

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ELIZABETH SEWELL, et al,

Plaintiffs,

v.

**SEWERAGE & WATER BOARD OF NEW
ORLEANS, et al.,**

Defendants.

CIVIL ACTION NO.: 2:15-cv-03117

SECTION “N”

JUDGE: Hon. Kurt Englehardt

DIVISION (3)

**MAGISTRATE: Hon. Daniel E.
Knowles**

**MEMORANDUM IN REPLY TO OPPOSITION OF THE SEWERAGE & WATER
BOARD OF NEW ORLEANS TO PLAINTIFFS’ MOTION TO SEVER AND REMAND**

MAY IT PLEASE THE COURT:

I. SUMMARY OF ARGUMENT

The Sewage & Water Board of New Orleans (hereinafter “SWB”) continues to follow an undeniable and well-documented strategy of delaying and stonewalling property damage claims by citizens of Orleans Parish. Following the strategy displayed in *Holzenthal*, SWB denies any responsibility for the SELA Projects while publically admitting to a partnership agreement imposing the duty to pay for construction-caused damages. Instead, the SWB seeks to shift responsibility to the Contractors by way of its Third Party Demands. Its litigation footprints in analogous cases related to SELA Projects show that the SWB has no intention of pursuing its third party claims to finality. For a municipal entity charged with maintaining public health, safety and welfare, the SWB’s actions are inexplicable.

The SWB's Opposition fails to rebut Plaintiffs' showing that this Court should decline supplemental jurisdiction under 28 U.S.C. § 1367. Its Third Party Demands for indemnity are an appendage to the Plaintiffs' claims that predominate the dispute. The SWB does not and cannot support the ripeness of its Third Party Demands for indemnity when substantive Louisiana law precludes indemnity claims where no underlying claims have been paid. The SWB raises no convincing argument as to how it could be unfairly prejudiced if jurisdiction is declined and Plaintiffs' claims are severed.

Finally, the SWB fails to discuss or rebut Plaintiffs' argument that their claims should be severed and remanded under Fed. R. Civ. P. 14(a)(4) and 21, 28 U.S.C. § 1447(c), and related jurisprudential authorities. For these reasons, and those that follow, Plaintiffs submit that the Motion should be granted.

II. THE SWB HAS CONTRACTUALLY AGREED THAT IT ALONE IS RESPONSIBLE TO PAY FOR PLAINTIFFS' DAMAGES.

The SWB grossly misstates its involvement in the current SELA Projects, arguing that the Projects are "not being conducted or supervised by the SWB..." (SWB Opposition, page 1). This same argument was made and specifically rejected in *Holzenthal*:

"The trial court noted that underlying all of SWB's arguments with respect to liability is its repeated assertion, made likewise on appeal, that the Project is not SWB's project because the construction was directly supervised by entities other than SWB. It asserts it was merely a "local sponsor" of the Project and that it contracted away to third parties any responsibility it otherwise would have had for damages caused by the Project. The trial court rejected this basic argument, finding that as a matter of law, SWB could not and did not contract away the duties it owed the plaintiffs. The court also found, as a matter of fact, that SWB "showcased" the Project as an SWB project.

...

The trial court concluded that for purposes of considering the plaintiffs' claims for inverse condemnation and for strict liability under La. C.C. art. 667, 'no one can credibly deny that the Napoleon Avenue covered canal project was, as the sign said, the 'Sewerage and Water Board of New Orleans Napoleon Avenue Covered Canal.'

We find that conclusion to be supported by the record.¹” Holzenthal v. Sewage & Water Bd. of New Orleans, 950 So. 2d 61, 63 (La. App. 4 Cir. 1/10/07).

