Case No. 19-1330

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Board of County Commissioners of Boulder County, et al.,
Plaintiffs-Appellees
v.
Suncor Energy (U.S.A), Inc. et al.,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO (CIV. NO. 18-1672)
(THE HONORABLE WILLIAM J. MARTINEZ, J.)

PLAINTIFFS-APPELLEES' REPY BRIEF IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL

This Court recently referred Plaintiffs-Appellees' Motion for Partial Dismissal of Defendants-Appellants' forthcoming appeal (the "Motion") to the panel that will decide the merits of that appeal; when ultimately considered, however, the Motion should be granted.

Defendants are incorrect in suggesting that a motion for a partial dismissal is inappropriate. Plaintiffs agree that the Motion does not fall under Circuit Rule 27.3(A), because it is not fully dispositive. But this Court has on multiple occasions entertained – and granted – non-dispositive motions to dismiss part of an appeal.

As to Defendants' substantive argument, Defendants do not dispute that the vast weight of authority is against their position. Indeed, while they imply that the Removal Clarification Act of 2011 – which added an exception to non-reviewability for federal officer cases – changed the interpretation of Section 1447(d) exceptions, precisely the opposite is true; Congress' legislation in this area confirms the majority interpretation. And Defendants' citation to *Coffey v. Freeport McMoran Copper & Gold,* 581 F.3d 1240 (10th Cir. 2009), establishes only that even if this Court *does* have jurisdiction over all grounds for removal, it should decline to review anything other than the federal officer issue.

I. This Court permits motions for partial dismissal.

Defendants argue wrongly that motions for *partial* dismissal are not

permitted by this Court. Opp. at 5-7. This Court has considered and granted motions to dismiss part of an appeal for lack of appellate jurisdiction. *See e.g.*, *Pers. Dep't, Inc. v. Prof'l Staff Leasing Corp.,* 297 Fed. Appx. 773, 788 (10th Cir. 2008) (granting partial motion to dismiss the appeal for lack of appellate jurisdiction); *Gross v. Pirtle,* 116 Fed. Appx. 189, 194-95 (10th Cir. 2004) (same); *United States v. Beyrle,* 75 Fed. Appx. 730, 733 (10th Cir. 2003) (same).

Defendants cite no contrary case law; instead they seek to create a new procedural bar based on an incorrect reading of Circuit Rule 27.3(A). That rule only governs the type of "dispositive motions" that can be filed. Plaintiffs' motion for partial dismissal, however, is a non-dispositive motion. A dispositive motion is one that "decides a claim or case . . . without further proceedings." Black's Law Dictionary (11th ed. 2019). *See also, e.g., O'Hanlon v. Accessu2 Mobile Sols.*, L.L.C., No. 18-cv-00185-RBJ-NYW, 2019 U.S. Dist. LEXIS 40924, at *10 (D. Colo. Jan. 22, 2019). By contrast, the Motion leaves open further proceedings with respect to the district court's rejection of removal under Section 1442, and is therefore not governed by Rule 27.3(A).

Rule 27.3(A) cannot be read to implicitly preclude other types of non-dispositive motions, including the Motion at issue here. Holding so would conflict with the Federal Rules of Appellate Procedure, which provide that "[a]n application for an order or other relief *is made by motion* unless these rules

prescribe another form." Fed. R. App. P. 27(a) (emphasis added); *see also Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 727 (7th Cir. 2006) ("Motions may be proper despite the lack of a specific rule."). Defendants' argument – that partial motions to dismiss are prohibited – makes no sense in light of their admission that the Court can dismiss part of an appeal for lack of jurisdiction; if the Court can grant such relief, a party can move for it.

II. Legislative history, the majority rule, and the law of this Circuit confirm that appellate review is limited to the federal officer portion of the order.

Plaintiffs urge following the Court's decision in *Sanchez v. Onuska*, No. 93-2155, 1993 U.S. App. LEXIS 20722, at *3-4 (10th Cir. Aug. 13, 1993) (per curiam), which ruled that appeal is limited to the grounds specified in 1447(d) exceptions, not because *Sanchez* is precedential – it is not – but because it is correct. It reflects Congress' intent and accords with the majority rule. Nothing in the Court's published cases, including *Coffey v. Freeport McMoran Copper & Gold,* 581 F.3d 1240 (10th Cir. 2009), is to the contrary.

A. Legislative history confirms the majority rule.

Defendants suggest that the Removal Clarification Act of 2011 is significant, and that cases that ignore it or that were decided before its enactment should be given less weight. *E.g.*, Opp. at 11, 13. The Act is significant – indeed, it confirms the majority rule.

