a sufficient writing to satisfy the statute of frauds. Thus, this Court concludes that CVM is likely to prevail on the merits because the exchanges averred to by Gamma are not likely to result in an enforceable contract for the possession of the Premises.

CVM has also demonstrated that it is likely to suffer irreparable harm in the absence of preliminary relief. "Real estate has long been thought unique, and thus, injuries to real estate interests frequently come within the ken of the chancellor." *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907 (1st Cir.1989). And CVM is in the business of managing and leasing real property. Therefore, although the loss incurred by CVM may be small relative to the realty wherein the premises are located and the resources at CVM's disposal, the harm to CVM's interest in the possession of the premises at issue constitutes irreparable harm.

But CVM may not obtain preliminary relief in this matter because the balance of the equities does not tip in CVM's favor. CVM represented to Gamma that a new lease would be forthcoming if Gamma fulfilled several conditions including certain improvements to the Premises. Gamma in-

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curred substantial expense by completing these improvements. CVM does not deny this conduct. Rather, counsel for CVM suggests that such allegations are more properly pled as a claim for unjust enrichment. But in light of such conduct that may well give rise to a claim in equity against CVM, this Court concludes that the balance of the equities does not tip in CVM's favor.

Real Truth About Obama makes clear that the party seeking preliminary equitable relief must satisfy the four factors set forth in *Winter* independently. 575 F.3d at 347. As such, this Court need not consider where the public interest lies. Because the balance of the equities does not tip in CVM's favor, CVM's Motion for Preliminary Injunction is DENIED.

II. Motion to Dismiss

***3** Gamma pleads counter-claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) promissory estoppel, (4) negligent misrepresentation, (5) unfair and deceptive trade practices in violation of N.C. Gen.Stat. § 75-1.1 *et seq,* and (6) specific performance.

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Papasan v. Attain,* 478 U.S. 265, 283, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993). Although specificity is not required, a complaint must allege enough facts to state a claim to relief that is facially plausible. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Mere recitals of the elements of a cause of action supported by conclusory statements do not suffice. *Ashcroft v. Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). If the factual allegations do not nudge the plaintiff's claims "across the line from conceivable to plausible," the "complaint must be dismissed." *Twombly,* 544 U .S. at 1973.

A. Breach of Contract, Good Faith and Fair Dealing, and Specific Performance

CVM moves to dismiss Gamma's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance on the grounds that no contract existed between the parties. CVM is correct to note that *Boyce v. McMahan,* 285 N.C. 730, 208 S.E.2d 692 (1974), and *Computer Decisions, Inc. v. Rouse Office Management of North Carolina,* 124 N.C.App. 383, 477 S.E.2d 262, (1996) set forth a difficult standard for finding the existence of a contract that satisfies the statute of frauds where the terms of the agreement are not set forth in a single executed writing. But although this Court noted above that CVM is likely to succeed on the merits and obtain possession of the premises when this matter reaches a conclusion, Gamma has stated a facially plausible claim for relief when the allegations set forth in Gamma's complaint are assumed to be true for the purposes of a motion to dismiss. Therefore, CVM's Motion to Dismiss is DENIED with respect to Gamma's claims arising out of the purported contract.

B. Estoppel

CVM moves to dismiss Gamma's claims for estoppel on the grounds that affirmative estoppel is not recognized in North Carolina. Promissory estoppel "has only been permitted in North Carolina for defensive relief and both North Carolina cases which recognized the doctrine involved the waiver of a preexisting right by a promisee." *Home Elec. Co. Of Lenoir, Inc. v. Hall and Underdown Heating and Air Conditioning Co.,* 68 N.C.App. 540, 543 (1987). And North Carolina has "never recognized it as a substitute for consideration ." *Id.* But "a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement." *Brooks v. Hackney,* 329 N.C. 166, 173, 404 S.E.2d 854 (1991) (quoting *Advertising Inc. v. Harper,* 7 N.C.App. 501, 505, 172

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S.E.2d 793 (1970)). Thus, although Gamma may not maintain a counter-claim for promissory estoppel to create a contract, Gamma may plead estoppel as a defense to ejectment. Therefore, CVM's Motion to Dismiss is GRANTED insofar as Gamma affirmatively pleads estoppel as a counter-claim, but this Court will construe Gamma's pleading of estoppel as a defense.

C. Negligent Misrepresentation and Unfair and Deceptive Trade Practices

***4** The crux of CVM's Motion to Dismiss Gamma's counter-claims for negligent misrepresentation and unfair and deceptive trade practices that it had no duty to disclose negotiations with other prospective tenants to Gamma.

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland,* 322 N.C. 200, 206, 367 S.E.2d 609 (1988). CVM is correct to note that it had no duty to disclose negotiations with another prospective tenant. *Computer Decisions,* 124 N.C.App. at 389, 477 S.E.2d 262. But non-disclosure is not the sum of the alleged conduct. Rather, Gamma also pleads with particularity that it justifiably relied on specific representation made by CVM that the satisfaction of certain conditions including improvements to the Premises would result in a new lease.

N.C. Gen.Stat. § 75-1.1 provides that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." "In order to prevail under this statute plaintiffs must prove: (1) defendant committed an unfair or deceptive act or practice, (2) that the action in question was in or affecting commerce, (3) that said act proximately caused actual injury to plaintiff." *Canady v. Mann,* 107 N.C.App. 252, 260, 419 S.E.2d 597 (1992). "Although it may be rare that the exercise of a contractual right will meet this stringent standard, it is possible for such an exercise, when it involves egregious or aggravating conduct, to constitute an unfair or deceptive trade practice under North Carolina's UTPA." *South Atlantic Ltd. P'ship v. Riese,* 284 F.3d 518, 539 (4th Cir.2002).

CVM argues that committed no unfair or deceptive act because it had no duty to disclose negotiations to lease the Premises to another party to Gamma. But Gamma has nonetheless stated a claim for unfair and deceptive trade practices by pleading additional facially plausible allegations that CVM "made false representations regarding their intent to enter into a binding [contract] and the terms of that agreement" and that "these misrepresentations were intended to deceive and induce reliance and they resulted in injury." *Dealers Supply Co., Inc. v. Cheil Indus., Inc.,* 348 F .Supp.2d 579, 594-95 (M.D.N.C.2004).

In sum, Gamma sets forth facially plausible claims for both negligent misrepresentation and unfair and deceptive trade practices supported by the allegations that CVM induced Gamma to make substantial improvements to realty by the promise of a new lease and affirmatively approving of Gamma's plans for substantial improvements to the realty while secretly negotiating with another party. Therefore, Defendant's Motion to Dismiss is DENIED with respect to Gamma's counter-claims for negligent misrepresentation and unfair and deceptive trade practices.

D. Unjust Enrichment

***5** It should also be noted that the facts pled in support of Plaintiff's claims for negligent misrepresentation and unfair and deceptive trade practices also set forth a claim for unjust enrichment. As the Supreme Court of North Carolina explained in *Wright v. Wright,* 305 N.C. 345, 351, 289 S.E.2d 347 (1982), a cognizable claim for unjust enrichment arises where a tenant makes improvements to realty "under the inducement of the owner's unenforceable promise to convey the land or an interest therein to the improver." [FN1] Because Gamma alleges that CVM obtained substantial improvements

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to realty by such inducement, Gamma has stated a facially plausible claim for unjust enrichment.

> FN1. It should be noted that no betterments claim may be maintained in this case because Gamma occupied the property as a tenant rather than a claimant to title. "The right to betterments is based upon the obvious principal of justice that the owner of land has no just claim to anything but the land itself, and fair compensation for damage and loss of rent. If the claimant, acting under an erroneous but honest and reasonable belief that he is the owner, makes valuable and permanent improvements, the true owner should not take them without compensation." *Sweeten v. King* 29 N.C.App. 672, 677, 225 S.E.2d 598 (1976) (quoting *Pritchard v. Williams,* 176 N.C. 108, 96 S.E. 733 (1918)). "Claims founded on unjust enrichment must be distinguished from defensive rights arising under the betterments statute, G.S. 1-340. Under this statute one who, under colorable title and in a good faith but mistaken belief that he has good title, makes improvements on land is entitled to compensation for the enhanced value of the land due to the improvements when he is ejected by the true owner." *Wright,* 305 N.C. 354 at n. 5. A party may not recover for betterments under N.C. Gen.Stat. § 1-340 where improvements to realty were made "not under any color of title, but while he was a tenant." *Hackett v. Hackett,* 31 N.C.App. 217, 220, 228 S.E.2d 758 (1976) , *rev. denied,* 291 N.C. 448, 230 S.E.2d 765 (1976).

CONCLUSION

Therefore, Plaintiff's Motion for Preliminary Injunction is DENIED. And Plaintiff's Motion to Dismiss is GRANTED in part and DENIED in part. Defendant's counter-claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) negligent misrepresentation, (5) unfair and deceptive trade practices, and (6) specific performance may proceed. Defendant's counter-claim for estoppel claim is DISMISSED.

SO ORDERED.

E.D.N.C.,2010.
CVM Holdings, LLC v. Gamma Enterprises, Inc.
Slip Copy, 2010 WL 2541093 (E.D.N.C.)