Public documents in this case confirm the Project *is* being conducted by the SWB, the broad extent of its involvement, and the financial motive behind the Third Party Demands and its strategy of delay. According to the Programmatic Agreement, attached as Exhibit “2” to Plaintiffs’ underlying Motion:

“The Southeast Louisiana Flood Control Project (SELA) in Orleans Parish is a partnership between the U.S. Army Corps of Engineers, the Coastal Protection and restoration Authority of Louisiana, and the Sewerage and Water Board of New Orleans designed to reduce the risk of flooding in Orleans Parish.”

In its own words in documents distributed to the Plaintiffs and the public, SWB states:

“The Sewerage & Water Board of New Orleans (SWBNO) being responsible for the major drainage operations in the City, has a partnership agreement with the USACE to fund 35% of the cost of their [the Project] construction. ...

Additionally, in accordance with the agreement, the SWBNO has agreed to investigate and resolve property damage issues caused by their construction, with those costs being credited against the SWBNO’s 35% contribution.”²

According to the SWB, the cost of the Project is \$1 billion (*See* Dkt. 7-3). The SWB’s Annual Financial Reports for 2013-2014 confirm that the Federal Government is funding 100% of the Project costs, that the SWB is to contribute 35% of the costs and that it has 30 years to pay back this debt.³ (*See*, Ex. “2” to the Declaration of Joseph M. Bruno attached hereto). Any damage claim payments are credited against this obligation. Significant financial motivation exists then, for the SWB to delay this litigation, as it has for all other arising out of the Project, for as long as possible.

¹ The Louisiana Court of Appeal for the Fourth Circuit found “no error in the trial court’s disposition of SWB’s claims”, affirming its findings and judgment on all assignments or error. 950 So. 2d at 85.

² *See* Declaration of Joseph M. Bruno, at Exhibit “1” hereto (emphasis added).

³ Total debt of \$350 million as calculated on construction costs of \$1 billion.

III. HOLZENTHAL AND SHIMON REVEAL THE SWB'S STRATEGY.

Holzenthal is informative not only for the Courts' reasoning, but also for illuminating the SWB's litigation strategy. In this case, as in *Holzenthal*, the SWB again attempts to evade its acknowledged responsibility for Plaintiffs' damages by making Third Party Demands against the Contractors. Delay is in the SWB's interest. Empirical evidence and historical precedent, including *Holzenthal* and *Shimon*, suggest it has no intent of pursuing these demands to judgment.

At the trial of *Holzenthal*, the SWB did not put on any evidence of the Contractors' negligence. The *Holzenthal* Court dismissed the Contractors following this failure of proof, and explained its reasoning in detail. 950 So.2d at 60, 81, and 83 (as recited by the Court of Appeal). This was after over four years of litigation, and was no accident or oversight—the SWB had dozens of lawyers, multiple law firms and numerous consultants working for it. In that case, the Third Party Demands caused enormous delay and expense, to the direct prejudice of the plaintiffs.

SWB seeks to do the same thing again in this case. Its history shows that it has no intent of pursuing the Third Party Demands to judgment. Doing so would require SWB to establish common elements of the Plaintiffs' case—specifically, the negligence of the Contractors.

The SWB continued to stonewall the *Holzenthal* plaintiffs, appealing the case to the 4th Circuit Ct. of Appeals, which affirmed the trial court's decision (950 So.2d 55), and then to the Louisiana Supreme Court (*writ denied*, 953 So.2d 71 (La.3/30/07)).

While those appeal was pending, almost every other SELA claim previously pending in the Civil District Court for the Parish of Orleans was removed by the third-party contractor defendants to the U.S. District Court for the Eastern District of Louisiana and consolidated for pretrial discovery. The lead case was known as *Shimon, et al. v. Sewerage and Water Board of New Orleans*. After removal and before discovery had begun, the Third Party Contractors and

their insurers moved for summary judgment dismissing SWB's claims against them, arguing that *res judicata* barred SWB's claims. The district court granted the contractors' motion for summary judgment. On SWB's appeal, the Fifth Circuit Court of Appeal affirmed the district court's dismissal of the contractors. *Shimon v. Sewerage & Water Bd. of New Orleans*, 565 F.3d 195 (5th Cir. 2009).

