NO. 15-_____

In the Supreme Court of the United States

TAMMY BERERA, Individually and
on Behalf of All Others Similarly Situated,

Petitioners,

–v–

MESA MEDICAL GROUP, PLLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Berera was employed by the Mesa Medical Group in Lexington, Kentucky. Berera brought suit in Fayette County Circuit Court in Lexington, KY, raising several common law causes of action and a violation of KRS 337.385, which allows workers to sue for unpaid wages, liquidated damages, attorney's fees, and other penalties where an employer has not paid employee wages. Berera, on behalf of herself and others similarly situated, alleged that she was cheated out of pay by Mesa, who was deliberately underpaying employees. Berera's Complaint stated that Mesa had reduced her wages by an amount equal to Mesa's employer-owed payroll tax liabilities, essentially forcing the employees to indirectly pay the employer's payroll taxes.

Mesa filed a Notice of Removal 78 days after receiving the Complaint. Over Petitioners' objection that said Notice was filed later than the 30-day time limit set by 28 U.S.C. § 1446(b), Mesa successfully removed the case to the United States District Court for the Eastern District of Kentucky, which reclassified the case as a "tax refund suit" and ruled that the exclusive remedy was for Berera to seek a refund from the IRS under 26 U.S.C. § 7422, despite the fact that she had no refund claim against the IRS.

Shortly thereafter, Petitioner Ednacot filed a complaint against Mesa, also stating that she was deliberately underpaid. However, her Complaint made no mention of payroll taxes. Based on the precedent in Berera, her Complaint was also transferred to federal court and dismissed.

Petitioners bring the following Questions to this court:

1) When an employer fails to pay an employee her agreed upon wages and then uses that windfall to allegedly pay for its own tax obligations, does this indirect and incidental implication of a federal tax transform the employee's state law cause of action into a claim for a federal tax refund, thereby creating federal jurisdiction and leading to dismissal?

2) Was Mesa's removal untimely under 28 U.S.C. § 1446(b), when it filed its motion more than 30 days after it received the Complaint, wherein it was stated that the unpaid wages were allegedly applied to satisfy the employer's FICA tax obligations?

PARTIES TO THE PETITION

The following parties participated at some level in the proceedings below:

- Tammy Berera, Latisha Kabalen Ednacot, and putative class members, Plaintiffs.
- Mesa Medical Group, PLLC, Defendant.

At the District Court level these cases were denoted as *Berera v. Mesa Med. Group*, 5:13-cv-294-JMH and *Ednacot v. Mesa Med. Group,* 5:14-cv-96-JMH. At the Sixth Circuit, the *Berera* proceedings fell under the case number 14-5054, while *Ednacot* was denoted as 14-5692.

Tammy Berera acted as a Plaintiff on behalf of herself and those similarly situated in the action styled *Berera v. Mesa Med. Group.* Prior to the removal and dismissal of the Berera case, the undersigned attempted to add Katisha Kabalen Ednacot as a named plaintiff, but the subject motion was ultimately deemed moot. In order to preserve her claims, Ednacot separately filed suit against the Defendant in the case styled *Ednacot v. Mesa Med. Group*. Accordingly, the Plaintiffs/ Petitioners here consist of Tammy Berera, Katisha Kabalen Ednacot, and the putative class members.

Under Supreme Court Rule 12.4, "Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. . . . When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical

or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices."