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301 Fed.Appx. 276, 2008 WL 4844717 (C.A.4 (W.Va.))
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▷
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.
Mildred F. JONES; Ronald L. Lazzarine; Tammy Lazzarine; Nellie G. Moses, on behalf of themselves and others similarly situated, Plaintiffs-Appellants,
v.
SEARS ROEBUCK AND COMPANY; Sears Holding Corporation; Sears National Bank; Citibank (USA), N.A., their successors and assigns jointly and severally, Defendants-Appellees.

No. 07-1584.
Argued: Sept. 23, 2008.
Decided: Nov. 10, 2008.

Background: Cardholders brought class action in state court against retailer and issuing bank seeking, inter alia, a declaration that the arbitration provision in credit card agreements was unconscionable, seeking statutory damages under West Virginia Consumer Credit and Protection Act (WVCCPA), and seeking declaratory and equitable relief under the WVCCPA because defendants failed to disclose trademark licensing relationships or place their addresses on credit cards, misleading class members as to the identification of the creditor. Defendants obtained removal. The United States District Court for the Southern District of West Virginia, Thomas E. Johnston, J., 2007 WL 964401, dismissed the action. Thereafter, the District Court, 2007 WL 1468742, denied cardholders' motion for reconsideration. Cardholders appealed.

Holdings: The Court of Appeals held that:
(1) cardholders failed to present justiciable case or controversy as to unconscionability of arbitration agreement;
(2) dismissal of complaint under WVCCPA precluded litigation of claim in federal court;
(3) cardholders failed to state claim under WVCCPA against issuing bank and affiliate of retailer;
(4) collection suit could not serve as basis for injury or imminent injury under consent decree with Federal Trade Commission (FTC); and
(5) class lacked standing to pursue claim for damages under WVCCPA.

Affirmed.

West Headnotes

[1] Declaratory Judgment 118A ⚿144

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(G) Written Instruments and Contracts
118AII(G)1 In General
118Ak143 Particular Contracts
118Ak144 k. Arbitration agreements. Most Cited Cases

Declaratory Judgment 118A ⚿301

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak301 k. Contracts. Most Cited Cases

Cardholders failed to allege that retailer and issuing bank either invoked or threatened to invoke arbitration provision of credit card agreement, as required to present a justiciable case or controversy and invoke standing to seek judgment declaring that arbitration agreement was unconscionable. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] Consumer Credit 92B ⚿8.1

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GOVERNMENT EXHIBIT C

92B Consumer Credit
92BI In General
92Bk8 Credit Cards
92Bk8.1 k. In general. Most Cited Cases

Cardholders lacked standing to pursue claim for damages under West Virginia Consumer Credit and Protection Act (WVCCPA), arising out of retailer's and issuing bank's allegedly unconscionable arbitration provisions, given that issue as to unconscionability was nonjusticiable. West's Ann.W.Va.Code, 46A-6-104.

[3] Removal of Cases 334 ⚿114

334 Removal of Cases
334VIII Proceedings in Case After Removal
334k114 k. Effect of proceedings in state court before removal. Most Cited Cases

State court's dismissal of cardholders' complaint against retailer and issuing bank for unfair and deceptive conduct under West Virginia Consumer Credit and Protection Act (WVCCPA) precluded, under law of the case doctrine, litigation of the claim in federal court.

[4] Consumer Credit 92B ⚿8.1

92B Consumer Credit
92BI In General
92Bk8 Credit Cards
92Bk8.1 k. In general. Most Cited Cases

Cardholders failed to explain how they were or could be injured by alleged "tremendous confusion" created by issuing bank's alleged conduct in not, inter alia, placing physical location and street address on credit cards as to where a cardholder could dispute dealings of defendants, including service of legal process, as required to establish standing to challenge such deceptive practices under West Virginia Consumer Credit and Protection Act (WVCCPA). West's Ann.W.Va.Code, 46A-6-102(7)(C, D).

[5] Consumer Credit 92B ⚿17

92B Consumer Credit
92BI In General
92Bk17 k. Effect of violation of regulations or lack of license. Most Cited Cases

Federal Civil Procedure 170A ⚿636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak636 k. Fraud, mistake and condition of mind. Most Cited Cases

Cardholders failed to plead with requisite particularity that issuing bank and retailer fraudulently misrepresented their identity to consumers, or intended that others rely on the omission of a correct address and phone number, as required to secure standing to assert a claim under West Virginia Consumer Credit and Protection Act (WVCCPA). West's Ann.W.Va.Code, 46A-6-102(7)(M); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[6] Antitrust and Trade Regulation 29T ⚿314

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)2 Federal Trade Commission
29Tk314 k. Decisions, determinations, and orders. Most Cited Cases

Retailer's collection suit, which sought the enforcement of a security interest, not the collection of a debt, was not addressed by Federal Trade Commission (FTC) consent decree ordering retailer not to collect any debt that had been legally discharged in bankruptcy, and therefore could not serve as basis for any asserted injury or threatened imminent injury on the part of cardholders, as required to assert standing for an alleged violation of the consent decree.

[7] Consumer Credit 92B ⚿18

92B Consumer Credit

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92BI In General
92Bk18 k. Actions. Most Cited Cases
Cardholder class never alleged a loss of money or property due to retailer's inclusion of an alleged unconscionable provision in their credit card agreements, as required to establish standing to pursue a claim for damages under West Virginia Consumer Credit and Protection Act (WVCCPA). West's Ann.W.Va.Code, 46A-6-102(7), 46A-6-104.

[8] Removal of Cases 334 ⚿2

334 Removal of Cases
334I Power to Remove and Right of Removal in General
334k2 k. Constitutional and statutory provisions. Most Cited Cases

Removal of Cases 334 ⚿74

334 Removal of Cases
334V Amount or Value in Controversy
334k74 k. Amount or value claimed or involved. Most Cited Cases
District court possessed subject matter jurisdiction, under Class Action Fairness Act (CAFA), over cardholders' removed class action against retailer and issuing bank for, inter alia, violations of Federal Trade Commission (FTC) consent decree and the West Virginia Consumer Credit and Protection Act (WVCCPA); complaint sought damages of approximately $370 million, claim was filed under West Virginia rule governing class actions; and the cardholders were citizens and residents of West Virginia, while the defendants were citizens of Illinois, South Dakota, and Arizona. 28 U.S.C.A. § 1332(d).

[9] Removal of Cases 334 ⚿2

334 Removal of Cases
334I Power to Remove and Right of Removal in General
334k2 k. Constitutional and statutory provisions. Most Cited Cases

Removal of Cases 334 ⚿102

334 Removal of Cases
334VII Remand or Dismissal of Case
334k101 Grounds for Remand
334k102 k. Want of jurisdiction or of cause for removal. Most Cited Cases
Cardholders class action complaint in federal court did not relate back to filing of state complaint against retailer and issuing banks, so as to render Class Action Fairness Act (CAFA) provisions inapplicable and warrant remand, given that federal complaint presented new claims that were premised on conduct and occurrences that were readily distinct from the allegations of the state complaint. W.Va.Rules Civ.Proc., Rule 15(c).

***278** Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Thomas E. Johnston, District Judge. (5:06-cv-00345).**ARGUED:** Henry Drewry McCoy, II, Peterstown, West Virginia, for Appellants. Daniel Harris Squire, Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** Raymond A. Bragar, Bragar, Wexler & Eagel, P.C., New York, New York, for Appellants. Rebecca J.K. Gelfond, Kelly Thompson Cochran, Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., Washington, D.C.; Christopher R. Lipsett, Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., New York, New York, for Appellees.

Before TRAXLER,[FN1] KING, and DUNCAN, Circuit Judges.

FN1. Judge Traxler participated in the oral argument of this case, and thereafter recused himself. This decision is thus rendered by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

Affirmed by unpublished PER CURIAM opinion.
Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

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**1 Mildred Jones, Ronald and Tammy Lazzarine, and Nellie G. Moses, on behalf of themselves and others (collectively, the "Plaintiffs"), appeal from an adverse judgment in their purported class action proceeding against Sears Roebuck & Co., Sears Holding Corporation, Sears National Bank, and Citibank USA, N.A. (collectively, the "Defendants"). The district court disposed of the relevant contentions in three steps: (1) denying the Plaintiffs' motion to remand, *Jones v. Sears Roebuck & Co.*, No. 5:06-cv-00345 (S.D.W.Va. Mar. 8, 2007) (the "Remand Denial");[FN2] (2) granting the Defendants' motion to dismiss, *279 *Jones v. Sears Roebuck & Co.*, No. 5:06- cv-00345, 2007 WL 964401 (S.D.W.Va. Mar. 28, 2007) (the "Dismissal Opinion");[FN3] and (3) denying the Plaintiffs' motion for reconsideration, *Jones v. Sears Roebuck & Co.*, No. 5:06-cv-00345, 2007 WL 1468742 (S.D.W.Va. May 18, 2007) (the "Reconsideration Denial").[FN4] On appeal, the Plaintiffs maintain that the court erred in dismissing their claims and declining to remand to state court, in denying reconsideration, in failing to conduct a hearing on the motion to remand, and in failing to grant leave to amend. As explained below, we affirm.

FN2. The Remand Denial is found at J.A. 105-17. (Citations herein to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

FN3. The Dismissal Opinion is found at J.A. 118-27.

FN4. The Reconsideration Denial is found at J.A. 129-30.

I.

A.