Holzenthall and its progeny thus reveal the enormous waste of time, money, and judicial resources created by the SWB's Third Party Demands and imposed upon all Parties and the Court. None of these delays or expenses were or are necessary. *Holzenthall* exposes that the SWB's strategy is for delay, not for genuine prosecution of its unripe indemnity claim. Plaintiffs submit the SWB's delay tactics cannot be condoned. Severance and remand resolve these problems.

IV. STANDARD TO BE APPLIED: CROCKER v. BORDEN

Plaintiffs contend that this Court should decline supplemental jurisdiction because of the presence of at least one of the factors enumerated in 28 U.S.C. § 1367 (c)(1)-(4) and as persuasively explained by Judge Livaudais in *Crocker v. Borden*, 852 F. Supp. 1322 (E.D. La. 1994). Section 1367(c) permits Courts to weigh and balance all factors on a "case specific basis" in determining whether it should decline supplemental jurisdiction. 852 F. Supp. at 1328-29.

Defendants' recitation of factual differences between this case and *Crocker* is misplaced. Plaintiffs' cite *Crocker* only for its articulation of the test to be applied in determining whether supplemental jurisdiction should be declined; that is, whether just one of the four factors listed in 28 U.S.C. § 1367(c)(1)-(4) is present. *Id* at 1328. Plaintiffs submit that the facts of this case demonstrate the presence of these circumstances sufficient to decline jurisdiction over Plaintiffs' claims and remand them to State Court.

V. PLAINTIFFS INVERSE CONDEMNATION CLAIMS RAISE COMPLEX ISSUES OF STATE LAW.

Defendant concedes that the authority cited by Plaintiffs, the Louisiana Supreme Court decisions in *Avenal* and *Constance*, set forth Louisiana law regarding inverse condemnation. The *Constance* Court explained the complex nature of this type of claim and the analysis a Court must follow, including a determination and application of both Louisiana constitutional law and Civil Code:

“To consider the taking and damaging of legal property rights, which is admittedly abstract and conceptual, the Chambers court adopted a three-prong analysis in determining whether a claimant is entitled to eminent domain compensation. In accordance with this analysis, the court must (1) determine if a right with respect to a thing or an object has been affected; (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for public purpose under. *Id.* at 603. In deciding whether the claimant’s right was taken or damaged, Civil Code articles 667 and 668, which impose legal limitations on a landholder’s right of ownership, must be considered. While Article 667 prohibits the landowner from exercising his right of ownership in such a way as to cause damage to his neighbors, Article 668 requires that he tolerate certain inconveniences which result from the lawful use of a neighbor’s property. *Id.* at 604. The *Chambers* court concluded that, where there is no allegation or evidence of personal injury or physical damage to property, a finding of liability under Article 667 “require[s] proof of the presence of some type of excessive or abusive conduct.” *Id.* at 605.

As demonstrated and in the words of the *Constance* Court, inverse condemnation claims are “abstract and conceptual”; stated differently, they are “complex”. Section 1367(c)(1) allows this Court to decline jurisdiction where the claims involve “complex issues of State law.” Plaintiffs’ claims against the SWB will require application of precisely this same complex body of laws.

Accordingly, and with the guidance of the *Crocker* decision, this Court may decline jurisdiction over the Plaintiffs’ claims and sever and remand them to State Court.

VI. PLAINTIFFS' CLAIMS SUBSTANTIALLY PREDOMINATE OVER THE SWB THIRD PARTY INDEMNITY DEMANDS.

The SWB Third Party Demands seeks indemnification from the Contractors for amounts it *may* become obligated to pay to the Plaintiffs as a result of their lawsuit. Critically, the SWB has not paid anything to the Plaintiffs, and it does not allege otherwise. The Third Party Demands are thus premature and not legally ripe. Further, since the Demands are purely for indemnity, they are an “appendage” to the Plaintiffs claims which “substantially predominate” the dispute.

