

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANNY HANNA	:	CIVIL ACTION NO.: 2:14-cv-1088
	:	
VERSUS	:	JUDGE: KURT D. ENGELHARDT
	:	
SHELL EXPLORATION AND	:	MAGISTRATE JUDGE:
PRODUCTION, INC., BRUNEL	:	KAREN ROBY
ENERGY, INC., CHARLES PERILLIAT,	:	
MARK TIPTON, 123 INSURANCE	:	
COMPANY, and XYZ INSURANCE CO.	:	

**REPLY MEMORANDUM TO DEFENDANTS' OPPOSITIONS TO PLAINTIFF'S
MOTION FOR REMAND**

NOW INTO COURT, through undersigned counsel, comes Plaintiff Danny Hanna who submits this reply memorandum to the defendants' opposition to his motion for remand. (Rec. Doc. Nos. 6).

Mr. Hanna is not making a Sorbanes-Oxley Claim. He cannot, it is time barred. The Defendants admit that they received notice of the failed SOX claim more than six months ago and did nothing. Now the defendants assert that this Court has Federal subject matter jurisdiction because the plaintiff talked about a federal cause of action in a deposition. He did not plead it, he cannot, it is time barred. All he did was mention it. Plaintiff submits that a plaintiff talking about a cause of action in a deposition does not confer subject matter jurisdiction on this Court. There is no federal claim.

Federal courts have limited subject matter jurisdiction and cannot entertain cases unless authorized by the Constitution and legislation. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) [4] (citing 1 J. Moore, Moore's Federal Practice § 0.71[1][5.-1] (1996)). The parties can never consent to federal subject matter jurisdiction, and lack of such

jurisdiction is a defense which cannot be waived. *Id.* (citing Fed.R.Civ.P. 12(h)(3); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, 62 S. Ct. 15, 20, 86 L. Ed. 47 (1941)). Accordingly, there is a presumption against subject matter jurisdiction in a federal court. *Zeringue v. Roche Labs., Inc.*, 2002 U.S. Dist. LEXIS 13406, 2002 WL 1585561 (E.D. La. July 15, 2002) citing *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); 1 J. Moore, *Moore's Federal Practice* § 0.71[5.-1] (1996)).

When considering a motion to remand, the removing party bears the burden of showing that removal was proper. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). The defendant has the burden of demonstrating that at least one of the plaintiff's alleged claims arises under federal law. *Hogg v. Clear Channel Broad., Inc.*, 2007 U.S. Dist. LEXIS 86812, 2007 WL 3396426 (M.D. La. Oct. 29, 2007)

When a claim can be supported by alternative and independent theories - one of which is a state law theory and one of which is a federal law theory - federal question jurisdiction does not attach because federal law is not a necessary element of the claim. The Supreme Court decided that very issue in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988). Although in that case the Court analyzed whether a controversy arose under the patent laws of the United States for purposes of 28 U.S.C. § 1338, it explicitly said that the same approach applies in determining general federal question jurisdiction. *Id.* at 890; see also WRIGHT and MILLER, 13B *Federal Practice and Procedure*, § 3562 n.68 (1995 Supp.) (discussing *Christianson*). In concluding that the case did not arise under the patent laws, the Court

laid down a simple test, holding: "a claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories." *Christianson*, 486 U.S. at 810.

In *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988), the Fifth Circuit considered a wrongful discharge action, similar to Plaintiff Hanna's wrongful termination claim, and held that there was no federal jurisdiction under *Christianson*. The plaintiff in *Willy* alleged that he was fired because he insisted that his employer obey various state and federal environmental and securities laws. *Id.* at 1162. The Fifth Circuit described the case as one "supported by alternative theories, first that his discharge was wrongful because it was on account of his attempt to cause employer compliance with or refusal to violate federal law, and second that it was wrongful because it was on account of his attempt to cause his employer compliance with or refusal to violate state law." *Id.* at 1170. The court noted that the plaintiff's stated cause of action was (1) independent of the federal cause of action and (2) self-sufficient and then held: "We conclude that the *Christianson* doctrine is properly applied to this case and results in the conclusion that *Willy's* wrongful discharge claim does not arise under federal law." *Id.* at 1171. In the case at bar, Plaintiff Hanna's claims, as pleaded, are sustained independent of any federal cause of action, therefore, this Court does not have federal subject matter jurisdiction.

In *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 2002 U.S. App. LEXIS 12203, 55 ERC (BNA) 1699, 32 ELR 20757 (5th Cir. La. 2002), the Plaintiff's only reference to federal law was an allegation that the PPI facility was maintained in violation of federal

regulations as well as in violation of state and local regulations. The Court found that does not suffice to render the action one arising under federal law.

There is not federal jurisdiction in this case the matter should be remanded to the State Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the preceding reply brief has been delivered via electronic Service to:

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on this 9th day of June, 2014.

by:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANNY HANNA

Plaintiff,

v.

SHELL EXPLORATION AND
PRODUCTION, INC., BRUNEL
ENERGY, INC., CHARLES PERILLIAT,
MARK TIPTON, 123 INSURANCE
COMPANY, and XYZ INSURANCE
COMPANY

Defendants.

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CIVIL ACTION
NO. 2:14-cv-01088

SECTION "N"
JUDGE KURT D. ENGELHARDT

MAG. DIV. 4
MAG. JUDGE KAREN WELLS ROBY

**BRUNEL ENERGY, INC.'S
CORPORATE DISCLOSURE STATEMENT
FEDERAL RULE OF CIVIL PROCEDURE 7.1**

NOW INTO COURT, through undersigned counsel, comes Brunel Energy, Inc., who respectfully submits the following corporate disclosure statement in accordance with Federal Rule of Civil Procedure 7.1:

Brunel Energy, Inc.'s parent company is Brunel International N.V., which is publicly traded on Euronext Amsterdam, but is not publicly traded in the United States.