Berera, on behalf of herself and others similarly situated, and Ednacot join together in this Petition to address their nearly identical claims for unpaid wages under their employment contracts with the Defendant. Specifically, both Petitioners allege that Mesa deliberately failed to pay their full rate of pay. In both cases, Mesa defended these allegations by claiming that it used the unpaid wages to pay employer-owed tax liabilities. In turn, the courts below determined that the Petitioners' claims were for a tax refund, despite a refund of the employer-owed tax being unavailable. Accordingly, both of these cases center on the propriety of federal question jurisdiction and the dismissal of the Plaintiffs' state law causes of action pursuant to 26 U.S.C. § 7422. It is anticipated that Plaintiffs and Defendant will seek to be heard on the issue in addition to possible amicus curiae.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tammy Berera, on behalf of herself and others similarly situated, and Petitioner Katisha Ednacot respectfully petition for a writ of certiorari to review the judgments of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

This petition seeks review of the decisions of the Sixth Circuit Court of Appeals. The Sixth Circuit's opinion in *Berera* is published at *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352 (6th Cir. 2015). (App.45a) The denial of Berera's Petition for Rehearing En Banc is not published, but is available at 2015 U.S. App. LEXIS 7662 (6th Cir. Apr. 27, 2015). (App.98a) The Sixth Circuit's opinion in *Ednacot* is not yet reported, but is available at 2015 U.S. App. LEXIS 8905 (6th Cir. Ky. 2015). (App.1a) The United States District Court for the Eastern District of Kentucky's decision denying Berera's Motion to Remand is reported at *Berera v. Mesa Med. Grp., LLC*, 985 F. Supp. 2d 836 (E.D. Ky. 2013). (App.82a) The District Court's decision dismissing Berera's claims with prejudice is not reported, but is available at 2014 U.S. Dist. LEXIS (393 E.D. Ky. 2014). (App.75a) The District Court's decision in *Ednacot* is available at 2014 U.S. Dist. LEXIS 75948 (E.D. Ky. 2014). (App.17a).

JURISDICTION

The Sixth Circuit rendered its decision on the *Berera* Petition for Rehearing En Banc on April 27, 2015. (App.98a) The Sixth Circuit rendered its decision in *Ednacot* on May 12, 2015. (App.1a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Constitution, Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. 26 U.S.C. § 7422

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in

that regard, and the regulations of the Secretary established in pursuance thereof.

[. . .]

(f) Limitation on right of action for refund

(1) General rule

A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue) and notwithstanding the provisions of section 1502 of such title 28 (relating to certain treaty cases).

(2) Misjoinder and change of venue

If a suit or proceeding brought in a United States district court against an officer or employee of the United States (or former officer or employee) or his personal representative is improperly brought solely by virtue of paragraph (1), the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action commenced, upon proper service of process on the United States. Such suit or proceeding shall upon request by the United States be transferred to the district or division where it should have been brought if such action initially had been brought against the United States.

C. 28 U.S.C. § 1446(b)

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of 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, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

D. KRS 337.385

Employer's liability—Unpaid wages and liquidated damages—Punitive damages for forced labor or services.

(1) Except as provided in subsection (3) of this section, any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of

> such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. (2) If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves.

Other provisions in the federal tax code are incidentally involved, including the Federal Insurance Contributions Act (FICA), codified at 26 U.S.C. §§ 3101-3128, and the Federal Unemployment Tax Act (FUTA), codified at 26 U.S.C. §§ 3301-3311.

STATEMENT OF THE CASE

Mesa Medical Group reduced its employees' contractually agreed-upon wages before said wages

were constructively paid to the employee, resulting in both a savings and a windfall to the employer. From the outset, the employer has always claimed that the windfall it gained from reducing the employees' wages went to employer-only tax obligations under FICA, FUTA, SUTA, and Kentucky's Worker's Compensation Act, meaning that the amounts were not a wrongful or excessive collection of any employee-owed tax. It is clear that the employee did not overpay any "tax," because these amounts are not reflected on the W-2 or any other official tax document that could be used for a refund. Mesa has never actually provided evidence that it used the stolen funds to pay any tax, much less a tax that was assessable to the employee. Yet, the courts below determined that Mesa's unsubstantiated and otherwise inapposite claims were sufficient to create federal jurisdiction and to warrant dismissal under 26 U.S.C. § 7422. However, as noted by the Sixth Circuit's Judge Batchelder, "what a thief does with his loot is immaterial to the victim's claim against him." (App.9a)

A. The Basics of Mesa's Wage Reduction Scheme

Mesa intentionally failed to pay its employees millions of contractually-owed dollars in order to cover its own employment-related overhead. This wage-reduction and expense-shifting scheme reportedly began in 2005 when Mesa's workforce was reclassified from independent contractors to employees. While Mesa traces its troubles back to the 2005 reclassification, both of the named Petitioners here began working for Mesa well after 2005. However, post-2005, Mesa promised a certain wage in each of their contracts and knowingly failed to pay that wage.

