**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| **NORA SMITH, *et al.,*** <br><br> **Plaintiffs,** <br> **v.** <br><br> **HOUSING AUTHORITY OF BALTIMORE CITY,** <br><br> **Defendant.** | **Civil Action No.: WDQ 10-1806** |

**U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S**
**OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

## I. Introduction

On July 2, 2010, the United States filed a Notice of Removal (hereinafter "Removal") on behalf of the United States Department of Housing and Urban Development (HUD) of a Writ of Garnishment originally issued by the Clerk of the Baltimore Circuit Court to Bank of America, where the Housing Authority of Baltimore City (HABC) maintains its accounts. The Removal was based on the fact that federal funds distributed by HUD are contained in the HABC accounts subject to garnishment, making HUD the real party in interest in the garnishment action. Because the garnishment action is, in effect, against a federal agency, 28 U.S.C. §1442(a)(1) permits removal as of right. Therefore, HUD requests that Plaintiffs' Motion to Remand be denied.

## II. Statement of Facts

On June 2, 2010, a Writ of Garnishment was issued to Bank of America, the bank where HABC deposits its funds, for $1,144,500, representing the judgment plus interest in the case of *Smith v. HABC*, No. 0404 September Term, 2007 (Md. Ct. Spec. App. January 26, 2010) (Ex. A). (Writ, Ex. B). Plaintiff Nora Smith had sued HABC individually and on behalf of her minor child, Lamar Lynch, for injuries he sustained from exposure to lead while living in an HABC property. The case went to trial in 2002, and the Plaintiff was awarded a $630,000 judgment. The judgment was subsequently reduced to zero because HABC was deemed to have sovereign immunity based on the Maryland Court of Appeal's decision in *Jackson v. Housing Opportunities Comm'n of Montgomery County*, 289 Md. 118 (1980). (*Smith* slip op., Ex. A). In November 2009, the Maryland Court of Appeals overturned the *Jackson* decision, concluding that HABC did not have sovereign immunity. *Brooks v. Housing Authority of Baltimore City*, No. 14, Sept. Term 2008, (Md. Nov. 17, 2009). In January 2010, the previously reduced *Smith* judgment was reinstated in the amount of $630,000. (*Smith* slip op, Ex. A). The Plaintiff has now attempted to execute the judgment by filing a Writ of Garnishment in the amount of $1,144,500, representing the original judgment plus interest. (Writ, Ex. B).

The accounts against which the Writ of Garnishment is pending contain federal funds distributed and controlled by HUD. HUD has filed a Motion to Quash the Writ of Garnishment as to Federal Funds, on the basis that sovereign immunity protects federal funds from garnishment. Based on this premise, although HUD was not named as a party in the Writ of Garnishment, HUD is the real party in interest in the garnishment action. Because 28 U.S.C. §1442(a)(1)

permits the removal of a suit against the United States or any agency thereof, the United States, on behalf of HUD, properly filed a Notice of Removal of the Writ of Garnishment on July 2, 2010.

## III. Argument

### A. Courts are permitted a broad standard of review for removal when an action is removed by the United States or an agency under 28 U.S.C. §1442(a)(1).

The standard of review for removal on the basis of suit against the United States or an Agency is broad, not narrow as the Plaintiffs argue. All of the cases cited by the Plaintiffs in the section of their brief entitled "Standard of Review for Removal Jurisdiction" involve removal under 28 U.S.C. §1441, not §1442(a)(1). In this case, the United States and HUD are primarily relying upon 28 U.S.C. §1442(a)(1) as the basis for removal, and this brief will focus on the elements necessary to remove under this provision. Additionally, the United States is permitted to remove this action pursuant to 28 U.S.C. §1441(b) as discussed *infra*.

As the Supreme Court stated in *Willingham v. Morgan*, 395 U.S. 402, 407 (1969), "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of §1442(a)(1)." Thus, rather than a narrow interpretation of removal jurisdiction as Plaintiffs advocate, the Supreme Court has emphasized the importance of broadly interpreting §1442(a)(1). The *Willingham* Court explicitly stated that "the right of removal under §1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court," and went on

to emphasize that "[f]ederal jurisdiction rests on a 'federal interest in the matter,'…the very basic interest in the enforcement of federal law through federal officials." 395 U.S. at 406. Since the *Willingham* decision was written, 28 U.S.C. §1441(a)(1) has been amended to explicitly include "the United States or any agency thereof" as parties having the right of removal. Pub. L. 104-317, Oct. 19, 1996.