This proceeding originated on November 18, 2003, in the Circuit Court of Raleigh County, West Virginia, when Mildred Jones and Ronald and Tammy Lazzarine (collectively, the "Original Plaintiffs"), filed suit against Sears National Bank ("SNB") and Sears, Roebuck & Co. ("Sears"), on behalf of all West Virginia residents holding Sears credit cards. In that complaint (the "State Complaint"), the Original Plaintiffs made three claims: (1) seeking a declaration that the arbitration provision in their Sears credit card agreements was unconscionable (Count I); (2) seeking statutory damages under the West Virginia Consumer Credit and Protection Act (the "WVCCPA") for unconscionable conduct (Count II); and (3) seeking declaratory and equitable relief under the WVCCPA because SNB and Sears failed to disclose trademark licensing relationships or place their addresses on credit cards, misleading class members as to the identification of the creditor (Count III).[FN5] On the face of the State Complaint, the words "Citibank USA, N.A." were handwritten in the caption, although Citibank was not mentioned in the factual allegations.[FN6]

FN5. The State Complaint is found at J.A. 278-88.

FN6. The state court declined to treat Citibank as a party to the State Complaint because no factual allegations were made against it.

In February 2004, SNB and Sears filed a motion to dismiss the State Complaint, contending that Counts I and II failed to present any justiciable issues because the Original Plaintiffs had not alleged an underlying dispute or sought to invoke the arbitration provision, and that Count III failed to state a claim. In December 2005, the state court dismissed Counts I and II, explaining,

> (1) ... [T]here exists no case or controversy between the parties sufficient to support this court's exercise of its constitutional jurisdiction, or, in the alternative, (2) if constitutional jurisdiction exists, the proper exercise of this court's discretion is that it should decline to consider declaratory relief as requested by the individual plaintiffs.

**2 *Jones v. Sears, Roebuck & Co.*, No.

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03-C-1011-B, slip op. at 6 (W.Va.Cir.Ct. Dec. 15, 2005) (the "State Court Opinion").[FN7] The state court also dismissed Count III, ruling that the Original Plaintiffs had not proffered any legal basis for the argument that a credit card issuer must disclose certain geographic licensing and trademark information to its customers. *Id.* at 8. Notably, the state court dismissed the State Complaint without certifying the class.

FN7. The State Court Opinion is found at J.A. 313-20.

Subsequently, on March 9, 2006, the Plaintiffs-the Original Plaintiffs plus Nellie Moses-filed an amended complaint in ***280** the state court that the Defendants removed to federal court (the "Federal Complaint").[FN8] The Plaintiffs therein added Citibank and Sears Holdings Corporation ("SHC") as defendants.[FN9] The Federal Complaint alleges five counts, with Counts I through III being substantially the same as Counts I through III of the State Complaint.

FN8. The Federal Complaint is found at J.A. 13-34.

FN9. According to the Federal Complaint, Citibank is a "successor and assignee in interest" of Sears credit card accounts because Citibank acquired the accounts in November of 2003 for approximately $3.5 billion. Federal Complaint ¶ 7. It further alleges that SHC is the parent company that resulted from a merger between Sears and KMart Corporation in March 2005, that SHC took the place of Sears on the New York Stock Exchange, and that SHC is the parent corporation of Sears.

Count IV of the Federal Complaint alleges violations of (1) a Federal Trade Commission ("FTC") consent decree, and (2) the WVCCPA, on behalf of Moses and other Plaintiffs. Count IV asserts that Sears's actions violated an FTC consent decree forbidding Sears to "[c]ollect any debt ... that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect." *In the Matter of Sears Roebuck & Co.*, FTC File No. 972-3187 (June 4, 1997) (the "Consent Decree").[FN10] Count IV further alleges that Sears contravened the Consent Decree because it had initiated an action against Moses in state court in January 2001-the year after her liability had been discharged due to Chapter 7 bankruptcy-to enforce a security interest in goods she purchased using a Sears credit card (the "Collection Suit"). The Collection Suit was dismissed in March 2002 for nonprosecution, but allegedly violated the WVCCPA because Sears's conduct constituted "unfair methods of competition and unfair or deceptive acts or practices." W. Va.Code § 46A-6-104 [FN11]

FN10. The Consent Decree is found at J.A. 70-78.

FN11. The entire text of West Virginia Code section 46A-6-104 provides, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

Count V of the Federal Complaint contains the same allegations as Counts I through IV, and is asserted on behalf of a limited subclass of plaintiffs ("Subclass A"), namely, all Sears credit card holders in West Virginia (1) who held credit cards between the filing of the Consent Decree (June 4, 1997), and the filing of the Federal Complaint (November 18, 2003), and (2) against whom Sears or SNB enforced or sought to enforce a security interest while the card agreements contained the arbitration provision.

B.

On May 10, 2006, Citibank removed the Federal Complaint to the Southern District of West Virginia, pursuant to 28 U.S.C. § 1446 and a Class Action Fairness Act ("CAFA") provision, 28 U.S.C. § 1453. The Plaintiffs moved to remand to state

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court, and the district court denied the motion. On May 17, 2006, all Defendants (SNB, Sears, SHC, and Citibank) sought dismissal of the Federal Complaint, and the court filed the Dismissal Opinion on March 28, 2007. In its ruling, the court made the following conclusions: (1) Counts I and II are not justiciable under Article III of the Constitution of the United States because they present no case or controversy; (2) the state court's 2005 dismissal of Count III should stand, pursuant to the law of the case doctrine; (3) Count IV does not state a claim under the terms ***281** of the Consent Decree or under West Virginia law; and (4) Count V simply restated the other counts on behalf of a limited subclass of plaintiffs, and therefore should also be dismissed.

***3** By letter of February 23, 2007, the Plaintiffs had informally suggested that the district court conduct a "preliminary hearing" before it disposed of the motion to remand. The Plaintiffs later sought reconsideration of the Dismissal Opinion, and the court filed its Reconsideration Denial on May 18, 2007, explaining that the Plaintiffs were rehashing old arguments or raising assertions that could have been made earlier. In seeking reconsideration, the Plaintiffs also sought leave to amend, and the Reconsideration Denial did not explicitly refer to the amendment request. The Plaintiffs have timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo issues of standing and justiciability. *Piney Run Pres. Ass'n v. County Comm'rs,* 268 F.3d 255, 262 (4th Cir.2001). We also review de novo a district court's dismissal for failure to state a claim upon which relief can be granted. *Mayes v. Rapoport,* 198 F.3d 457, 460 (4th Cir.1999). By contrast, we review for abuse of discretion a district court's denial of a motion for reconsideration or a request for leave to amend. *Ingle v. Yelton,* 439 F.3d 191, 197 (4th Cir.2006) (providing standard for denial of reconsideration); *Franks v. Ross,* 313 F.3d 184, 192 (4th Cir.2002) (explaining standard for denial of leave to amend).

III.

This appeal challenges the Dismissal Opinion's rulings (1) that Counts I and II are not justiciable under Article III, and thus subject to dismissal, because each fails to present a case or controversy; (2) that dismissal of Count III was mandated under the law of the case doctrine; (3) that Count IV fails to allege a claim under either the FTC Consent Decree or West Virginia law; and (4) that Count V simply restates the other counts on behalf of a limited subclass of plaintiffs, and therefore must be dismissed as well. The Plaintiffs also contend that the court erred in the Remand Denial, the Reconsideration Denial, and in failing to grant leave to amend. As explained below, we affirm the Dismissal Opinion on the following bases: Counts I and II because the Plaintiffs lack standing; Count III as to the Original Plaintiffs under the law of the case doctrine, and because the added Plaintiffs lack standing; and Counts IV and V for lack of standing.

A.

First of all, we assess the district court's dismissal of Counts I and II of the Federal Complaint. In Count I, the Plaintiffs seek declaratory relief under the West Virginia Declaratory Judgment Act, FN12 maintaining that the arbitration provisions of the Sears credit card agreements are unconscionable. They claim that the agreements unlawfully bar participation in class actions, prevent access to the courts, and unconstitutionally deprive them of their right to a jury trial. In Count II, the Plaintiffs allege violations of the WVCCPA and claim statutory damages. As explained below, we agree that Counts I and II fail to ***282** present a justiciable case or controversy under Article III of the Constitution.

FN12. Although the State Complaint purported to invoke West Virginia's Declaratory Judgment Act, we apply the federal Declaratory Judgment Act in this proceeding. *See* 28 U.S.C. § 2201; *Chapman v. Clarendon Nat'l Ins. Co.,* 299 F.Supp.2d 559, 562-63 (E.D.Va.2004) (holding that

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removal of state declaratory judgment action invokes § 2201).

**4 A federal court may exercise its jurisdiction in a declaratory judgment proceeding only when "the complaint alleges an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir.2004) (internal quotation marks omitted). In order to satisfy this requirement, a plaintiff must possess standing to sue, meaning that a claim must present a "controversy that qualifies as an actual controversy under Article III of the Constitution." *Id.* Standing encompasses three components: "(1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical, (2) the injury must be fairly traceable to the challenged conduct, and (3) a favorable decision must be likely to redress the injury." *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir.2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

In light of our decision in *Volvo*, Count I fails to show an actual or threatened injury that rises to the level of a case or controversy. *Volvo* also concerned a claim for declaratory relief, and although we found a controversy present, we observed that one is not present when "the defendant ha [s] not taken any action, even of a preliminary nature, against the plaintiff, and the defendant ha[s] not indicated that it intend[s] to take any future legal action against the plaintiff." 386 F.3d at 592 n. 12 (distinguishing *N. Jefferson Square Assocs. v. Va. Hous. Dev. Auth.*, 94 F.Supp.2d 709, 714 (E.D.Va.2000)). Such is precisely the situation at hand: none of the Defendants has threatened to invoke the arbitration provision, and none of the Plaintiffs has alleged an underlying dispute that might legitimately progress to that point.