Each pay period, Mesa reduced the employees' base pay by an amount roughly corresponding to employer-only obligations under FICA, FUTA, SUTA, and Kentucky's Worker's Compensation Act. This conduct is defined as a failure to pay rather than the collection of a tax, because Mesa reduced its employees' wages before they were ever constructively paid and before the employer or employee tax liabilities attached.[1]

The employees' W-2s firmly corroborate the above conclusion. The W-2s do not show that an excessive amount of Social Security and/or Medicare taxes were collected. Rather, the W-2s simply show amounts for gross wages that were lower than the contractually-owed amounts. Mesa's attorney, Hunter Hughes, also admitted that wages were simply lowered, stating that the whole scheme was an exercise in Mesa "adjust[ing] its wage structure." (App.125a)

> To address this issue caused by the employee status conversion, Mesa calculated the wages of its employee—as opposed to gross compensation—by reducing from the gross amounts previously paid to them as an independent contractor an amount equal to the employer's share of the FICA and

[1] On a monthly basis, Mesa's payroll took place over the course of three documents, allowing Mesa to conceal the true nature of the illegal deductions. In fact, all of the unauthorized deductions took place on a separate document before the wages or "salary" went to payroll, *i.e.*, before the wages were paid. Each of these documents represents a step in Mesa's payroll process. Mesa calculated a lowered salary for the employees during the second step and paid the employee that lowered salary in the third step.

> Medicare Tax. Mesa paid the employer's share of FICA and Medicare Tax directly to the IRS. (emphasis added) (App.125a)

In the course of the *Berera* litigation, Mesa described the scope of its wage theft through the affidavit of its Chief Executive Officer, Lawrence P. Kraska, showing a systematic conversion of massive amounts of money through the employer FICA reductions. (App.113a) Although this affidavit covers only three years and only one of several illegal deductions, even within those narrow limits, Mesa admits to taking $2,817,625.55 from 254 employees through the FICA shifting scheme alone. *Id.* From 2011 to 2013, these FICA "expense" deductions averaged $939,208.18 per year. As the "wage structure" conversion took place in 2005, Mesa likely has converted upwards of $8 million from its employees through the conduit of this singular deduction.

If these cases were permitted to proceed in state court, they would include only an incidental reference to the federal tax code. Federal "payroll taxes" would merely serve as factual background, showing Mesa's alleged motivation to preserve its profit margins through the reduction of wages. However, after being removed to and dismissed from federal court, these appeals now center on whether the Petitioners' claims are ones for a federal tax refund. In order to prove this negative, the Petitioners must rely heavily on certain provisions of the federal tax code.

B. Procedural History

On June 25, 2013, Tammy Berera, individually and on behalf of those similarly situated, filed a state court cause of action in Fayette Circuit Court, alleging several claims against her employer, Mesa, based on a failure to provide compensation at the contractually-agreed upon rate. Based on the systemic nature of Mesa's actions, Berera was styled as a class action, but the class was never certified.

Within Berera's Complaint, there was a general reference to the employee being forced to pay the employer's "payroll taxes," which was largely a restatement of what the employee had been told by her employer:

> The Class consists of current and former employees who have been designated as employees but for which the employees have been forced to pay the employer's share of payroll taxes and other taxes and withholdings. The forced payment resulted in the employees receiving less money than they earned and were entitled to as wages. (App.101a)

The Complaint was filed and served upon Mesa on June 25, 2013. On August 9, 2013, Mesa Counsel Hunter Hughes wrote plaintiffs' attorneys that it was his opinion that the case must be construed as an over-withholding of FICA taxes.