Respectfully submitted,

**BAKER DONELSON BEARMAN
CALDWELL & BERKOWITZ, PC**

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**ATTORNEYS FOR DEFENDANT,
BRUNEL ENERGY, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2014, a copy of the foregoing Corporate Disclosure Statement was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to counsel for all parties by operation of the court's electronic filing system and via facsimile. Notice of this filing will be sent via U.S. Mail to all counsel not appearing on the CM/ECF system.

/s/ Kathlyn G. Perez

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANNY HANNA

Plaintiff,

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SHELL EXPLORATION AND
PRODUCTION, INC., BRUNEL
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MARK TIPTON, 123 INSURANCE
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Defendants.

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CIVIL ACTION: NO. 2:14-cv-1088

JUDGE: KURT D. ENGELHARDT

MAG. DIV.

MAG. JUDGE: KAREN ROBY

* * * * *

OPPOSITION TO PLAINTIFF'S MOTION TO REMAND¹

Plaintiff, Danny Hanna ("Hanna"), has confirmed that he is pursuing a whistleblower claim based on alleged violations of the Public Accounting Reform and Corporate Responsibility Act, 15. U.S.C. § 7201 *et seq.*, more commonly known as the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). The court should not accept Hanna's equivocal and self-serving statements that he is not pursuing a Sarbanes-Oxley claim "at this time."² These statements are contradicted by: (1) Hanna's erroneous contention that Defendants' removal of this action is untimely because they were "on notice of his Sorbanes-Oxley [sic] claim more than thirty days ago,"³ and (2) his failure to produce a copy of the letter from the Department of Labor ("DOL") dismissing his

¹ Defendants, Shell Exploration & Production Company, Shell International and Exploration Inc., (referred to collectively herein as "Shell"), Mark Tipton ("Tipton"), and Charles Perrilliat ("Perrilliat"), by and through their undersigned counsel, file this Opposition to Plaintiffs Motion to Remand, Rec. Doc. 6.

² Rec. Doc. 6 at p. 3.

³ *Id.* at 2.

Sarbanes-Oxley claim during discovery despite Defendants' request for it. Hanna's failure to produce this document suggests that he did not want Defendants to know any details about the DOL's investigation of his Sarbanes-Oxley claim because he wants to pursue the claim in this lawsuit, which he has done.

However, even if the Court accepts Hanna's self-serving statements regarding the nature of his claims at face value, Hanna's Motion to Remand ("Motion") must fail. His whistleblower claim, which is admittedly based on alleged violations of Sarbanes-Oxley, "arises under" federal law, and is therefore sufficient to support removal of this case based on federal question jurisdiction. Additionally, Hanna's arguments regarding the timeliness of his Sarbanes-Oxley claim and depositions in this matter are irrelevant to the Court's subject matter jurisdiction over this action, and do nothing to defeat Defendants' properly noticed removal.

FACTS ESTABLISHING THE BASIS FOR REMOVAL

Hanna filed a petition for damages in Louisiana state court on or around August 8, 2012, alleging several causes of action based on the termination of his services as the Cost Management Lead on a Shell deepwater drilling project known as the Cardamom project. His state court petition alleges that Defendants Brunel and Shell terminated his employment in violation of La. Rev. Stat. 23:967 "for making complaints of fraudulent and illegal activity."⁴ Specifically, Hanna alleges that he made "numerous complaints about fraudulent reports" authored, edited, and/or submitted by Defendant Charles Perrilliat, Hanna's supervisor on the Cardamom project, and delivered to "corporate officers," the "board of directors," and "to shareholders."⁵ Hanna's state court petition alleges that Perrilliat's actions in submitting the "fraudulent reports" violated Louisiana law:

⁴ See Hanna's Second Amended Petition, Rec. Doc. 1-1, at ¶ 15.

⁵ *Id.* at ¶¶ 8-14.

PERILLIAT'S [sic] actions of delivering false numbers to corporate and in fraudulently changing financial reporting numbers to correct the false numbers **violated Louisiana law**, amounting to civil fraud, false accounting in violation of La. R.S. 14§ 70, theft of business record in violation of La. R.S. 14 § 20, Unauthorized Use of a Movable in violation of La. R.S. 14 § 20, Bank Fraud in violation of La. R.S. 14 § 71, Disposal of Property with fraudulent or malicious intent in violation of La. R.S. 14 § 72.4, Computer fraud in violation of La. R.S. 14 § 73.5, Unfair Trade Practices Acts in violation of La. R.S. 51 § 1401 *et seq.* and other violations of **State** Constitutional law and **Louisiana State** Criminal and civil laws.⁶

Hanna's petition does **not** allege that Perrilliat's actions violated Sarbanes-Oxley, or any other federal law.⁷

On or around November 6, 2013, Hanna produced documents in response to requests for production of documents by Defendant Shell. The documents included a "Sorbanes Oxley [sic] retaliation complaint" that Hanna filed with the United States Department of Labor ("DOL") ("DOL Complaint") on or around May 22, 2012, more than two months before he filed his lawsuit in state court.⁸ The DOL Complaint alleges that Hanna was terminated in retaliation for reporting Perrilliat's false reports to Defendant Mark Tipton, Perrilliat's supervisor during the relevant time period.

While Hanna included a copy of the DOL Complaint with his discovery responses, he did **not** include a copy of the June 12, 2012 letter from the DOL dismissing the complaint, although

⁶ *Id.* at ¶ 10 (emphasis added).