[1] The Plaintiffs apparently added Moses as a named plaintiff in the Federal Complaint to correct their standing problem, as evidenced by their present contention that "only one plaintiff must have standing in order that a federal court have jurisdiction over a class action suit under Article III." Br. of Appellants 17 (citing *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986)). The addition of plaintiff Moses, however, fails to cure the Plaintiffs' standing problem. Moses was subjected to the Collection Suit by Sears in 2001, and the Plaintiffs maintain that it "relegate [ed] her solely to arbitration under NAF [National Arbitration Forum] auspices." *Id.* at 22. In other words, the Plaintiffs contend, if Moses had filed a counterclaim in the Collection Suit, she would likely have had to submit to arbitration in an NAF forum.

Assuming the validity of such an assertion, it does not raise Moses's claim in Count I to an Article III case or controversy. Declaratory judgment actions must allege disputes that are "real and substantial and admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S.Ct. 764, 771, 166 L.Ed.2d 604 (2007) (internal quotation marks omitted). As with other Plaintiffs, Sears neither invoked nor threatened to invoke the arbitration provision of Moses's credit card agreement, and any ruling made here on the arbitration provision would constitute an advisory opinion.

5 The Plaintiffs also maintain on appeal that a district court "should refuse to entertain a declaratory judgment only for good cause." Br. of Appellants 27 (citing ***283*Aetna Cas. & Surety Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir.1937)). The lack of standing is sufficient good cause, however; it is the "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Thus, in the absence of an injury and with no "real and substantial" dispute, the court properly declined to entertain Count I upon removal.

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In its Dismissal Opinion, the district court compared this proceeding to the situation in *Bowen v. First Family Financial Services, Inc.*, 233 F.3d 1331 (11th Cir.2000). In *Bowen*, the class action plaintiffs lacked standing to question whether arbitration agreements are generally unenforceable under the Truth-in-Lending Act. The Eleventh Circuit so ruled because "there [was] no allegation that First Family has invoked, or threatened to invoke, the arbitration agreement to compel the plaintiffs to submit any claim to arbitration." *Id.* at 1339.[FN13] This action is similar to *Bowen* because the Plaintiffs have not sufficiently alleged that the Defendants either invoked or threatened to invoke the arbitration provision of the Sears credit card agreements.

> FN13. The Eleventh Circuit addressed two separate standing issues in *Bowen:* first, under the Truth-in-Lending Act and second, under the Equal Credit Opportunity Act (the "ECOA"). Although the court ruled that the plaintiffs did not possess standing to pursue a Truth-in-Lending Act claim, it concluded that they possessed standing to challenge the defendant's requirement that customers must execute arbitration agreements as a condition of credit under the ECOA. But the plaintiffs' standing only arose from the ECOA itself, which creates an explicit cause of action for consumers who are discriminated against "with respect to any aspect of a credit transaction" because they "in good faith, exercise[ ] any right under [the Consumer Credit Protection Act]." *Bowen*, 233 F.3d at 1334-35 (citing 15 U.S.C. § 1691(a)). In so ruling, the court of appeals reasoned that "[t]he difference is that the plaintiffs were required to and did sign the arbitration agreement, but there has been no occasion for First Family to attempt to enforce it against them." *Id.* at 1339. The matter on appeal is more analogous to the Truth-in-Lending Act claim because these Plaintiffs do not allege that they were coerced into signing an arbitration provision in exchange for exercising a statutory right.

We thus agree, in disposing of Count I, with the courts that have deemed a challenge to an arbitration provision, in the absence of an underlying dispute or imminent injury, to be nonjusticiable. *See, e.g., Bowen*, 233 F.3d 1331; *Lee v. Am. Express Travel Related Servs.*, No. 07-04765, 2007 WL 4287557, at *5 (N.D.Cal. Dec.6, 2007) (concluding that plaintiffs "have not and cannot allege any damage because they do not have a dispute with defendants that they tried unsuccessfully to litigate as a class action"); *Rivera v. Salomon Smith Barney Inc.*, No. 01 Civ. 9282, 2002 WL 31106418, at *6-7 (S.D.N.Y. Sept. 20, 2002) (recognizing that plaintiff lacked standing to seek declaratory relief on arbitration provision because she did not "file[ ] or serve[ ] any lawsuit alleging that [defendant] ... [or] anyone representing any of the defendants has informed her that they will seek to invoke the Arbitration Policy"); *Tamplenizza v. Josephthal & Co.*, 32 F.Supp.2d 702, 704 (S.D.N.Y.1999) (recognizing as nonjusticiable challenge to arbitration provision, absent sufficient indications that it would be invoked). Notably, some courts have premised such decisions on the ripeness doctrine. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (recognizing lack of ripeness on whether arbitration will provide reasonable compensation, where plaintiff "did not allege or establish that it had been injured by actual arbitration under the statute"); ***284** *Bd. of Trade v. Commodity Futures Trading Comm'n*, 704 F.2d 929, 932 (7th Cir.1983) (concluding that threatened enforcement of arbitration rule did not establish ripeness).

****6** The Plaintiffs rely on the Second Circuit's decision in *Ross v. Bank of America, N.A.*, for the proposition that they suffered an injury-in-fact and therefore possess standing. *See* 524 F.3d 217 (2d Cir.2008). In *Ross*, a group of plaintiffs sued Bank

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of America and Citibank, among others, because their credit card agreements included provisions imposing arbitration "as the sole method of resolving disputes relating to the credit accounts" and disallowing class action proceedings. *Id.* at 220. The *Ross* plaintiffs, however, were pursuing a different proposition than we face here. They claimed that the agreements violated the antitrust statutes because the banks had colluded "to constrict the options available to cardholders"; they did not simply allege that the provision alone caused them injury. possessed standing "in terms of the antitrust injuries that the cardholders have asserted," observing that "one form of *antitrust injury* is '[c]oercive activity that prevents its victims from making free choices.' " *Id.* (emphasis added) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 528, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)). Our situation is distinguishable-the Plaintiffs have not alleged antitrust violations or collusion by credit card companies. We thus agree with the Defendants that *Ross* does not support the Plaintiffs' argument on standing. FN14

FN14. The Plaintiffs also rely on *Arnold v. United Cos. Lending Corp.*, for the proposition that an arbitration agreement "contain[ing] a substantial waiver of the borrower's rights ... while preserving the lender's right to a judicial forum ... is unconscionable." 204 W.Va. 229, 511 S.E.2d 854, 862 (1998). *Arnold,* however, involved certified questions concerning arbitration provisions, and the ruling was premised on the presumption that "some controversy remains before the circuit court." *Id.* at 858. Thus, *Arnold* did not present a standing issue. The Plaintiffs also rely on *State ex rel. Dunlap v. Berger,* and assert that arbitration provisions are unconscionable because they are rarely read or understood by cardholders. 211 W.Va. 549, 567 S.E.2d 265, 274 (W.Va.2002). *Dunlap* addressed the merits of the unconscionability issue only, not the question of standing. *Id.* at 269. These West Virginia decisions thus do not aid our analysis.

[2] Turning to Count II, we recognize that this claim turns on the possibility of collecting damages under the WVCCPA for the Defendants' conduct. FN15 The Plaintiffs contend that Moses and the other Plaintiffs seek to "redress th[e] wrong" of allegedly unconscionable arbitration provisions under West Virginia law. Br. of Appellants 25. In order to award damages, however, a court would be required to first decide that the arbitration provisions are unconscionable, or that the Defendants engaged in unconscionable conduct. Because we have already concluded that this issue is nonjusticiable, the Plaintiffs lack Article III standing to pursue Count II.

FN15. In Count II, the Plaintiffs claim $1,000 for each violation of the WVCCPA, under sections 46A-5-101 and/or 46A-5-105. Section 46A-5-101(1) provides that a debtor who can show that his or her creditor violated Chapter 46A "has a cause of action to recover actual damages and ... a penalty [of] ... not less than one hundred dollars nor more than one thousand dollars." Pursuant to section 46A-5-105, "if a creditor has willfully violated the provisions of this chapter, ... in addition to the remedy provided in [section 46A-5-101], the court may cancel the debt when the debt is not secured by a security interest."

B.

We must now analyze the issues presented with respect to the district court's dismissal of Count III of the Federal Complaint. As explained below, we also affirm ***285** the Dismissal Opinion with respect to this claim.

We first examine the Plaintiffs' contention that the district court erroneously dismissed Count III of the Federal Complaint, which alleges that Defendants engaged in unfair and specifically, it asserts

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that, in failing to disclose their trademark licensing relationships and their physical addresses on credit cards, the Defendants misled the class members with respect to the corporate entities and geographical addresses of their creditors. For such deceptive practices, the Plaintiffs maintain that section 46A-6-106 of the WVCCPA permits them to collect statutory damages of $200 per violation. Because the state court dismissed Count III with respect to the original parties only, we will separately examine the Plaintiffs' contentions with regard to both the original parties and the added parties.