The Removal Clarification Act merely changed the language of the non-reviewability exception in Section 1447(d) from "Section 1443" to "Section 1442 or 1443." *See* P.L. 112-51 § 2(d) (2011). It did not effect any change in the way this exception is interpreted. Indeed, the House Report does not suggest any intent to allow wholesale review of any remand; instead it confirms that it should be treated exactly the same way as Section 1443: "Section 2(d) [of the Act] amends § 1447 by permitting judicial review of § 1442 cases that are remanded, just as they are with civil rights cases." H.R. Rpt. 112-17 at 7.

At the time the Act was passed, *every* relevant Court of Appeals decision had concluded that appeals from remands of civil rights cases could only consider the Section 1443 issue. Congress' intent that appeals of Section 1442 removals should be treated the same way indicates an intent to repeat that limited review. "When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Here, the meaning of Section 1447(d) was well-established by 2011, with the unanimous concurrence of at least seven Circuits. The fact that Congress merely added Section 1442 to the existing section, while expressing its intent that it should be treated the same as Section 1443, indicates Congress' intent to incorporate the

then-established judicial interpretation.[1]

B. This Court's decision in *Coffey* confirms that additional removal arguments should not be considered.

Defendants argue that *Coffey v. Freeport McMoran Copper & Gold,* 581 F.3d 1240, 1247 (10th Cir. 2009), conflicts with *Sanchez* and "strongly suggests" the Tenth Circuit would review the Court's "entire order." Opp. at 12-13. *Coffey* does no such thing. The district court, which recently denied Defendants' motion for a stay pending appeal, correctly held that "*Coffey* suggests the Tenth Circuit would be unlikely to review aspects of a remand order that would otherwise be unreviewable." Exhibit 5 (Dist. Ct. Order Denying Stay) at 7.

As the district court observed, "Unlike *Sanchez*, which turned on the Tenth Circuit's reading of Section 1447(d), *Coffey* analyzed the language in the Class Action Fairness Act (CAFA)." *Id.* at 6. CAFA provides that "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." *Coffey,* 581 F.3d at 1247 (quoting 28 U.S.C. § 1453(c)(1)). In *Coffey*, the Tenth Circuit observed that Section 1453(c)(1) contained "no language limiting the court's consideration solely to the CAFA issues in the remand order." *Id.* As the district court noted, it "expressly

[1] The Seventh Circuit in *Lu Junhong v. Boeing Co.,* 792 F.3d 805, 810-13 (7th Cir. 2015), apparently missed the entire line of Section 1443 cases decided before the Removal Clarification Act, citing only one subsequent Eighth Circuit case.

authorized appellate review;" "by contrast, the plain language of Section 1447(d) makes remand orders 'not reviewable,' with two narrow exceptions." Exhibit 5 at 6. Rather than the CAFA language that states that the rule *does not apply*, Defendants here are urging that the 1447(d) exceptions should swallow the rule.

But even if Defendants were correct that *Coffey* establishes that this Court has jurisdiction to review all grounds for remand, that would not assist them. As the district court observed, "even though the Tenth Circuit in *Coffey* found it had discretion to review the whole order, it declined to do so, reasoning that since there would have been no appellate jurisdiction over the remand order absent the CAFA issue, review of the non-CAFA issue would 'not fit within the reasons behind §1453(c)(2),' *i.e.* to 'develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions.'" *Id.* (quoting 581 F.3d at 1247). *Accord Parson v. Johnson & Johnson*, 749 F.3d 879, 892-93 (10th Cir. 2014) (declining to exercise discretion to review non-CAFA basis of remand order in part because "absent our jurisdiction over the CAFA remand order, there would have been no freestanding appellate jurisdiction to review the district court's ruling on diversity jurisdiction"). Exactly the same considerations apply here. *Coffey* is consistent with *Sanchez* and the majority rule that remand review should be limited to only the express exceptions in Section 1447(d).

Coffey also disposes of Defendants' claim that the Supreme Court's decision

in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) – regarding the scope of interlocutory appeals – has any great significance here. As *Coffey* noted, while *Yamaha* held that appellate jurisdiction extended to the entire order certified for interlocutory appeal, consideration of all grounds is not mandatory. *Coffey*, 581 F.3d at 1247. So even if Defendants were correct that the Court of Appeals has jurisdiction to consider issues beyond the federal officer statute, *Yamaha* does not require such consideration, and *Coffey* establishes that this Court should decline to go beyond Section 1442.

* * *

The merits panel should rule that only the federal officer issue under 28 U.S.C. § 1442 is properly on review in this appeal, either as a matter of appellate jurisdiction or as a matter of discretion.

Dated: October 10, 2019

Respectfully submitted,

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Dated: October 10, 2019

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