⁷ Hanna's state court petition alleges, "in the alternative," that Hanna was terminated in retaliation for making a worker's compensation claim, in violation of Louisiana law. Hanna also asserts a number of state law causes of action stemming from his alleged wrongful termination and preceding employment, including tortious interference with an employment contract, intentional infliction of emotional distress, employment discrimination under Louisiana law, negligence, defamation, and violations of the Louisiana Unfair Trade Practices Act, La. Rev. Stat. § 51:1405 *et seq.* *Id.* at ¶¶ 16-31, 38, 40.

⁸ Rec. Doc. 6-2.

it was requested by Defendants.⁹ *See* Shell's Request for Production of Documents No. 20 (requesting "all documents that you have sent to **or received from** the Equal Opportunity Commission, or **any other state or federal** government agency charged with the administration of laws relating to employment, which concern the alleged occurrences made the basis of [Hanna's] lawsuit.").¹⁰

After exchanging written discovery, the parties scheduled the depositions of Hanna and Marilyn Jordan Douget, who preceded Hanna in providing contract services in the role of Cost Management Lead for the Cardamom project. During the course of Hanna's deposition on April 14, 2014, Hanna testified that he believed Perrilliat's actions were a violation of Sarbanes-Oxley:

Q. Okay. Do you believe that you were terminated because you made complaints of fraudulent and illegal activity?

A. Yes, ma'am.

Q. Okay. What illegal activity do you claim you complained of?

A. The illegal activity was based off of my first attorneys that Shell had hired out from under me, that we were going to file some SOX compliance -- Sarbanes Oxley non-compliance that had -- three days before we were filing these, my law firm called me in and said that they could no longer represent me because it would be a conflict of interest, that they were working for Shell now. That is based off of, you know, all of this illegal activity that they were not compliant with some of the SOX and Sarbanes Oxley compliances.

Q. Who was not complying with SOX and Sarbanes Oxley?

A. That would have been Charles Perrilliat and filing -- filing false numbers and stuff.¹¹

⁹ While Hanna withheld the DOL dismissal letter in discovery, he has attached a copy to his Motion. *See* Rec. Doc. 6-3.

¹⁰ *See* Request for Production of Documents Propounded by Shell Exploration & Production Company, Request No. 20, attached hereto as Exhibit A. Hanna's failure to produce the dismissal letter is apparent based on the lack of bates stamping on the copy attached to his Motion. *See* Rec. Doc. 6-3.

¹¹ *See* Rec. Doc. 1-2 at pp. 2-3.

On April 15, 2014, during Douget's deposition, Hanna's counsel questioned Douget regarding the reports allegedly falsified by Perrilliat, and specifically asked whether the falsification of those reports constituted a violation of Sarbanes-Oxley:

Q. I think you testified earlier that manipulation of the SAP¹² numbers **could be a violation of Sarbanes Oxley**, correct?

A. Yes.

Q. And if somebody input false numbers into SAP, **that would be a violation of Sarbanes Oxley**, correct?

A. I would assume, yes.

Q. And if Charles Perrilliat is providing false numbers to Kimberly McNeely and they get put into the SAP, **that would be a violation of Sarbanes Oxley**, correct?

A. I can't answer that. I don't think Kimberly would enter them if they were wrong.

Q. If you didn't catch it and they were submitted without your knowledge, they would get input, correct?

A. They could if she didn't question it.

Q. And Charles Perrilliat was intentionally changing those numbers, correct?

A. Yes.¹³

Hanna noticed Douget's deposition, and Hanna's counsel, **not** counsel for any defendant, initiated the above line of questioning concerning Sarbanes-Oxley.

Finally, in his Motion seeking remand of this action to state court, Hanna provides the following description of the facts supporting his whistleblower claim in this case: "While working for Defendants, Plaintiff witnessed numerous illegal accounting transactions at Shell Corporation. Plaintiff reported the

¹² SAP is a computer software tool that Shell uses to manage certain financial information and other functions of its business.

¹³ See Rec. Doc. 1-3 at pp. 2-3 (objections omitted).

illegal activity and was terminated in retaliation for reporting the illegal activity.” More importantly, while Hanna asserts that he is pursuing his whistleblower claim under La. Rev. Stat. 23:967, he concedes that his claim is based on Defendant Shell’s alleged violation of Sarbanes-Oxley: **“Sorbanes Oxley is the criminal violation that triggers civil damages pursuant to La. R.S. 23:967.”**¹⁴ He also asserts that removal is untimely because defendants were “on notice of [his] Sorbanes Oxley Claims more than thirty days ago,” when they received his discovery responses on November 6, 2013, which included a copy of his DOL complaint.¹⁵

ARGUMENT

I. The Court Should Deny Hanna’s Motion Because It Establishes that Hanna is Pursuing a Claim that “Arises Under” Federal Law.

A defendant may remove a state court action to federal court if the plaintiff asserts a claim “arising under” the Constitution, treaties or laws of the United States, such that it is an action over which a federal district court would have original jurisdiction. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005); 28 U.S.C. §§ 1441, 1331. A plaintiff’s claim “arises under” federal law when federal law “creates” the right of action and “provides the rules of decision.” *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 748 (2012) (quoting 28 U.S.C. 1331). Another “longstanding” basis for “arising under” jurisdiction is a plaintiff’s pursuit of a state-law claim that raises a disputed and substantial issue of federal law. *Grable*, 545 U.S. 308, 314 (2005); *Hughes v. Chevron Phillips Chem. Co. LP*, 478 F. Appx. 167, 170 (5th Cir. 2012). In explaining this additional basis for “arising under” jurisdiction, the Supreme Court has described the existence of a federal private cause of action governing the disputed federal issue as a “sufficient condition” for finding a

¹⁴ Rec. Doc. 6 at p. 3 (emphasis added)

¹⁵ *Id.* at p. 2.

substantial federal issue sufficient to confer federal-question jurisdiction. *Id.* at 317 and n. 5. (citing *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986)).