1.

**7 [3] In 2005, the state court dismissed Count III of the State Complaint under West Virginia Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The Dismissal Opinion dismissed the virtually identical Count III of the Federal Complaint under the law of the case doctrine and 28 U.S.C. § 1450.[FN16] Pursuant to the law of the case doctrine, "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton,* 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Similarly, under § 1450, "[a]ll injunctions, orders, and other proceedings had in such [state court] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." *See also Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70,* 415 U.S. 423, 436, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974) ("After removal, the federal court 'takes the case up where the State court left it off.' " (quoting *Duncan v. Gegan,* 101 U.S. 810, 812, 25 L.Ed. 875 (1879))). As the Supreme Court explained in *Granny Goose Foods,* in recognizing that the underlying state court rulings are effective in federal court, the interests of judicial economy are promoted and the parties' rights are protected. *See* 415 U.S. at 435-36, 94 S.Ct. 1113.

FN16. The Plaintiffs contend that Count III of the Federal Complaint contains "material revisions" from the State Complaint. Br. of Appellants 33. This contention is without merit, however, because the only revisions made to the Federal Complaint are not materially distinct allegations. First, the Plaintiffs simply added the allegation that Sears and SNB were likely not the true and correct owners of the accounts because they sold them as "securitized assets" to unknown parties. Federal Complaint ¶ 19, n. 2. Second, the Plaintiffs contend that the Federal Complaint alleges-in contrast to the State Complaint-that SNB has disappeared or has been liquidated. These revisions merely reflect a change in the Defendants' situation, however, and do not affect the state court's dismissal of its Count III. Third, the Plaintiffs also claim that they added specific statutes to Count III of the Federal Complaint. These are all grounded in West Virginia law, however, and the state court ruled that the Original Plaintiffs have failed to allege a cause of action under West Virginia law. Finally, the Dismissal Opinion correctly observed that, in response to the Defendants' motion to dismiss the Federal Complaint, the Plaintiffs addressed Count III simply by incorporating by reference the arguments they had made in state court.

Although most of the decisions invoking § 1450 relate to state court injunctions and interlocutory rulings in removed federal cases, their reasoning extends to proceedings such as this, where a federal court must address a claim that has been previously dismissed in state court. The utilization of § 1450 in this setting thus advances the principles that it seeks to promote-judicial economy and protection of the parties'***286** rights-and also implicates the law of the case doctrine. In sum, the Plaintiffs have not presented us with any reason for disturbing the state court's ruling on Count III as to the Original Plaintiffs.

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(Not Selected for publication in the Federal Reporter)
(Cite as: 301 Fed.Appx. 276, 2008 WL 4844717 (C.A.4 (W.Va.)))

2.

Because Citibank and SHC were first made defendants in the Federal Complaint (the state court found that Citibank was not a defendant in the State Complaint), we must assess Count III with regard to these additional defendants. Similarly, because Moses and the Subclass A plaintiffs were added as plaintiffs in the Federal Complaint, we must analyze Count III as to them. As explained below, the new plaintiffs lack standing to pursue Count III against Citibank and SHC because the Federal Complaint fails to sufficiently allege an injury or threatened injury.

> In that respect, the Plaintiffs contend that the Defendants engage in a definite and elaborate scheme and unfair method of doing business so that consumers and credit cardholders may not readily locate either any telephone number or physical mailing address or actual place of business other than post office boxes and other than so-called "Customer Service" 800 numbers.

Federal Complaint ¶ 57. The Plaintiffs also allege that "Sears National Bank is not in fact and in law the owner of the trademarks" of the credit cards, as Sears has led its consumers to believe. *Id.* at ¶ 55. The Plaintiffs allege that Sears and Citibank caused SNB to be liquidated and dissolved, "without any merger or supersedes clauses in any agreement upon which a Sears cardholder may rely," and classify the Defendants' actions as a "classic 'shell' game." *Id.* at ¶ 56, 58. They assert that Citibank continues a pattern of "deceptive practices" and "should similarly be enjoined from such practices" for violation of West Virginia Code section 46A-6-102 (f)(3), (f)(4). [FN17] *Id.* at ¶ 60.

> FN17. Under the WVCCPA, "unfair trade practices" include: "[c]ausing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or certification by another" and "[u]sing deceptive representations or designations of geographic origin in connection with goods or services." W. Va.Code § 46A-6-102(7)(C), (7)(D) (renumbered 2005).

****8** [4] The Plaintiffs have failed, however, to explain how they were or could be injured by the alleged "tremendous confusion" created by defendants' conduct. Federal Complaint ¶ 56. The solution to this problem, they maintain, is that Citibank "should be ordered to place the physical location and street address on their credit cards as to where a cardholder may dispute dealings of defendants, including service of legal process." *Id.* at 60. Again, they fail to explain how such a mandate would have assisted them in locating the Defendants, or how any of the Plaintiffs were harmed by the absence of such a disclosure.

[5] Although the Plaintiffs seek to utilize the WVCCPA as a means to secure standing, this effort also fails. The WVCCPA provides that "unfair methods of competition and unfair or deceptive acts or practices" include

> [t]he act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, *whether or not any person has in fact been misled, deceived or damaged thereby.*

***287** W. Va.Code § 46A-6-102(7)(M) (emphasis added). In order to invoke this provision, however, a plaintiff is obliged to plead *with particularity* that defendants have fraudulently misrepresented their identity to consumers, or intended that others rely on the omission of a correct address and phone number. *See* Fed.R.Civ.P. 9(b). No such pleading was presented, and a cursory reference to a "shell game" and "a pattern of deceptive practices" is simply not sufficiently particular to proceed. *See Garvin v. S. States Ins. Exch. Co.*, 329 F.Supp.2d 756, 760 (N.D.W.Va.2004) (concluding that, on fraud claims, elements pleaded with partic-

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ularity include time, place, and contents of false representations), *aff'd,* No. 05-1812, 2006 U.S.App. LEXIS 1593 (4th Cir. Jan. 23, 2006).

Finally, although the Plaintiffs allege in Count III that locating the actual place of business of the Defendants causes extreme difficulty, the state court observed that "[t]his is a rather difficult point for Plaintiffs to maintain because they have, it seems, managed to sue the Defendants." State Court Opinion 7. In any event, the Sears credit card agreement states that SNB, as issuer, is an affiliate of Sears. J.A. 51 (defining "we," "us," and "our" as "Sears National Bank (an affiliate of Sears) or any subsequent holder of the account or ... any servicer of your account authorized by us"). For these reasons, the Dismissal Opinion must be affirmed as to Count III-with respect to both Moses and the Subclass A plaintiffs-because they lack standing to pursue it.

C.

Having disposed of the three counts that were first pursued in the State Complaint, we turn to Counts IV and V, the claims alleged for the first time in the Federal Complaint. We begin with Count IV.

1.

****9** The district court dismissed Count IV under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. If we disagree with that ruling, we are nonetheless entitled to affirm on different grounds "if fully supported by the record." *Brewster of Lynchburg, Inc. v. Dial Corp.,* 33 F.3d 355, 361 n. 3 (4th Cir.1994). Because this record reveals that none of the Plaintiffs-i.e., the Original Plaintiffs, the Subclass A plaintiffs, or Moses-has standing to pursue Count IV, we affirm for that reason. *See Davis v. Fed. Election Comm'n,* --- U.S. ----, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008) ("A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct."); *Bowen,* 233 F.3d at 1340 ("A threatened injury must be 'certainly impending' to constitute injury in fact." (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990))).

In Count IV, the Plaintiffs allege violations of the Consent Decree and seek statutory damages for violations of the WVCCPA (specifically section 46A-6-104). In the Decree, Sears was ordered not to "[c]ollect any debt (including any interest, fee, charge, or expense, incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect." Consent Decree 3. Count IV alleges that Sears violated the Decree and the WVCCPA by filing the Collection Suit.

[6] The state court terminated the Collection Suit in March 2002 for nonprosecution, and Count IV fails to plead any facts to show that Sears had "collect[ed] any debt" from Moses either before or after termination of the Collection Suit. The Plaintiffs contend, however, that "the law suit [sic], nonetheless, constitutes ... a continuing violation of the [Consent Decree]***288** ... until the date of [the Collection Suit's] dismissal." Federal Complaint ¶ 43. To the contrary, the Collection Suit could not be classified as a threatened violation of the Consent Decree.

The Collection Suit sought the enforcement of a security interest, not the collection of a debt, and "[a] discharge in perfected security interests in tangible personal property. The lienholder retains a right of repossession, subject, however, to the bankrupt's possible right of redemption." *Arruda v. Sears Roebuck & Co.,* 310 F.3d 13, 16 (1st Cir.2002); *see also Farrey v. Sanderfoot,* 500 U.S. 291, 297, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy."); *Johnson v. Home St. Bank,* 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) (concluding that Chapter 7 liquidation "extinguishes *only* the personal liability of the debtor" (internal quotation marks omitted) (emphasis in original)). Because the Consent Decree addressed conduct not alleged in Count IV, that claim fails to allege an injury, or a threatened or imminent injury.