The importance of the broad standard for removal was emphasized by the Fourth Circuit in *State of North Carolina v. Carr*, 386 F.2d 129, 131 (1967): "[i]nsistence on the right of removal has been declared essential to the integrity and preeminence of the Federal government within its realm of authority." "The purpose of the statute [§1442(a)(1)] is to take from the State courts the indefeasible power to hold an officer or agent of the United States…civilly liable for an act allegedly performed in the execution of any of the powers or responsibilities of the Federal sovereign." *Carr*, 386 F.2d at 131. See also *Williams v. Williams*, 427 F. Supp. 557, 563 (D. Md. 1976) (Kaufman, J.) (holding that under broad standard for removal, a garnishment action against a federal official was a civil action that was properly removed under 28 U.S.C. §1442(a)(1)).

**B. HUD has met the broad standard for removal pursuant to 28 U.S.C. §1442(a)(1), and therefore, this action was properly removed.**

The District of Maryland has held that a garnishment action is considered a "civil action" for the purposes of §1442(a)(1). *Williams,* 427 F. Supp. at 560, Fn. 8. In *Williams*, a divorced wife sought to garnish her husband's federal military retirement pay, and the United States removed the case to federal court. *Williams*, 427 F.Supp. at 558. The court explicitly stated that

"[a] garnishment proceeding is "a civil action" within the meaning of section 1442(a)(1). *Id*. at 560, Fn. 8. Thus, the District of Maryland is consistent with the positions of the Eighth and Ninth Circuits in holding that a garnishment is a civil action under §1442(a)(1). *See Nationwide Investors v. Miller*, 793 F.2d 1044, 1048 (9th Cir. 1986) (holding that garnishment is a civil action removable under 28 U.S.C. §1442(a)(1)); *Randolph v. Employers Mutual Liability Ins. Co.,* 260 F.2d 461 (8th Cir. 1958) (holding that garnishment is a civil action under federal removal statutes); *Stoll v. Hawkeye Casualty Co.*, 185 F.2d 96 (8th Cir. 1950) (holding that garnishment is a civil action under federal removal statutes). Therefore, the first prong required for removal, that the case involves a "civil action," has been satisfied.

In their Motion to Remand, the Plaintiffs argue that the Writ of Garnishment is merely an ancillary proceeding that is not a civil action subject to removal. However, none of the cases cited are controlling in the District of Maryland, and the Plaintiffs make no mention of the *Williams* case, in which the District of Maryland extensively analyzed the removal of a garnishment proceeding, and determined that it was, in fact, properly removable under §1442(a)(1). *Williams*, 427 F.Supp. at 560. The pending case presents an even more compelling reason to consider the garnishment action a "civil action" for the purposes of §1442(a)(1): while the *Williams* case which involved the attempted garnishment of federal retirement pay for which sovereign immunity had been waived, the instant garnishment is pending directly against federal funds for which sovereign immunity has not been waived, making HUD the real party in interest in the garnishment proceeding.

HUD is the real party in interest in the instant garnishment proceeding, thereby satisfying the second prong necessary for removal under §1442(a)(1), that the civil action is pending against the agency. Even though the United States and HUD were not named defendants in the garnishment proceeding, HUD's pending Motion to Quash clearly demonstrates that the funds that are the subject of the garnishment are federal funds. This makes HUD the real party interest in the garnishment proceeding, and gives the Agency the right to remove the proceeding pursuant to §1442(a)(1).

In cases involving the garnishment of federal funds in the hands of a grantee like HABC, courts have consistently held that the United States and its agencies have properly removed such matters to federal court because they were the real parties in interest in the garnishment actions. For example, in *Palmitter v. Action, Inc.*, 733 F.2d 1244, 1245 (7th Cir. 1984), the United States removed a garnishment proceeding that was pending in Indiana state court against Action, Inc., a community service organization substantially funded by federal grants under the Headstart program. The garnishment proceeding had resulted from a judgment in a personal injury suit against Action, in which the United States was not a party. *Id*. at 1246. The United States removed the case pursuant to 28 U.S.C. §1442(a)(1), even though it was not named by the plaintiff as a party, on the basis that "it was the real party in interest to the extent that the proceedings were 'directed at garnishing, attaching, or freezing the federal Headstart funds in Action's bank accounts.'" *Id*. at 1246. Subsequent to the removal, the district court granted the separate motion of the Secretary of the U.S. Department of Health and Human Services to intervene as a matter of right pursuant to Fed.R.Civ.P. 24(a).