This Court “has wide, but not unfettered, discretion” in determining the evidence and facts to utilize in making its decision on jurisdiction. *Clauer v. Heritage Lakes Homeowners Ass'n*, 2010 U.S. Dist. LEXIS 8947, at *4-5 (E.D. Tex. Jan. 14, 2010) (citing *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996)). Courts generally follow the “well-pleaded complaint” rule in determining whether an action arises under federal law, under which “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Hughes*, 478 Fed. Appx. 167, at *7 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)). However, it is well-established that “a plaintiff may **not** defeat removal by omitting to plead necessary federal questions in a complaint.” *Id.* (quoting *Franchise Tax Bd.*, 463 U.S. at 22). In deciding whether this action is properly removed, the Court may therefore rely on the facts contained in Hanna’s state court petition, Defendants’ Notice of Removal, and Hanna’s Motion to Remand. *Clauer*, 2010 U.S. Dist. LEXIS 8947, at *5.

Hanna has confirmed in both his deposition and in his Motion that his whistleblower claim is based on Shell’s alleged violation of Sarbanes-Oxley through “illegal accounting activities.”¹⁶ Hanna independently raised the alleged violation of Sarbanes-Oxley during his deposition, and his counsel confirmed Hanna’s intent to pursue a claim based on alleged Sarbanes-Oxley violations when he specifically questioned Douget regarding Sarbanes-Oxley violations during her deposition.

¹⁶ Rec. Doc. 6 at pp. 1. and 3.

Hanna's stated intent to pursue his Sarbanes-Oxley whistleblower claim under the Louisiana state whistleblower statute (La. Rev. Stat. 23:967) is dubious¹⁷ and, as previously discussed, it is contradicted by both his decision to withhold documents related to the claim in discovery and his erroneous position regarding the timeliness of defendants' notice of removal.

However, even if the Court accepts Hanna's stated intent to pursue his Sarbanes-Oxley whistleblower claim under state law, removal is still proper in this case. La. Rev. Stat. 23:967 **requires** a plaintiff to prove an "**actual violation**" of law. *See e.g., Stevenson v. Williamson*, 547 F.Supp. 2d 544 (M.D. La. 2008) (providing that a plaintiff is required to prove an "actual violation" of law to satisfy his burden of proof under La. Rev. Stat. 23:967); *Hale*, 886 So. 2d at 1216 (same). Thus, notwithstanding Hanna's stated intention to pursue his whistleblower claim under La. Rev. Stat. 23:967 instead of the Sarbanes-Oxley whistleblower provision codified in 18 U.S.C. 1514A, resolution of Hanna's whistleblower claim will inarguably require a court or a jury to determine whether Defendants engaged in conduct that **actually** violated Sarbanes-Oxley – the only law that Hanna identified in his deposition and his Motion as the alleged basis for his claimed whistleblowing related to Shell's alleged "illegal accounting activities."

¹⁷ La. Rev. Stat. 23:967 contains three provisions that allow a whistleblower to pursue a claim based on a "violation of law." The first provision, La. Rev. Stat. 23:967(A)(1), specifically states that "[a]n employer shall not take reprisal against an employee who . . . [d]iscloses or threatens to disclose a workplace act or practice that is in violation of state law." Thus, the provision, by its own terms, requires a violation of state law. The second and third provisions, La. Rev. Stat. 23:967(A)(2)-(3), lack an explicit reference to "state law" and instead apply to a whistleblower who "[p]rovides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law" or "[o]bjects to or refuses to participate in an employment act or practice that is in violation of law." Nonetheless, numerous courts have held that La. Rev. Stat. 23:967 requires a violation of state law. *See, e.g., Diaz v. Superior Energy Servs. LLC*, 341 F. App'x 26, 28 (5th Cir. 2009) ("A violation of state law is an element of the claim."); *Walter v. BP Am., Inc.*, No. 12-177, 2014 WL 1786676, at *17 (E.D. La. May 6, 2014) ("To establish a claim under this statute, plaintiff must have advised his employer of, or threatened to disclose, an *actual violation of state law*." (emphasis in original); *Hale v. Touro Infirmary*, 886 So. 2d 1210, 1216 (La. App. 4th Cir. 2004) ("[T]he violation of law in question must be that of a state statute...").

It is thus clear that, with respect to Hanna's whistleblower claim based on Shell's alleged violations of Sarbanes-Oxley, federal law "creates the right of action" and "provides the rules of decision" governing the claim. *Mims*, 132 S. Ct. at 748 & n.8. That alone is a sufficient basis to deny Hanna's motion to remand. *See Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005) (a "single claim over which federal-question jurisdiction exists is sufficient to allow removal"); *see also Halmekangas v. State Farm Fire and Cas. Co.*, 603 F.3d 290, 293 (5th Cir. 2010) (if a plaintiff alleges "both federal and state claims arising out of the same controversy, the entire action may be removed"). Moreover, the existence of a specific federal cause of action under 18 U.S.C. 1514A for alleged Sarbanes-Oxley whistleblowers like Hanna demonstrates that a finding of federal question jurisdiction is appropriate in this case, regardless of whether Hanna is pursuing his claims under the federal statute or under La. Rev. Stat. 23:967.