> I am told [by Mesa management] that their best estimate is that the claim, albeit mistakenly, is based on FICA withholdings

> that Mesa makes to the IRS relative to employee wages. (App.125a)

Thereafter, on September 11, 2013, Mesa filed a Notice of Removal. Petitioners objected that said Notice was untimely, since it was filed 78 days after the Complaint had been served, well after the 30 day time limit imposed by 28 U.S.C. § 1446(b). Even with lenient standards, the Notice was 33 days post the August 9 letter from Mesa counsel that declared Mesa's construing of the case as a federal tax issue.

Instead, the District Court marked the start date of the 30 day window to August 13, 2015, due to the following statement in the Hughes letter:

> Absent your advising me by August 13 both that we have not accurately identified the factual predicate for the complaint as now pled, and what in fact is your factual predicate if not FICA withholdings, then we will proceed on the basis that at least one of the matters alleged in your complaint (which we disagree with) is that Mesa improperly caused its employees' wages to have deducted therefrom the employer's share of FICA. (App.126a)

In a startling self-contradiction, the District Court also held that the initial June 25, 2013 pleading was <u>clear</u> that the Complaint was unambiguously a case of over-withholding of payroll taxes:

> However, the Court does not need to rely on the hearing transcript to determine this is a tax refund suit for purposes of a Rule

> 12(b)(6) dismissal, as the four corners of Plaintiffs' Complaint clearly establishes that Plaintiffs wish to recover excessively withheld payroll taxes. (App.79a)(Emphasis added)

Thus the lower courts held the Complaint up as both sword and shield, on the one hand stating that it "clearly established" that the case was about recovering "excessively withheld payroll taxes," but then laundering Mesa's tardy Notice of Removal by characterizing the pleadings as "sparse and vague." (App.63a) In *Berera*, the District Court relegated the timeliness of Mesa's removal to a footnote. (App.94a) It offered little analysis and simply stated: "The Court cannot find that the Defendant had solid and unambiguous information that the case was removable at the time of the filing of the original complaint when Plaintiffs' counsel flatly denied that FICA taxes were involved." *Id.* The employees still flatly deny that the adjustment was a "FICA tax," but that does not mean that Mesa was unaware of its own position regarding the purported role of FICA. Accordingly, Berera argued to the Sixth Circuit that, if the reference to "payroll taxes" in her Complaint was clear enough to create a federal cause of action, it should also provide clear notice of removability.

The District Court found federal question jurisdiction based on the complete pre-emptive effect of 26 U.S.C. § 7422. It ultimately dismissed the case under FRCP 12(b)(6) for failure to state a claim, reasoning that there was no right to an implied private right of action under FICA. While the District Court admitted that there was no evidence that Mesa had used the

stolen amounts to pay a tax, it found that the singular reference to "payroll taxes" in the Complaint was sufficient to bring the case within the ambit of federal tax law. (App.89a)

As a result of a procedural oversight at the District Court, what was meant to be one action under the umbrella of the *Berera* class action became two separate cases: *Berera v. Mesa Medical Group* and *Ednacot v. Mesa Medical Group*.[2] As in *Berera*, the United States District Court for the Eastern District of Kentucky found federal question jurisdiction based on the complete pre-emptive effect of 26 U.S.C. § 7422, also finding that Ednacot had artfully pled what were truly federal claims. The District Court dismissed the FICA-related and FUTA-related claims, because of the lack of implied private rights of action under both statutes.