Similarly, in *Fernandez v. Huerfano and Las Animas Counties Head Start Policy Council*, No. 90-A-540, 1990 WL 126195 at *1-2 (D. Colo. 1990), an employee of the Head Start Policy Council obtained a judgment against her former employer in a wrongful discharge and breach of contract action. Pursuant to the judgment, a Writ of Garnishment was filed against federal Headstart funds contained in the Head Start Policy Council's bank accounts. *Fernandez*, 1990 WL 126195 at *1. The Secretary of Health and Human Services (HHS) filed a Notice of Removal, even though HHS was not a party to the underlying case. *Id*. The plaintiff challenged the removal, alleging that the Secretary did not have standing to remove the case. *Id*. The court followed the lead of the Seventh Circuit in *Palmitter*, determining that even though the Secretary was not a party to the underlying wrongful discharge case, the garnishment pending against federal funds made the Secretary the real party in interest, giving HHS the right to remove the case pursuant to 28 U.S.C. §1442(a)(1). *Id*. at *2. See also *Alan Stanton Corporation v. City of North Las Vegas Housing Authority* (NLVHA), Case No. 2:10cv147, slip op. at 3 (D. Nev. June 16, 2010) (United States properly removed garnishment action against NLVHA, even though it was not a party to the underlying action, because the garnishment was against federal funds in NLVHA accounts, making the garnishment against the United States within the meaning of 28 U.S.C. §1442(a)(1)) (Ex. C); *Alliston v. Little Neighborhood Schools, Inc.*, 6 F.Supp.2d 396, 397 (E.D. Pa. 1998) (garnishment against federal head start funds arising from judgment in private employment dispute where United States was not a party was properly removed to federal court by the United States, and federal funds were not subject to garnishment).

Plaintiffs argue that removal is improper because Plaintiffs "have not filed an action against the United States or an agency thereof or any officer or any person acting under that officer." Pl.'s Motion to Remand, p. 4. To accept Plaintiffs argument would permit any plaintiff to force the United States to litigate the garnishment of federal funds in state courts by simply not properly naming the federal government as a defendant. The *Palmitter, Fernandez, Alan Stanton* and *Alliston* cases establish that even though the United States may not be a named party to a case giving rise to a garnishment action, once a garnishment action is pending against federal funds, it is properly removed to federal court by the United States as the real party in interest. Thus, the second prong of the removal statute, that the action is pending against an agency, has been satisfied.

Plaintiffs argue that HUD must fulfill a third prong of §1442(a)(2) that is required when a federal officer is sued; that is, to "establish that the suit is for an act under color of office" in order to remove the garnishment to federal court. Pl.'s Motion to Remand, p. 5. However, when the United States or an agency seeks to remove, this third prong of §1442(a)(1) does not apply. Until 1996, §1442(a)(1) only explicitly permitted removal of suits against federal officers, not federal agencies. *City of Cookeville Tennessee v. Upper Cumberland Electric Membership Corp.*, 484 F.3d 380, 390 (6th Cir. 2007). The current version of the statute now explicitly permits removal by "the United States, or any agency thereof, or any officer…" 28 U.S.C. §1442(a)(1). After engaging in an extensive analysis of the statute and its legislative history, the Sixth Circuit in *City of Cookeville* determined that the clause of the removal statute that reads "sued in an official or individual capacity for any act under color of such office" does not pertain

to removals by the United States or any agency. 484 F.3d at 390. The Sixth Circuit held that "the text and legislative history of §1442(a)(1) demonstrate that any federal agency sued can always remove under §1442(a)(1) because the "sued" clause in that provision applies only to federal officers." Id. Therefore, HUD is not required, as Plaintiffs assert, to "establish that the suit is for an act under color of office" in order to remove the garnishment to federal court, because the United States and HUD, not an officer, is the removing party. The cases relied upon by Plaintiffs are clearly distinguishable because they involve cases against federal officers, not the United States or any agency. Pl.'s Motion to Remand, p. 5; *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 424 (1999).