II. Hanna's Assertion that Defendants' Removal is Untimely is Incorrect.

Hanna filed his state court petition alleging only state law claims with **no** mention of Sarbanes-Oxley in August of 2012, more than two months after the date shown on the DOL Complaint that was produced to defendants in discovery. Based on this sequence of events and the complete absence of any reference to Sarbanes-Oxley in Hanna's state court petition, Defendants reasonably concluded that Hanna had decided to forego his Sarbanes-Oxley claim and pursue only state law claims. Defendants had no basis for concluding otherwise until Hanna testified in his deposition on April 14 that he was terminated for allegedly complaining about Sarbanes-Oxley violations, and his counsel thereafter specifically questioned Douget regarding Sarbanes-Oxley violations on April 15.

Defendants filed their notice of removal within 30 days of these depositions. This removal is therefore timely pursuant to 28 U.S.C. § 1446(b). *See* 28 U.S.C. § 1446(b) (providing

that when an action is not initially removable, a defendant has 30 days after it receives “a copy of an amended pleading, motion, order or **other paper** from which it may first be ascertained that the case is one which is or has become removable[.]”); *see also Brinkley v. Universal Health Services, Inc.*, 194 F. Supp. 2d 597, 599 (S.D. Tex. 2002) (holding that deposition testimony, including that of a non-party, constitutes “other paper” for purposes of Section 1446(b) where the testimony giving rise to removal is a “voluntary act” of the plaintiff); *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 466-67 (6th Cir. 2002) (same).¹⁸

III. Hanna’s Assertion that His Sarbanes-Oxley Claim is Time-Barred Does Not Defeat This Court’s Subject Matter Jurisdiction.

Contrary to Hanna’s arguments, this Court does **not** lack subject matter jurisdiction over Hanna’s claims simply because his Sarbanes-Oxley claim is time-barred. Various courts, including courts within this circuit, have affirmed the removal of time-barred federal claims to federal court. *See, e.g., Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 945 (5th Cir. 2014) (where the Fifth Circuit affirmed the district court’s dismissal of time-barred claims after the claims were removed to federal court); *Dupree v. United States*, 495 F. App’x 422, 423 (5th Cir. 2012) (affirming dismissal of time-barred claim removed to federal court); *Taylor v. Giant Food, Inc.*, 438 F. Supp. 2d 576, 586 (D. Md. 2006) (“Whether this court has subject matter jurisdiction is an entirely separate inquiry than whether Plaintiff’s claim is time-barred. To the extent that the court has jurisdiction but Plaintiff’s claims are time-barred, the proper action is for the court to

¹⁸ Similar to the removal in this case, the removal in *Brinkley* was based on the plaintiff’s noticing of a deposition of an expert and her counsel’s specific questioning of the expert regarding a claim under federal law. 194 F.Supp. 2d at *2-4. In determining whether deposition testimony constituted an “other paper” for purposes of 28 U.S.C. 1446(b), the *Brinkley* court considered whether the questioning of the witness by plaintiff’s counsel during the deposition was a “voluntary act” by the plaintiff. The court concluded that it was despite the plaintiff’s contention that “she had no intent to pursue any claims under federal law regardless of [the expert’s] opinion.” Given Hanna’s statements in his Motion confirming his intent to pursue a claim based on alleged violations of Sarbanes-Oxley, there is no question that a “voluntary act” sufficient to support removal exists in this case.

dismiss the claims, and not, as Plaintiff asserts, to conclude that removal was improper.”); *Mette v. Vill. of Maywood*, No. 13-C-01359, 2013 WL 903175, at *1 (N.D. Ill. Nov. 4, 2013) (where the defendant removed federal claims to federal court and then moved to dismiss them as time-barred, which the court granted); *LaFore v. Hous. Auth. of Portland*, No. 99-827-JO, 1999 WL 1058992, at *1 (D. Or. Nov. 19, 1999) (where the defendant removed federal claims to federal court and then moved to dismiss them as time-barred six days later, which the court granted); *see also Honeywell Internat’l, Inc. v. Phillips Petroleum Co.*, 415 F.3d 429, 433 (5th Cir. 2005) (“legal insufficiency of a federal claim generally does not eliminate the subject matter jurisdiction of a federal court.”).

Hanna’s failure to timely assert his Sarbanes-Oxley claim is no more indicative of an intent to allege only state law claims than it is indicative of an attempt to allege a legally deficient Sarbanes-Oxley claim, which does **not** defeat this Court’s subject matter jurisdiction.

IV. Hanna’s Complaints About Depositions in this Case Are Misguided at Best and Irrelevant to the Motion Before the Court.

Hanna’s complaints about depositions in this case have no bearing on the issues before the Court. In addition, he has misled the Court in asserting that “Defendants refused to produce Perrilliat” for his deposition. When asked for dates for Perrilliat’s deposition, the undersigned notified Plaintiff’s counsel that the location of Perrilliat’s deposition would be in the Netherlands, the place where Perrilliat lives and works and, thus, the required location for his deposition under the Louisiana Code of Civil Procedure.¹⁹ Plaintiff’s counsel represented that he would provide legal authorities to the undersigned showing that Perrilliat was required to appear in New Orleans, Louisiana for his deposition. Despite multiple requests for these authorities,

¹⁹ See e-mail correspondence from undersigned counsel to plaintiff’s counsel, attached hereto as Exhibit B. Perrilliat transferred to the Netherlands for work **before** Hanna filed this lawsuit, and before Hanna requested Perrilliat’s deposition.

Plaintiff's counsel never provided them and, instead, issued a subpoena commanding that Perrilliat appear for a deposition at a date, time, and location that he unilaterally selected without conferring with defense counsel in this case.

Defense counsel has cooperated with Plaintiff's counsel in scheduling depositions in this case. In fact, Defendants agreed to produce Tipton, another alleged "bad actor" in this case, for a deposition on May 9, 2014. However, Plaintiff cancelled Tipton's deposition a few days before it was scheduled, and has not attempted to reschedule it.²⁰ Plaintiff's complaints regarding depositions in this case are therefore unfounded and should be ignored by the Court.