Before the Sixth Circuit, both Berera and Ednacot argued that the finding of federal jurisdiction under § 7422 was erroneous, because the stolen amounts were not taxes for which there could be a tax refund. In both cases, the Petitioners argued

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[2] While *Berera* was still in state court, a Motion to File a Second Amended Complaint was filed, attempting to add Ednacot, then "Katisha Kabalen," as a named plaintiff. Before the motion was ruled upon, Mesa filed a Notice of Removal and a Motion for Summary Judgment with the United States District Court for the Eastern District of Kentucky. When Berera was eventually dismissed, the District Court's order specifically stated that all pending motions were deemed moot, which included the Motion to File a Second Amended Complaint, meaning that Ednacot's claims were left undecided and unpreserved. Accordingly, Ednacot filed suit on her own behalf on February 18, 2014.

that, to the extent § 7422 has any complete pre-emptive effect, it must be limited by the plain language of the statute. The Sixth Circuit determined that it could uphold the finding of federal jurisdiction without reference to complete pre-emption, because of the reference to "payroll taxes" in the Berera complaint. (App.54a) It reasoned that the forced payment of the employer's tax obligation was the factual foundation of the state law causes of action, making the suit clearly federal. (App.55a) This ignores, however, that state and federal claims can share the same or similar factual foundations. Indeed, "parallelism does not render the state law analysis dependent." *See Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 408 (U.S. 1988). In order to obliterate the state law claims, complete pre-emption and/or ordinary pre-emption must necessarily be addressed.

In the dismissal arena, the Petitioners argued that the lack of an implied private right of action under federal law could not possibly preempt state law causes of action, because the touchstone of preemption is congressional intent, not congressional silence. *See Medtronic, Inc. v. Lohn* 518 U.S. 470, 485 (1996). Based on the District Court's logic, any time that Congress failed to create a private right of action under federal law, this silence would prevent recovery under state law. Clearly, since the federal government is one of limited powers, leaving states with a considerable degree of sovereignty, this result would be unconstitutional. Accordingly, the Sixth Circuit departed from this reasoning, finding simply that the Petitioners failed to exhaust their administrative remedies.

In *Berera*, the Sixth Circuit determined that the Petitioners had waived the bulk of their arguments regarding the non-tax nature of the stolen amounts, mistaking elaboration for supplementation, further forgetting that the case had been swiftly booted without the benefit of discovery. In *Ednacot*, on the other hand, there was no colorable argument that anything had been waived. Yet, the Sixth Circuit blindly followed its waiver-based decision in *Berera*, failing to address the argument that the stolen amounts could not possibly be a "tax" and that there can be no "tax refund." The *Ednacot* panel instead focused on FUTA, stating "[i]t matters not, under *Berera III*, that the employee herself is not liable for FUTA taxes." (App.7a) Citing no specific administrative, civil, or criminal remedies and no law in support, the Sixth Circuit determined that "[t]he IRS could refund to Ednacot any wrongfully withheld FICA or FUTA taxes and then pursue Mesa to recover the money." (App.8a)

While the Sixth Circuit brought the District Court's decision more in line with our constitutional framework, its decision was nevertheless erroneous. According to the Sixth Circuit, on these facts, the employees have no redress against the employer. The employees are only permitted to seek an administrative remedy and then, if denied, the employees can only sue the United States. This outcome shields from liability an intentional tortfeasor that was acting well outside its authority as a tax collector.

Feeling bound by precedent, the Sixth Circuit's Judge Batchelder wrote a concurring opinion, but it was full of blistering dissention, arguing that the

majority was providing the wronged employees with no more than an "empty assurance." (App.11a) She understood that "the specter of a tax refund claim only arises from the secondary fact that Mesa Medical Group used the money that it skimmed—*i.e.*, stole—from Ednacot's wages to pay the employer's—*i.e.*, Mesa Medical's—share of FICA and FUTA taxes." (App.9a) She concluded her opinion, stating:

> There is no reason to recast a very simple state law claim as a highly complicated tax refund claim. In the end, such a reconstruction leaves the plaintiffs without any plausible avenue for redress and it federalizes an entire class of cases that should properly remain within the jurisdiction of the state courts. (App.11a)