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(Not Selected for publication in the Federal Reporter)
(Cite as: 301 Fed.Appx. 276, 2008 WL 4844717 (C.A.4 (W.Va.)))

2.

The Plaintiffs also allege in Count IV that Sears's conduct-filing suit against Moses while knowing that she had filed bankruptcy, and its purported violation of the Consent Decree-entitles them to recover statutory damages under the WVCCPA. This aspect of Count IV also fails, however, because Moses and the Subclass A plaintiffs lack standing to collect such damages.

****10** In *Orlando v. Finance One of West Virginia, Inc.*, the Supreme Court of Appeals of West Virginia ruled that a plaintiff cannot collect damages under sections 46A-6-102(f) or 46A-6-104 of the WVCCPA if he "ha[s] suffered no 'ascertainable loss of money or property' as a result of the inclusion of" an allegedly unconscionable provision in a contract. 179 W.Va. 447, 369 S.E.2d 882, 888 (1988) (quoting W. Va.Code § 46A-6-106). In *Orlando*, the plaintiffs challenged a purported waiver of a homestead and personal property exemption in their loan contract with Finance One. *Id.* at 883. After the Plaintiffs defaulted on their loan, Finance One instituted collection activities. It did not, however, seek judicial enforcement of the waiver clause. *Id.* As in this proceeding, the plaintiffs sued Finance One for a declaration that the waiver clause was unconscionable, and seeking statutory penalties under the WVCCPA because inclusion of the clause was an unfair and deceptive act or practice. *Id.*

[7] The state supreme court concluded that the *Orlando* plaintiffs could not collect damages for violations of the WVCCPA because "Finance One made no attempt to enforce [the waiver clause]," and, therefore, "[plaintiffs] suffered no ascertainable loss of money or property." *Orlando*, 369 S.E.2d at 888. Similarly, Moses and the other Plaintiffs have never alleged a loss of money or property due to the inclusion of an alleged unconscionable provision in their credit card agreements. In such circumstances, they lack standing to pursue a claim for damages under Count IV.[FN18]

FN18. The Plaintiffs also make an argument with respect to common law fraud. This issue was mentioned in passing in the Federal Complaint, but nothing was pleaded "with particularity" pursuant to Rule 9(b). The district court did not address this point, and neither do we. *See In re Wallace and Gale Co.*, 385 F.3d 820, 835 (4th Cir.2004) (observing that failure to raise argument before district court results in waiver on appeal, absent exceptional circumstances).

***289** D.

Count V purports to reallege the allegations of Counts I through IV on behalf of Subclass A, a limited number of plaintiffs who held credit cards between June 4, 1997, and November 18, 2003, and against whom Sears or SNB either enforced or attempted to enforce a security interest while the cardholder agreement contained the arbitration provision. These plaintiffs, however, have no greater cognizable injuries or causes of action than the other plaintiffs, as they have not shown either the invocation or the impending invocation of the arbitration provision. Furthermore, because Moses satisfies the requirements of Subclass A, the conclusions we have made regarding Moses are attributable to the Subclass A plaintiffs. We thus affirm the dismissal of Count V for lack of standing.

E.

Finally, we turn to the Plaintiffs' several allegations of procedural error. First and foremost, we are generally unable to review the propriety of the denial of a motion to remand. "It is, of course, beyond question that an order of a district court denying a motion to remand, standing alone, is not a final order appealable under 28 U.S.C. § 1291." *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 114 (4th Cir.1979). Nevertheless, the Plaintiffs argue that this case was improperly removed and that we can now address that issue. In *Aqualon Co. v. Mac Equipment, Inc.*, however, we recognized that, even if removal was improper, the judgment should not be disturbed if the court possessed juris-

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diction to enter it. *See* 149 F.3d 262, 264 (4th Cir.1998). Because the district court possessed subject matter jurisdiction, we will not disturb the Remand Denial.

****11** [8] The district court properly concluded under CAFA that it possessed subject matter jurisdiction at the time of judgment. *See* 28 U.S.C. § 1332(d).[FN19] Under CAFA, a class action may be initiated in federal court if (1) the controversy exceeds the sum or value of $5,000,000; (2) the claim was originally filed as a class action under Rule 23 of the Federal Rules or a comparable state statute; and (3) any member of the class of plaintiffs is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(1)(B), (d)(2)(A). Here, the Federal Complaint seeks damages of approximately $370 million; the claim was filed under West Virginia Rule 23 (governing class actions); and the Plaintiffs are citizens and residents of West Virginia, while the Defendants are citizens of Illinois, South Dakota, and Arizona. In those circumstances, the court possessed diversity jurisdiction over the Federal Complaint.

> FN19. Although the Remand Denial concluded that the court possessed diversity jurisdiction under CAFA, it appears to have also possessed diversity jurisdiction under § 1332(a).

[9] The Plaintiffs contend, however, that the CAFA provisions do not apply to the Federal Complaint, because the State Complaint was filed in November 2003, prior to CAFA being enacted. CAFA became effective in February 2005 and, according to the Plaintiffs, the Federal Complaint relates back to November 2003. It is uncontested that CAFA applies to any suit commenced on or after February 18, 2005. *See* Pub.L. No. 109-2, § 9, 119 Stat. 14 (2005); *Adams v. Ins. Co. of N. Am.*, 426 F.Supp.2d 356, 367 (S.D.W.Va.2006). The Remand Denial correctly determined, however, that CAFA applies here, concluding that the Federal Complaint "commenced" a new action when it was filed in 2006, because it alleged claims that were ***290** "factually and legally distinct" from those in the State Complaint. Remand Denial 8.

Because state law controls the issue of whether an amended complaint has "commenced" a new action, we look to West Virginia Rule of Civil Procedure 15(c) for guidance. *See Adams*, 426 F.Supp.2d at 370. Pursuant thereto, an amendment of a complaint relates back when it "ar[ises] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." W. Va. R. Civ. P. 15(c)(2). In other words, a complaint will relate back when its amendments "state a cause of action growing out of the specified conduct of the defendant which gave rise to the original cause of action." *Adams*, 426 F.Supp.2d at 375 (citing *Roberts v. Wagner Chevrolet-Olds, Inc.*, 163 W.Va. 559, 258 S.E.2d 901, 903 (1979)). It follows that, if an amended complaint states a claim growing out of conduct *distinct* from the original complaint, the amended complaint does not relate back.

In this situation, Counts IV and V present new claims that are premised on conduct and occurrences that are readily distinct from the allegations of the State Complaint, and the Federal Complaint thus does not relate back. For example, the Federal Complaint alleges Sears's enforcement of its security interests and violation of the Consent Decree, and it added Moses and a new subclass of plaintiffs presumably affected by such conduct. Because these are distinct and new allegations, the Federal Complaint does not, pursuant to state Rule 15(c)(2), relate back to the filing of the State Complaint. CAFA thus applies here, and the district court possessed subject matter jurisdiction of the Federal Complaint. Any alleged procedural deficiency in the removal process thus does not affect the final judgment of the district court.[FN20]

> FN20. The district court did not abuse its discretion in filing the Reconsideration Denial and denying the Plaintiffs' request for amendment of the Federal Complaint. First, we have recognized three potential grounds for reconsideration: (1) to accom-

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modate an intervening change in controlling law, (2) to account for new evidence not available at trial, or (3) to correct a clear error of law to prevent manifest injustice. *Hutchinson v. Staton,* 994 F.2d 1076, 1081 (4th Cir.1993). The Plaintiffs did not assert any of these grounds; thus, their motion was properly denied. The court also did not abuse its discretion in declining to grant leave to amend the Federal Complaint. In *HealthSouth Rehabilitation Hospital v. American National Red Cross,* we explained that disposition of a motion to amend lies within the sound discretion of the district court. 101 F.3d 1005, 1010 (4th Cir.1996). The court need not articulate grounds for denying leave to amend, "as long as its reasons are apparent." *Id.* The Plaintiffs' proposed amendments-relabeling Count V as Count IV and deleting all references to the Consent Decree-would be futile; therefore, the district court did not err in this respect. Finally, we are not satisfied that the Plaintiffs sufficiently requested a hearing by way of their February 23, 2007 letter to the court. In any event, nothing in the Federal Rules of Civil Procedure obliged the court to hold a hearing in that situation; thus, the court could not have abused its discretion in declining to do so.

IV.

****12** Pursuant to the foregoing, the judgment of the district court is affirmed.

AFFIRMED.

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(Not Selected for publication in the Federal Reporter)
(Cite as: 189 Fed.Appx. 161, 2006 WL 1725131 (C.A.4 (Md.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.
Durk PEARSON; Sandy Shaw, Plaintiffs-Appellants,
v.
Michael LEAVITT, in his official capacity as Secretary of the U.S. Department of Health and Human Services; Lester M. Crawford, in his official capacity as Acting Commissioner of the U.S. Food and Drug Administration; United States Food and Drug Administration; U.S. Department of Health & Human Services; United States of America, Defendants-Appellees.

No. 05-1937.
Argued: May 22, 2006.
Decided: June 23, 2006.

Background: Formulators of dietary supplements containing S-adenosyl-L-methionine (SAMe) brought action for both declaration that potential enforcement of Food and Drug Administration (FDA) regulations against formulators' sale of publication containing government report about dietary supplements with SAMe violated their free speech rights and injunction barring FDA and Department of Health and Human Services (HHS) from declaring publication to be evidence of intent to sell supplements as "new drugs" and preventing formulators' licensees from selling publication. The United States District Court for the District of Maryland, Alexander Williams, Jr., J., dismissed action on ripeness grounds. Formulators appealed.