CONCLUSION

Hanna has stated in his deposition and in his Motion to Remand that he is pursuing a whistleblower claim in this case based on Defendants' alleged violations of Sarbanes-Oxley. He should not be allowed to avoid the consequences of these statements, which confirm that he is pursuing a claim that "arises under" federal law. Accordingly, for all of the above reasons, the Court should deny Hanna's Motion.

²⁰ See letter from Plaintiff's counsel, attached hereto as Exhibit C. The date reflected on the letter is incorrect. The letter was provided to defense counsel on Tuesday, May 6th.

Respectfully submitted,

/s/Kindall C. James

Thomas J. McGoey II, T.A. (La. Bar No. 18330)

Wm. Brian London (La. Bar No. 33948)

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Kindall C. James (La. Bar No. 31203)

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Houston, Texas 77002

Telephone: (713) 651-2900

Facsimile: (713) 651-2908

Attorneys for Shell Exploration & Production

Company, Shell International and Exploration Inc.,

Mark Tipton, and Charles Perrilliat

CERTIFICATE OF SERVICE

I certify by my signature below that on the 3rd day of June, 2014, a copy of the foregoing pleading was provided to all counsel of record via the Court's e-filing notice.

/s/Kindall C. James

Kindall C. James

EXHIBIT A

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2012-07799

SECTION 10

DANNY HANNA

versus

SHELL EXPLORATION AND PRODUCTION, INC., BRUNEL ENERGY, INC., CHARLES
PERILLIAT, MARK TIPTON, 123 INSURANCE COMPANY
AND XYZ INSURANCE COMPANY

FILED: _____

DEPUTY CLERK

REQUEST FOR PRODUCTION OF DOCUMENTS
PROPOUNDED BY SHELL EXPLORATION & PRODUCTION COMPANY

TO: Plaintiff, Danny Hanna
through his attorney of record:
Jean-Paul Robert, Esq.
Attorney at Law, L.L.C.
2315 S. Burnside Avenue
Gonzales, LA 70737

Defendant Shell Exploration & Production Company hereby requests that Plaintiff, Danny Hanna, produce for inspection and copying, at the office of Liskow & Lewis, 701 Poydras Street, Suite 5000, New Orleans, Louisiana, 70139, within 15 days after service hereof, the original or clear and authentic copies of the following documents.

INSTRUCTIONS

1. If you contend that one or more parts of a Request for Production is objectionable, answer each portion of the Request for Production that you do not contend is objectionable and state the grounds upon which you base your objection.
2. In answering these Requests for Production, furnish all information available to you, including information in the possession of your attorneys and their investigators and all persons acting on your behalf and not merely such information known of your own personal knowledge. If you cannot answer a Request for Production in full, after exercising due diligence to secure the information, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portion.
3. These discovery requests shall be deemed continuing to the extent required by law so as to require further and supplemental answers if respondent receives or generates additional information or Documents between the time of the original answer and the time of trial.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 20:

Please produce all documents that you have sent to or received from the Equal Employment Opportunity Commission, or any other state or federal government agency charged with the administration of laws relating to employment, which concern the alleged occurrences made the basis of this lawsuit.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 21:

Please produce all documents related to any medical treatment or therapy you have received as a result of the conduct alleged in your Petition for Damages, including but not limited to, all records from any psychiatrist, psychologist, social worker or therapist.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 22:

Please produce all affidavits, declarations, written statements, letters, correspondence, or other documents prepared or signed by, or referencing, any persons with knowledge of facts concerning the allegations of your Petition for Damages in this matter.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 23:

Please produce all documents that have been made or prepared by any expert used for any consultation purposes that form the basis, either in whole or in part, of the opinions of an expert who may be called as a witness.

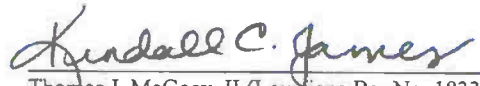
REQUEST FOR PRODUCTION OF DOCUMENTS NO. 24:

Please produce all documents provided to any testifying expert including, but not limited to, all correspondence and all documents that a consulting expert relied on in reaching his/her opinion if the consulting expert's opinions have been or will be reviewed by any testifying expert.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 25:

Please produce all working papers, notes, calculations, charts, diagrams, photographs, models, exhibits, and other documents, including reports and factual observations, created or reviewed by any expert who will testify at trial.

Respectfully submitted,



Thomas J. McGoe, II (Louisiana Bar No. 18330)

Kindall C. James (Louisiana Bar No. 31203)

LISKOW & LEWIS

One Shell Square

701 Poydras Street, Suite 5000

New Orleans, Louisiana 70139-5099

Telephone: (504) 581-7979

Counsel for Defendants Shell Exploration &
Production Company and Mark Tipton

CERTIFICATE OF SERVICE

I certify by my signature below that on the 6th day of November, 2012, a copy of the foregoing pleading was served upon counsel for plaintiff, Jean-Paul Robert, Esq., by electronic mail.

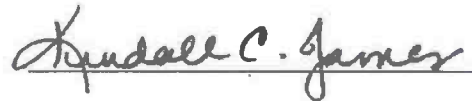


EXHIBIT B

Kindall James

From: Kindall James
Sent: Thursday, March 13, 2014 8:12 AM
To: 'Jean-Paul Robert'
Cc: Shannon Smith; 'kperez@bakerdonelson.com'; Thomas J McGoe II
Subject: RE: Danny Hanna Deposition

Jean-Paul

We will notice Mr. Hanna's deposition for April 14 at Baker Donelson's Houston office starting at 10 am.