Ultimately, both the Court of Appeals for the Sixth Circuit and the District Court saw the use of the misappropriated funds as an over-payment of taxes by employees and immediately jumped to the conclusion that this was a tax overpayment case preempted by 26 U.S.C. § 7422, and therefore the employees' only remedy for theft of wages was to apply for a tax refund from the IRS. This knee-jerk analysis was incomplete and inaccurate. This was not a case of excess employee taxes that were over-withheld and sent to the taxing authorities to satisfy the employee FICA tax burden. Instead, they were illegally garnished from the employees' paychecks by Mesa. Mesa in turn, used the illegally gotten unpaid wages to add to its balance sheet, cover its operating expenses, of which one item was its corporate SUTA/FUTA obligations. In the convoluted logic of

the Sixth Circuit, if Mesa had used the garnished wages to cover operating expenses, then a case could be brought under KRS 337.385. But because it was allegedly applied to the corporate tax burden, the Sixth Circuit forgives Mesa, and the burden shifts to the employees to petition the IRS, applying 26 U.S.C. § 7422. Such reasoning ignores the fact that money is fungible, and Mesa could have used the unpaid wages to pay for its operating expenses, while using a different pot of money to pay the corporate taxes. Unless the Sixth Circuit has a method for magically tracking the route of a dollar bill, there is no way to say that the unpaid wages went directly to the taxing authorities. However, even if the unpaid wages did go to the IRS, the amounts were not applied to a *bona fide* tax on the employees and were not paid for the employees' benefit.

REASONS FOR GRANTING THE PETITION

I. THE COURT MUST USE ITS SUPERVISORY AUTHORITY TO DETERMINE THE SCOPE OF § 7422'S COLLECTION AGENT IMMUNITY AND TO DETERMINE WHETHER A TAX REFUND IS AVAILABLE

In this case, "the specter of a tax refund" arises from the secondary and collateral fact that Mesa allegedly used the stolen employee wages to pay its own tax liabilities, *i.e.*, the greed of not wanting to pay a federal tax simply motivated the wage theft. Yet, the courts below allowed this attenuated and tortured nexus with a federal tax to create federal

jurisdiction, thus precluding a cause of action any time that an "employer claims to have used skimmed funds to pay its taxes." (App.10a) While, as a matter of law, it should not matter "what a thief does with his loot" (App.9a), the above decisions were flippantly reached, never requiring Mesa to prove that it collected the subject funds as a tax to pay the IRS. Yet, even if Mesa could prove that it took the difference in salary and paid that amount directly to the IRS for the employer share of FICA, the courts below ignored Mesa's utter lack of authority to perform those actions.

In doing so, the courts below helped solidify § 7422's potential as a leviathan of federal jurisdiction. Here, § 7422 has vacuumed up state law claims that neither involve a tax nor a tax refund. The confusion among lower federal courts over the scope of § 7422 has paved the way for this outcome. Now, only this Court can reel in § 7422's pre-emptive tentacles by holding: (1) § 7422 must be limited to claims for a refund of a *bona fide* internal revenue tax, penalty, or sum; and (2) § 7422 cannot immunize parties that, while otherwise considered tax collection agents, are committing intentional torts outside the scope of their authority.

A brief history of § 7422 is necessary to understand the essence of the lower courts' erroneous rulings. The following statutory context highlights several important issues regarding the factual application of § 7422:

1. Were the deductions an internal revenue tax, penalty, or sum?

2. Was Mesa acting within its authority as a tax collection agent?

3. Is it possible to receive a tax refund for the deductions?

§ 7422 was enacted to correct some of the problems spurned by its mother statute, 28 USC § 1346(a). Thus, § 1346 and § 7422 must be read together. *See United States v. Dalm*, 494 U.S. 596, 601 (U.S. 1990). Under § 1346(a), federal district courts have jurisdiction over federal tax matters. Prior to the enactment of § 7422, the concurrent jurisdiction over these tax refund matters frequently led to lawsuits directly against IRS district directors in their individual capacity, requiring the United States to reimburse the district director if the taxpayer prevailed. *See In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133, 1137 (D. Minn. 1999) (*citing* 1966 U.S.C.C.A.N. 3676, 3681, 3682). These lawsuits further encouraged forum shopping and led to statute of limitations issues due to district directors dying or leaving post in the midst of litigation. *Id.* Thus, in 1966, the Internal Revenue Code was amended to remediate those issues, adding 26 U.S.C. § 7422.