Under Louisiana law, indemnification claims do not exist until the indemnity claimant has sustained a loss, either through payment, settlement of the underlying claim, or judgment. *Reggio v. E.T.I.*, 15 So. 3d 951, 957 (La. 12/12/08); *See also Smith Int'l, Inc. v. The Eagle Group, LLC*, 490 F.3d 380, 388-89 (5th Cir. 2007). Put differently, “a claim for indemnification doesn’t begin to prescribe until the party is cast in judgment.” *Claiborne v. Rheem Mfg. Co.*, 579 So. 2d 1199, 1200 (La. App. 5 Cir. 1/23/2013).

It is undisputable that SWB has not paid a judgment in favor of Plaintiffs, settled their claims, or otherwise sustained any kind of financial loss related to Plaintiffs’ lawsuit. The Third Party Demands thus do not exist as a matter of law, and consequently SWB’s indemnity claims against contractors (Cajun Constructors, Boh Brothers Construction Company, and B&K Construction Company) merit dismissal under Rule 12(b)(6) for the failure to state a claim.

Because the indemnity demands necessarily depend upon and arise out of the Plaintiffs’ lawsuit, they are “an appendage” to the Plaintiffs’ claims which are clearly the main body of the dispute, and “predominate”. Under 28 U.S.C. § 1367(c)(2), the Court may decline jurisdiction when “the claim substantially predominates over the claim or claims over which the district court has original jurisdiction”.

As stated in the landmark case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727 (1966), if “state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.” *Id.* at 726-27.

Accordingly, and as authorized by the above authorities, jurisdiction over the Plaintiffs’ claims should be declined and their case severed and remanded.

VII. THE SWB FAILS TO OVERCOME PLAINTIFFS’ SHOWING OF FUNDAMENTAL UNFAIRNESS OR THAT IT WOULD BE PREJUDICED.

In ruling on this Motion, the Court is to weigh and balance the interest of the parties and is to decline jurisdiction for situations presenting “compelling interests”. *Crocker*, 852 F. Supp. at 1328. Such compelling interests are found in the damage and distress to Plaintiffs caused by the Project.

It is fundamentally unfair to the Plaintiffs to force them to suffer for years in severely damaged homes and with damaged businesses while the SWB pursues its delay tactics. Plaintiffs’ homes have become unbearable due to noise, dust and structural damage; they are suffering physically, emotionally and financially. Some may die before their claims get to trial if the SWB is permitted to engage in its strategy of delay.

The SWB is a government bureaucracy. It will not suffer physically, emotionally, or financially. It argues that it will be prejudiced because severance will result in “dual track litigation” with Plaintiffs litigating in State Court, while SWB is “simultaneously litigating in Federal Court using the same facts and evidence”. (Opposition, pg. 20). Empirical evidence proves the SWB’s is simply misleading the Court. As discussed, the SWB indemnity claims do not exist at present as a matter of law. The Third Party Demands cannot be tried without a fundamental prerequisite—a judgment or settlement by SWB in favor of Plaintiffs. Until that prerequisite

occurs, there is no legal basis for indemnity or proceeding with the federal court action, and SWB's claim of "unfair dual track litigation" is revealed as specious.

Severance and remand results in no prejudice to the SWB. A balance of the respective interests of the Parties weighs in favor of declining jurisdiction under 28 U.S.C. §1367(c)(2) and granting Plaintiffs' Motion to Sever and Remand.

VIII. CONCLUSION.

For the reasons set forth above and in the Moving Papers, Plaintiffs respectfully submit that this Court should decline jurisdiction over their claims, sever them and remand them to State Court forthwith. This is the fair and just resolution.

Respectfully submitted:

BRUNO & BRUNO, L.L.P.

/s/ Joseph M. Bruno

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2015, I electronically filed the foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

/s/ Joseph M. Bruno
JOSEPH M. BRUNO