I will inquire into Mark Tipton's availability after the week of April 14, and provide you with possible dates.

I will also inquire into Kimberly McNeely's location and availability. As I mentioned during our call, I am not sure that she is located in Houston.

Please send the authorities that you contend require Charles Perrilliat to appear for his deposition in New Orleans.

Thank you,

Kindall

Kindall James

(713) 651-2945 Direct
(713) 651-2908 Fax
kjames@liskow.com

LISKOW & LEWIS
New Orleans | Lafayette | Houston

First City Tower
1001 Fannin Street, Suite 1800
Houston, TX 77002
www.liskow.com

Liskow & Lewis, A Professional Law Corporation. This communication is solely for the person to whom it is addressed. It contains legally privileged and confidential information. If you are not the intended recipient, you may not forward, disclose, copy, print, or save the message or its attachments. If you have received this message in error, please notify me immediately, and please delete this message.

Treasury Circular 230 Disclosure: To the extent this communication contains any statement regarding federal taxes, that statement was not written or intended to be used, and it cannot be used, by any person (i) as a basis for avoiding federal tax penalties that may be imposed on that person, or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

From: Jean-Paul Robert [<mailto:jpr@attorneyatlawllc.com>]
Sent: Wednesday, March 12, 2014 2:35 PM
To: Kindall James
Cc: Shannon Smith; 'kperez@bakerdonelson.com'; Thomas J McGoe II
Subject: RE: Danny Hanna Deposition

Kindall James

From: Kindall James
Sent: Tuesday, February 04, 2014 4:22 PM
To: 'Shannon Smith'
Cc: 'kperez@bakerdonelson.com' (kperez@bakerdonelson.com); Thomas J McGoe II
Subject: Hanna v. SEPCO et al - Depositions

Shannon:

This is to confirm the conversation that you and I had this afternoon regarding depositions in the Danny Hanna matter. The parties agreed that Mr. Hanna's deposition will take place on Thursday, March 13th, 2014 beginning at 10:00 am in Mr. Robert's office in Gonzales, Louisiana. I will look into possible dates for Plaintiff to depose Mark Tipton and Charles Perrilliat. However, as discussed, Charles Perrilliat lives and works overseas, which may impact the timing and location of his deposition.

Kathlyn, Shannon also requested possible dates for Joanna Redsell's deposition. Can you look into that?

I will send out a notice for Mr. Hanna's deposition shortly.

Thank you,

Kindall

Kindall James

(713) 651-2945 Direct
(713) 651-2908 Fax
kjames@liskow.com

LISKOW & LEWIS

New Orleans | Lafayette | Houston

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Kindall James

From: Kindall James
Sent: Thursday, February 20, 2014 9:15 AM
To: 'Shannon Smith'
Cc: Thomas J McGoey II; Perez, Kathlyn
Subject: RE: Hanna v. SEPCO et al - Depositions

Shannon:

Mark Tipton is available on the following dates in April: Thursday, April 10; Friday, April 11; or Wednesday, April 23.

As mentioned previously, Charles Perrilliat lives in the Netherlands, and has no plans to be in the United States anytime in the near future. Please confirm that Mr. Robert plans to travel to the Netherlands for Mr. Perrilliat's deposition, and I will inquire as to a date, time, and place for that to happen.

Thank you,

Kindall

Kindall James

(713) 651-2945 Direct
(713) 651-2908 Fax
kjames@liskow.com

LISKOW & LEWIS
New Orleans | Lafayette | Houston

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Treasury Circular 230 Disclosure: To the extent this communication contains any statement regarding federal taxes, that statement was not written or intended to be used, and it cannot be used, by any person (i) as a basis for avoiding federal tax penalties that may be imposed on that person, or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

From: Shannon Smith [<mailto:ss@attorneyatlawllc.com>]
Sent: Monday, February 17, 2014 12:24 PM
To: Perez, Kathlyn; Kindall James
Cc: Thomas J McGoey II
Subject: RE: Hanna v. SEPCO et al - Depositions

Ms. James and Ms. Perez,

As of today's date, I have not heard back from you regarding the depositions of Charles Perrilliat, Mark Tipton, and Joanna Redsell. Please provide available dates by Wednesday. If we do not receive a response by close of business Wednesday, February 19, 2014, we will have no choice but to schedule the depositions and issue subpoenas.

EXHIBIT C

JEAN-PAUL ROBERT
ATTORNEY AT LAW, L.L.C.

Telephone: 225-647-9200
Facsimile: 225-647-9300

2315 S. BURNSIDE AVE.
GONZALES, LA 70737

e-mail: jpr@attorneyatlawllc.com
website: attorneyatlawllc.com

April 29, 2014

Kindall C. James
Liskow & Lewis
One Shell Square
701 Poydras Street, Suite 5000
New Orleans, Louisiana 70139

*Re: Danny Hanna vs. Shell Exploration and Production Company, Brunell
Energy, Inc., Charles Perrilliat, Mark Tipton et. al.
Civil District Court Orleans, Suit No.: 2012-7799, Div. 'C', Sec.: '10'
Cancellation of deposition of Mark Tipton*

Dear Ms. James:

Since you and your co-defendant took an additional nine hours with Mr. Hanna on Friday, May 2, 2014, I was not able to take Ms. Redsell with Brunell. I would like to take Ms. Redsell's deposition prior to taking Mr. Mark Tipton's deposition. Therefore, I am cancelling Mr. Tipton's deposition and I am requesting new dates for Ms. Redsell. In addition, I need to know if you are producing Mr. Perilliat on May 23, 2014.