Holdings: The Court of Appeals held that:
(1) formulators did not demonstrate issues fit for judicial review, and
(2) formulators did not show hardship required for ripeness.

Affirmed.

West Headnotes

[1] Declaratory Judgment 118A ⚿203

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak203 k. Federal Officers and Boards. Most Cited Cases

Formulators of dietary supplements with S-adenosyl-L-methionine (SAMe) did not show, as required by ripeness inquiry, issues fit for judicial review in seeking declaration that potential enforcement of Food and Drug Administration (FDA) regulations against formulators' sale of publication containing government report about dietary supplements with SAMe violated their free speech rights and injunction barring FDA and Department of Health and Human Services (HHS) from declaring publication to be evidence of intent to sell supplements as "new drugs" and preventing formulators' licensees from selling publication, given that the record lacked evidence respecting factors to be considered in analyzing intended use of product, that there was no threatened or actual action taken against formulators, and that there was no final agency determination of publication as evidence of intended use. U.S.C.A. Const.Amend. 1.

[2] Declaratory Judgment 118A ⚿203

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak203 k. Federal Officers and Boards. Most Cited Cases

Formulators of dietary supplements with S-

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GOVERNMENT EXHIBIT D

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(Cite as: 189 Fed.Appx. 161, 2006 WL 1725131 (C.A.4 (Md.)))

adenosyl-L-methionine (SAMe) did not show hardship required for ripeness in action for declaration that potential enforcement of Food and Drug Administration (FDA) regulations against formulators' sale of publication containing government report about dietary supplements with SAMe violated their free speech rights and injunction barring FDA and Department of Health and Human Services (HHS) from declaring publication to be evidence of intent to sell supplements as "new drugs" and preventing formulators' licensees from selling publication, given that formulators' anticipated losses were not immediate, since they had not yet undertaken to sell publication, and FDA had not made determination regarding publication as evidence of intended use. U.S.C.A. Const.Amend. 1.

***162** Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-04-3600-AW).**ARGUED**: Jonathan Walker Emord, Emord & Associates, P.C., Reston, Virginia, for Appellants. Matthew Miles Collette, United States Department of Justice, Civil Division, Appellate Section, Washington, D.C., for Appellees. **ON BRIEF**: Michelle C. Gayeski, Emord & Associates, P.C., Reston, Virginia, for Appellants. Peter D. Keisler, Assistant Attorney General, Rod J. Rosenstein, United States Attorney, Douglas N. Letter, United States Department of Justice, Civil Division, Appellate Section, Washington, D.C., for Appellees.

Before WILKINSON and TRAXLER, Circuit Judges, and RICHARD L. WILLIAMS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished PER CURIAM opinion.
Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).
PER CURIAM:

****1** Durk Pearson and Sandy Shaw ("Appellants") sought and were denied declaratory and injunctive relief to preclude the Food and Drug Administration ("FDA") and the Department of Health and Human Services ("HHS")(collectively "Appellees") from taking action to prevent Appellants from selling a report published by the United States government that suggests that dietary supplements containing S-adenosyl-L-methionine ("SAMe") were a possible treatment for various diseases. Appellants claimed that the potential for FDA enforcement of its regulations chilled their constitutionally protected First Amendment free speech rights. Finding that there is not a sufficient factual basis upon which to make a determination of Appellants' claims, we agree with the district court's ruling that the controversy is not ripe and accordingly affirm the dismissal of the claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

Durk Pearson and Sandy Shaw are formulators of dietary supplements containing SAMe. Appellants receive royalties from distributors who are licensed to sell their products. SAMe is an amino acid created within human cells by the energy molecule ATP and the amino acid methionine. SAMe plays a role in many of the biochemical reactions in the human body. SAMe has been the subject of research by privately funded organizations and by federal government agencies.

In October 2002, the Agency for Healthcare Research and Quality ("AHRQ"), a division of HHS, published a report entitled "S-Adenosyl-L-Methionine for the Treatment of Depression, Osteoarthritis, and Liver Disease" (the "Report"). The Report summarized the conclusions of various published studies examining the effect of SAMe on the treatment of depression, osteoarthritis , and liver disease. The Report concluded that supplements containing SAMe are more effective than placebos in the treatment of depression and osteoarthritis but were no more effective in treating liver disease. The Report was made available to the

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189 Fed.Appx. 161, 2006 WL 1725131 (C.A.4 (Md.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 189 Fed.Appx. 161, 2006 WL 1725131 (C.A.4 (Md.)))

public on at least seven different websites.

In 2004, Appellants wrote a prologue to the Report, touting its findings and explaining***163** the role of SAMe in bodily processes. Appellants intended to sell a bound volume consisting of their prologue and the Report (collectively the "Publication") to the general public through their licensees.

Appellants refrained from selling the Publication because of fear of prosecution by the FDA. Specifically, Appellants feared that the FDA, under their administrative enforcement policy, would use the Publication as evidence of the "intended use" of the dietary supplements and reclassify Appellants' SAMe-containing dietary supplements as "new drugs" under the Food Drug and Cosmetics Act ("FDCA"), thus prohibiting sale of the Publication to consumers.

In November 2004, Appellants brought this action seeking a declaration that the potential enforcement of FDA regulations was a violation of their First Amendment right to free speech. Appellants also sought to enjoin Appellees from declaring the Publication as evidence of an intent to sell the SAMe-containing dietary supplements as "new drugs" and from taking any action to prohibit Appellants' licensees from selling the Publication to the public. At the time the action was filed, the FDA had not threatened or implemented any procedures to either prohibit the sale of the Publication or to prosecute Appellants for FDA violations.

****2** Appellants moved for summary judgment and Appellees moved to dismiss or, in the alternative, for summary judgment. The district court ruled that there was not a sufficient factual record upon which to make a determination regarding the validity of Appellants' claims and that the case was not ripe, and granted Appellees' motion to dismiss. This appeal followed.

II.

Ripeness requirements are relaxed in First Amendment cases because of the potential chilling effect of unconstitutional restrictions on free speech. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 129-30, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). To withstand a ripeness challenge, a plaintiff must demonstrate "a live dispute involving the actual or threatened application of [a statute or policy] to bar particular speech." *Renne v. Geary,* 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991). But without a factual record of an actual or threatened action resulting in the suppression of free speech, no ripe, justiciable controversy exists. *Woodall v. Reno,* 47 F.3d 656, 656 (4th Cir.1995); *see Jordahl v. Democratic Party of Virginia,* 122 F.3d 192, 198 (4th Cir.1997).

In evaluating the ripeness of a claim for judicial review, courts must consider (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Regarding administrative agency cases, this court has held that a claim is not ripe for review unless the issues to be considered are purely legal ones and the agency rule giving rise to the claim is final and not dependent on future uncertainties or intervening agency rulings. *Charter Fed. Sav. Bank v. Office of Thrift Supervision,* 976 F.2d 203, 208 (4th Cir.1992). If certain critical facts that would substantially assist the court in making its determination are contingent or unknown, the case is not ripe for judicial review. *Arch Mineral Corp. v. Babbitt,* 104 F.3d 660, 665-66 (4th Cir.1997).

[1] Appellants have offered insufficient evidence to demonstrate the fitness for judicial review that ripeness requires. Appellants claim that the FDA will use their Publication as evidence of the "intended ***164** use" of their SAMe containing supplements. However, the record is devoid of any evidence that would support this contention. There is no indication of who will sell the Publication,

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how the Publication will be marketed, the purpose for which the Publication will be used, or the way in which it will be distributed. These factors are a necessary part of the analysis of the "intended use" of a product. In *United States v. An Article of Drug Consisting of 250 Jars, etc. of U.S. Fancy Pure Honey, etc.*, 218 F.Supp. 208, 209-11 (E.D.Mich.1963), *aff'd*, 344 F.2d 288 (6th Cir.1965), the court found that jars of honey were unapproved drugs because booklets containing statements about the honey's disease-treating capacity were sold adjacent to the jars of honey. In *United States v. 24 Bottles 'Sterling Vinegar & Honey, etc.' (Balanced Foods, Inc.)*, 338 F.2d 157 (2d Cir.1964), the Second Circuit held that booklets claiming the curative power of honey were not evidence of intended use because they were shelved with other publications and were not marketed with the honey in any way. Accordingly, any determination of "intended use" must be grounded in a fact-based inquiry and cannot be based on speculative contentions. Appellees have neither threatened nor taken action against Appellants. There has been no final agency determination of the Publication as evidence of intended use. Because Appellants have not shown such action on the part of Appellees, there is no issue to decide and judgment must be deferred.

****3** [2] In a ripeness inquiry, hardship is determined by considering (1) the immediacy of the threat and (2) the burden imposed upon the party compelled to act under threat of enforcement of the challenged law. *Charter*, 976 F.2d at 208-09. The threatened harm must be "immediate, direct, and significant." *West Virginia Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 800 (4th Cir.1998) (citations omitted). Appellants' complaint meets none of these requirements. Appellants allege harms relating to the loss of free speech, the right to sell the Publication via their licensees, and the loss of royalties from sales of the Publication and their SAMe dietary supplements. These alleged losses are not immediate, Appellants have not undertaken any campaign to sell the Publication, and the FDA has not made a final determination regarding the Publication as evidence of the "intended use" of Appellants' product. These issues prevent the court from making a determination as to whether an immediate threat exists that requires the injunction that Appellants seek. Any losses or hardship suffered by Appellants would be contingent on these factual circumstances.