The first subsection of § 7422 is an exhaustion provision, requiring the taxpayer to seek administrative remedies before seeking judicial recovery. Subsection (f) adds a further caveat, stating that the lawsuits referenced in subsection (a) may only be maintained against the United States and not its officers or employees, *i.e.*, suits against the district directors would not be permitted. When enacting subsection (f), "the reporting committee specifically noted that it

was abolishing the right of action against the district directors 'only because other adequate remedies . . . are already available'" *See In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d at 1137 (*citing* 1966 U.S.C.C.A.N. 3682) (*emphasis added*).

Despite the narrow scope of § 7422's text and legislative purpose, its breadth was expanded in subsequent case law. In 1977, an early federal decision read the "collecting agent" language into § 7422, making collection agents on par with employees and officers of the United States for the purposes of § 7422(f). *See In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d at 1133 (*citing Du Pont Glore Forgan, Inc. v. Am. Tel. & Tel. Co.*, 428 F. Supp. 1297 (S.D.N.Y. 1977)). This meant that a party had to bring a tax refund suit against the United States and not its officers, employees, or collecting agents. The collection agent theory was later applied to airlines in several federal decisions (hereafter "the airline excise cases" for convenience), which interpreted both § 7422 and the term "collection agent" broadly. *See Brennan v. Sw. Airlines Co.*, 134 F.3d 1405 (9th Cir. 1998); *Sigmon v. Sw. Airlines Co.*, 110 F.3d 1200 (5th Cir. 1997); *Kaucky v. Sw. Airlines Co.*, 109 F.3d 349 (7th Cir. 1997).

The airline excise cases involved the collection of an excise tax on domestic air transportation pursuant to 26 U.S.C. § 4261. *See Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1408 (9th Cir. 1998). The airlines were to collect the taxes from customers and remit the tax to the IRS twice per month. *Id.* The tax had been in place since 1941 and never lapsed until 1996. *Id.* During 1995, the airlines sold tickets for air

transportation in 1996, charging customers for the excise tax, because they believed the tax would be renewed. *Id.* However, the tax was not timely renewed by Congress, leading to a lapse between January 1996 and August 1996. *Id.* Thus, everything about the collection of the tax was sanctioned by federal law, but the airline's assumption regarding renewal proved incorrect. *Id.* In that respect, it was not unreasonable to conclude that the airlines were acting within their authority as collection agents.

This "collection agent" scope creep was further expanded when the Third Circuit determined that a collection agent could be protected by § 7422 even though it collected a sum that was never a tax. *See Umland v. PLANCO Fin. Sercs., Inc.,* 542 F.3d 59 (3d Cir. 2008). In *Umland*, the plaintiff attempted to distinguish the airline cases, arguing that PLANCO had no colorable authority to withhold the additional 7.65% from her paycheck. *Umland*, 542 F.3d at 68. The Third Circuit merely side-stepped that argument, stating her claim nevertheless amounted to a wrongfully collected tax, reasoning that § 7422 applies to "any suit for any sum wrongfully collected in any manner." *Id.*

In support of this broad reading of "any," the Third Circuit relied on this Court's decision in *United States v. Clintwood Elkhorn Mining Co.,* 553 US 1 (2008)). In that case, several coal companies were seeking the refund of a coal tax that was later deemed unconstitutional. While the companies were able to receive a refund for the coal export tax for the most recent tax years, they were not able to recover previous years' amounts. Accordingly, the companies

brought suit under the Export Clause in the U.S. Court of Federal Claims rather than seeking an administrative refund. This Court held that the coal companies first had to exhaust their administrative remedies before they could file suit against the United States pursuant to 26 U.S.C. § 7422. However, like the airline excise cases, there was no dispute that the amounts were a *bona fide* tax assessed by the I.R.S. to the appropriate parties under colorable authority at the time they were collected.