Yours very truly,

/s/Jean-Paul Robert
Jean-Paul Robert
Attorney at Law, LLC

cc T. McGoey
K. Perez

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DANNY HANNA	:	CIVIL ACTION NO.: 2:14-cv-1088
	:	
VERSUS	:	JUDGE: KURT D. ENGELHARDT
	:	
SHELL EXPLORATION AND	:	MAGISTRATE JUDGE:
PRODUCTION, INC., BRUNEL	:	KAREN ROBY
ENERGY, INC., CHARLES PERILLIAT,	:	
MARK TIPTON, 123 INSURANCE	:	
COMPANY, and XYZ INSURANCE CO.	:	

**REPLY MEMORANDUM TO DEFENDANTS' OPPOSITIONS TO PLAINTIFF'S
MOTION FOR REMAND**

NOW INTO COURT, through undersigned counsel, comes Plaintiff Danny Hanna who submits this reply memorandum to the defendants' opposition to his motion for remand. (Rec. Doc. Nos. 6).

Mr. Hanna is not making a Sorbanes-Oxley Claim. He cannot, it is time barred. The Defendants admit that they received notice of the failed SOX claim more than six months ago and did nothing. Now the defendants assert that this Court has Federal subject matter jurisdiction because the plaintiff talked about a federal cause of action in a deposition. He did not plead it, he cannot, it is time barred. All he did was mention it. Plaintiff submits that a plaintiff talking about a cause of action in a deposition does not confer subject matter jurisdiction on this Court. There is no federal claim.

Federal courts have limited subject matter jurisdiction and cannot entertain cases unless authorized by the Constitution and legislation. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) [4] (citing 1 J. Moore, Moore's Federal Practice § 0.71[1][5.-1] (1996)). The parties can never consent to federal subject matter jurisdiction, and lack of such

jurisdiction is a defense which cannot be waived. *Id.* (citing Fed.R.Civ.P. 12(h)(3); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, 62 S. Ct. 15, 20, 86 L. Ed. 47 (1941)). Accordingly, there is a presumption against subject matter jurisdiction in a federal court. *Zeringue v. Roche Labs., Inc.*, 2002 U.S. Dist. LEXIS 13406, 2002 WL 1585561 (E.D. La. July 15, 2002) citing *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); 1 J. Moore, *Moore's Federal Practice* § 0.71[5.-1] (1996)).

When considering a motion to remand, the removing party bears the burden of showing that removal was proper. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). The defendant has the burden of demonstrating that at least one of the plaintiff's alleged claims arises under federal law. *Hogg v. Clear Channel Broad., Inc.*, 2007 U.S. Dist. LEXIS 86812, 2007 WL 3396426 (M.D. La. Oct. 29, 2007)

When a claim can be supported by alternative and independent theories - one of which is a state law theory and one of which is a federal law theory - federal question jurisdiction does not attach because federal law is not a necessary element of the claim. The Supreme Court decided that very issue in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988). Although in that case the Court analyzed whether a controversy arose under the patent laws of the United States for purposes of 28 U.S.C. § 1338, it explicitly said that the same approach applies in determining general federal question jurisdiction. *Id.* at 890; see also WRIGHT and MILLER, 13B *Federal Practice and Procedure*, § 3562 n.68 (1995 Supp.) (discussing *Christianson*). In concluding that the case did not arise under the patent laws, the Court

laid down a simple test, holding: "a claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories." *Christianson*, 486 U.S. at 810.

In *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988), the Fifth Circuit considered a wrongful discharge action, similar to Plaintiff Hanna's wrongful termination claim, and held that there was no federal jurisdiction under *Christianson*. The plaintiff in *Willy* alleged that he was fired because he insisted that his employer obey various state and federal environmental and securities laws. *Id.* at 1162. The Fifth Circuit described the case as one "supported by alternative theories, first that his discharge was wrongful because it was on account of his attempt to cause employer compliance with or refusal to violate federal law, and second that it was wrongful because it was on account of his attempt to cause his employer compliance with or refusal to violate state law." *Id.* at 1170. The court noted that the plaintiff's stated cause of action was (1) independent of the federal cause of action and (2) self-sufficient and then held: "We conclude that the *Christianson* doctrine is properly applied to this case and results in the conclusion that *Willy's* wrongful discharge claim does not arise under federal law." *Id.* at 1171. In the case at bar, Plaintiff Hanna's claims, as pleaded, are sustained independent of any federal cause of action, therefore, this Court does not have federal subject matter jurisdiction.

In *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 2002 U.S. App. LEXIS 12203, 55 ERC (BNA) 1699, 32 ELR 20757 (5th Cir. La. 2002), the Plaintiff's only reference to federal law was an allegation that the PPI facility was maintained in violation of federal

regulations as well as in violation of state and local regulations. The Court found that does not suffice to render the action one arising under federal law.

There is not federal jurisdiction in this case the matter should be remanded to the State Court for further proceedings.

Respectfully submitted,

/s/Jean-Paul Robert, Bar # 27628
Attorney at Law, L.L.C.
2315 S. Burnside Ave.
Gonzales, LA 70737
Tel: (225) 647-9200
Fax: (225) 647-9300
Attorney for Plaintiff Danny Hanna

CERTIFICATE OF SERVICE

I hereby certify that the preceding reply brief has been delivered via electronic Service to:

Thomas McGoey
LISKOW & LEWIS
701 Poydras Street, Ste. 5000
New Orleans, Louisiana 70139-5099
Attorney for SEPCO and Mark Tipton

Ms. Kathlyn G. Perez
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ
201 St. Charles Avenue, Ste. 3600
New Orleans, Louisiana 70170
Attorney for Brunel Energy, Inc.

on this 9th day of June, 2014.

by:

/s/Jean-Paul Robert

Jean-Paul Robert, Bar # 27628
Attorney at Law, L.L.C.
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Fax: (225) 647-9300