For the foregoing reasons, we conclude that the instant matter is not ripe for disposition and the district court's decision is

AFFIRMED.

C.A.4 (Md.),2006.
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189 Fed.Appx. 161, 2006 WL 1725131 (C.A.4 (Md.))

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131 F.3d 135, 1997 WL 746757 (C.A.4 (S.C.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 131 F.3d 135, 1997 WL 746757 (C.A.4 (S.C.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.
MAERSK CONTAINER SERVICE COMPANY, INCORPORATED, Petitioner-Appellant,
v.
Jeana F. JACKSON, District Director for the Sixth Compensation District, Office of Workers' Compensation Programs, United States Department of Labor; John Vittone, Chief Judge, Office of Administrative Law Judges, United States Department of Labor, Respondents-Appellees.

No. 97-1056.
Submitted Oct. 31, 1997.
Decided Dec. 4, 1997.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, District Judge. (CA-96-2302-2-23)
Stephen E. Darling, Joseph D. Thompson III, SINKLER & BOYD, P.A., Charleston, South Carolina, for Appellant.

J. Davitt McAteer, Acting Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Samuel J. Oshinsky , Mark A. Reinhalter, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellees.

Before HALL, WILKINS, and HAMILTON, Circuit Judges.

OPINION

PER CURIAM:

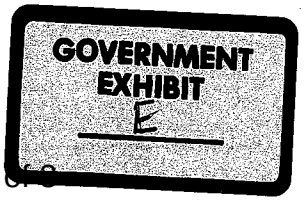
*1 This matter is on appeal from the district court's denial of Maersk Container Service Company's mandamus petition. For the reasons set forth below, we affirm.

Pursuant to 28 U.S.C. § 1361 (1994), Maersk brought a mandamus action seeking an order compelling the District Director of the Office of Workers' Compensation Programs (the "Director") and the Chief Judge of the Office of Administrative Law Judges ("OALJ") to comply with certain statutes and regulations promulgated under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950 (West 1986 & Supp.1997) ("LHWCA").

The relevant facts in this case are not disputed. James E. Hamilton filed a claim for benefits under the LHWCA as a result of injuries he sustained during the course of his employment for Maersk. Maersk and Hamilton agreed to resolve their disputes and all other aspects of Hamilton's LHWCA compensation claim by way of a lump sum settlement. Through counsel, both Hamilton and Maersk submitted an application for approval of the settlement to the Defendant Director.

The Director approved the settlement agreement in a Compensation Order that was filed and served on December 1, 1995. On December 11, Hamilton sent a letter to Maersk's claim representative seeking to withdraw from the settlement agreement. The Director received that letter on December 22, deemed it a timely motion for reconsideration, and subsequently filed a Supplemental Compensation Order vacating the December 1 Compensation Order. The Director then transferred Hamilton's claim to the OALJ for formal agency adjudication.

Maersk then filed the complaint in district court requesting mandamus relief which is the subject of this appeal. Maersk sought an order that would: (1) terminate the pending LHWCA administrative proceeding with prejudice and (2) require the administrative adjudicators to reinstate the va-



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cated December 1 Compensation Order approving the settlement agreement.

Meanwhile, in the administrative proceeding before the OALJ, Maersk raised the same objection as presented to the district court in the mandamus complaint. Maersk asserted that Hamilton's claim was finally resolved by the Director's December 1 Compensation Order. The ALJ assigned to hear the claim (who is not a defendant in this action) remanded the proceedings to the Director for investigation and fact-finding regarding whether the agreement was subject to rescission for fraud, duress, or incapacity. Hamilton's claim is still pending before the Director.

Following a hearing, the district court granted the Defendants' motion to dismiss the complaint. Ruling from the bench, the court stated that the case was premature as administrative remedies had not been exhausted. Maersk timely appealed.

Maersk argues that the LHWCA and its corresponding regulations mandate that an employer be discharged from any further liability once a settlement is approved by the Director. *See* 33 U.S.C. § 908(i). It contends that the Director and the OALJ's duty to enforce this statute is sufficiently clear to warrant a writ of mandamus. This court agrees with the district court that Maersk has failed to state a cause of action upon which relief can be granted.

***2** A writ of mandamus is a drastic remedy to be invoked only in the most compelling circumstances. *See Kerr v. United States Dist. Court,* 426 U.S. 394, 402 (1976). A writ of mandamus will not lie absent a showing that: (1) plaintiff has a clear right to the relief sought; (2) defendants have a plainly defined ministerial duty to perform the act in question; and (3) plaintiff has no adequate alternative remedy and will suffer irreparable harm absent judicial intervention. *See United States v. Helvering,* 301 U.S. 540, 543-44 (1937).

Maersk has advanced no claim which merits this extraordinary remedy. First, Maersk has not shown that either the statute or the regulations create the necessary right. Maersk bases its right to relief on § 908(i)(3), which states that "[a] settlement approved under this section shall discharge the liability of the employer." While Maersk is correct that such settlements are not subject to subsequent modification, *see* 33 U.S.C. § 922 (specifically exempting orders pursuant to § 908(i) agreements), the regulation providing for motions for reconsideration within ten days of the entry of a compensation order does not specifically exempt orders entered pursuant to settlement agreements. 20 C.F.R. § 802.206 (1997). While we express no opinion on whether approved settlement agreements are subject to 20 C.F.R. § 802.206, we find that LHWCA does not reflect a clear right to either dismissal of a motion for reconsideration or summary dismissal of a subsequent administrative claim filed after a settlement agreement is approved. *See* 33 U.S.C. § 923(a) (granting discretion to Director to investigate claims in such a way as to "best ascertain the rights of the parties").

In addition, the applicable statute does not establish a "positive command" on the part of Defendants to perform a specific action.[FN1] As such, the "clear duty" requirement for mandamus is absent. *See Pittston Coal Group v. Sebben,* 488 U.S. 105, 121-23 (1988). Even if the employer's liability is finally and completely discharged after a settlement agreement is approved, the statutes do not clearly state how such a right is to be enforced. That is, it may be that the discharge should be entered as a defense in any future action, rather than requiring dismissal by the administrative officials *sua sponte.* Again, we express no opinion on the correct interpretation of the relevant statutes, we hold only that Maersk has failed to show either a "clear right" to the relief it requests or a "clear duty" on the part of the Defendants to perform a certain action.

FN1. Furthermore, it is unclear what the Defendant Chief Judge could do at this point in time. The case is no longer before

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the OALJ, and even if it were, it has been assigned to a different judge.

Maersk also does not meet the third requirement for mandamus, because it has not shown that, absent judicial intervention, it will suffer irreparable harm or that it lacks an adequate alternative remedy. Maersk contends that it has the right to avoid litigation on this claim. However, at this point in time, Maersk has not suffered any legally cognizable harm. Mere lapse of time and litigation expense do not constitute irreparable harm. *See F.T.C. v. Standard Oil Co.*, 449 U.S. 232, 244 (1980). Moreover, if the Department of Labor dismisses Hamilton's claim or finds it without merit, Maersk's fear of future injury will be moot.

***3** In addition, Maersk does not lack adequate alternative remedies. Currently, Maersk's assertions are being considered by the Director. If a formal hearing is held by an ALJ, Maersk has the right to appeal any adverse decision to the Benefits Review Board ("BRB"). 33 U.S.C. § 921(b). Moreover, Maersk may appeal the BRB's decision to this court. 33 U.S.C. § 921(c). Any procedural objection that Maersk may have regarding the administrative procedure would be preserved for appeal. *See F.T.C.*, 440 U.S. at 244-45.

In summary, Maersk has not demonstrated that it has a clear right to the relief sought, that defendants have a clear duty to dismiss Hamilton's claim, or that it will be irreparably injured if this court does not intervene. [FN2] Therefore, we affirm the district court's order dismissing Maersk's mandamus complaint. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

FN2. In support of its argument, Maersk cites *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 134 (5th Cir.1994). In *Ingalls*, the Fifth Circuit affirmed the grant of mandamus relief, ordering the Director to transfer asbestos claims to the OALJ for a hearing. The Director had, despite numerous requests, continued to delay the transfer, even though LHWCA and the corresponding regulations required the Director, upon a party's application, to transfer the case for a hearing.

The instant case differs from *Ingalls* in a crucial way. As discussed above, § 908(i) does not clearly create a duty on the part of the Director to do a particular action. While the Director is presumably charged with ensuring that an employer's liability is discharged pursuant to an approved settlement agreement, there is no requirement that the Director enforce that provision pursuant to a specific procedure. Conversely, in *Ingalls*, the director *was* explicitly required, by statute and by regulations, to transfer the cases. Further, in *Ingalls*, the Fifth Circuit had binding circuit precedent clearly outlining the Director's duty. *Id.* at 133. Because such is lacking here, Maersk cannot show a clear and mandatory duty.

AFFIRMED

C.A.4 (S.C.),1997.
Maersk Container Service Co., Inc. v. Jackson
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