Even if HUD were required to demonstrate that the garnishment action is for "an act under color of office," however, this requirement is easily met. As outlined in detail in HUD's Motion to Quash, it is only by virtue of HUD's distribution of federal funds to HABC that there are funds available in HABC's accounts for Plaintiffs to garnish. The funds contained in HABC's accounts are federal funds that are prohibited from garnishment, absent HUD consent, making HUD the real party in interest in the garnishment action. The pending Writ of Garnishment seeks to interfere with the use of those federal funds for their appropriated purpose. Thus, the garnishment action is a suit for HUD's grant of funds to HABC, clearly establishing that the suit is for an "act under color of office" by HUD, for the purposes of §1442(a)(1).

In addition to the moot requirement of establishing that the suit is for an act under color of office, Plaintiffs assert that HUD must assert a colorable federal defense in order to remove the case. Pl.'s Motion to Remand, p. 5. It is true that where a suit is against a federal officer, a

colorable federal defense must be asserted in order to give the court Article III jurisdiction over the suit (insuring that the case "arises under" federal law). *See Jefferson County*, 527 U.S. at 431(holding that suits against federal officers meet the requirements of federal question jurisdiction if the defense depends on federal law). However, in cases where the United States or an Agency is the defendant, a colorable federal defense is not required for removal, because Article III, Section 2, of the Constitution is a direct grant of jurisdiction to federal courts where the United States is a party, thereby making the requirement of a federal defense moot. *City of Cookeville*, 484 F.3d at 391 (holding that "the requirement of a colorable federal defense…is not only not supported by the statutory language [where the United States or an agency is the removing party], but also is not necessary to ensure the constitutionality of §1442(a)(1) under Article III of the Constitution.").

However, to the extent that such a requirement is deemed necessary, HUD has clearly articulated in its Motion to Quash the defense of sovereign immunity, arguing that under this doctrine the federal funds that are the subject of the Plaintiffs' garnishment action are not subject to garnishment. This is clearly a federal defense that fulfills the "colorable federal defense" requirement, even if it were required for removal. *See Kessnick v. Clob Car Acceptance Corporation*, No. 07-123, 2007 WL 3120692 (E.D. Ky. 2007) (holding that although no assertion of colorable federal defense is necessary, the Department of Health and Human Services had fulfilled the requirement by asserting the defense of sovereign immunity).

**C. The Writ of Garnishment is also removable pursuant to 28 U.S.C. §1441(b).**

As articulated in the Notice of Removal and Motion to Quash filed by HUD, this Court has original jurisdiction in this matter pursuant to §1441(b) because the funds sought to be garnished are federal funds that are subject to HUD's control. Section 1441(b) permits the removal of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States…." As established above, the pending garnishment action is a "civil action" in the District of Maryland for the purposes of removal. *Williams*, 427 F. Supp. at 560, Fn. 8 (citing cases holding that a garnishment is a "civil action" for the purposes of both §1442(a)(1) and §1441). This Court has original jurisdiction over the garnishment action because Plaintiffs are seeking to garnish funds that are subject to federal rules and regulations, and are under HUD's control. In order to put forth a viable garnishment action, Plaintiffs must ground their action in some law or premise that would be sufficient to defeat the sovereign immunity of the United States that protects the federal funds at issue from garnishment. Because sovereign immunity can only be waived by federal law, Plaintiffs' garnishment action must necessarily be founded "a claim or right arising under….the laws of the United States" if it is to be viable. Therefore, the garnishment action can be properly removed pursuant to §1441(b).

## IV. Conclusion

To remand this case back to state court would imply that any plaintiff could garnish the money of the United States by simply not properly naming the federal government as a defendant, and that the United States would then be forced to litigate seizures of its own funds in

state courts. This is clearly not what was contemplated by Congress in enacting the removal statute. In fact, when §1442 was amended in 1996 to explicitly permit the United States or an agency to remove, Congress specifically noted that the amendment was also intended to overrule lower court decisions that forced "federal agencies . . . to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity. This section fulfills Congress' intent that questions concerning the exercise of federal authority, the scope of federal immunity and federal-state conflicts be adjudicated in federal court." H.R. Rep. 104-798, *20; See S. Rep. 104-366, *30-31. In amending the removal statute, Congress clearly did not intend for the matters pending in this case, where the sovereign immunity of the United States is being threatened by the attempted garnishment of over a million federal dollars, to be adjudicated in a state forum. For the reasons set forth in this brief, the United States on behalf of HUD respectfully request that Plaintiffs' Motion to Remand be denied.

Respectfully submitted,

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