A. A Collection Agent Acting as a Con Man Should Not Be Cloaked with Immunity Under § 7422

Since the funds at issue here were not a tax assessable to the employee, there is a complete lack of authority for Mesa to collect those amounts as a tax. Here, both the District Court and the Sixth Circuit dodged the implications of a tax collector collecting a faux-tax, one that it has no authority to collect. Both courts, following the reasoning of the Third Circuit, fell on the side of a phony tax nevertheless being "any" tax, penalty, or sum under § 7422. However, the applicability of § 7422, based on the number of "any's" in the statute, is extended beyond all logical limits on these facts; the word "any" does not operate to wipe out the meaning of the statute's other terms. § 7422 governs refunds for "internal revenue" taxes, penalties, and/ or sums; it does not govern "any" sum subjectively deemed by the tortfeasor to be IRS-related. The tax, penalty, or sum must be collected at the behest of the IRS or, at least, within colorable authority granted by the federal government.

The Seventh Circuit has directly addressed the possibility of a con-man scenario wherein a tax collector was taking amounts for which it had no colorable authority. There, the court found that the existence of "colorable authority" was relevant to § 7422's preemptive effect:

> The con man's victims would have no action against the IRS, because he was not an agent of the IRS and presumably had not been clothed by it with apparent authority to collect taxes. The victims would have their usual state law remedies against the con man, because they would not be seeking a refund of federal taxes; the con man had not even colorable authority to collect taxes.

Kaucky v. Sw. Airlines Co., 109 F.3d at 352. As in the Seventh Circuit's hypothetical con-man scenario, Mesa was not acting as an agent of the IRS when it paid the employee a reduced salary and had no colorable authority from the IRS to partake in such conduct.

The Internal Revenue Code clearly dictates that the employer pay the § 3111 tax and details exactly how the employer should do so. Notably absent from this guidance is any countenance for withdrawing the tax from the employees' wages.[3] In fact, the source withholding provision under FICA refers only to the employee share of FICA in § 3101. *See* 26 U.S.C. § 3102. In turn, any amount subject to source withholding should be held in trust for the employee. Here, Mesa used its windfall from paying the

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[3] The same is true of FUTA under 26 U.S.C. § 3301.

employees less for its own benefit. Simply put, there is no authority to subject an employee to the collection of any amount of any tax imposed upon the employer under § 3111 or § 3301.

Allowing § 7422 to preempt state law recovery on these terms would be preposterous. For example, if an employer steals from an employee's wages to pay the employer's income taxes, the employee would not need to seek a tax refund, because there was no authority to collect the "tax." Similarly, if an employer steals wages from an employee to buy cigarettes, the employee would not need to seek a tax refund due to the incidental payment of the federal excise on tobacco. This situation is no different.

Unlike the tax that had been renewed every year for decades in the airline excise cases, an employer has never been allowed to shift the employer excise taxes under FICA and FUTA to its employees. Further, unlike the coal tax in *Clintwood Elkwood Mining*, which was a *bona fide* tax that was later struck down, there has never been a § 3111 or § 3301 tax that is assessable to an employee. If anything, FICA and FUTA are quite clear that the employer pays those excise taxes in addition to the wages paid to the employee; it is also clear that only the employee-owed tax can be withheld from wages. Yet, Mesa intentionally acted in a manner that is contrary with that explicit guidance. Despite its intentional noncompliance with the dictates of the tax code, Mesa now expects civil immunity under the tax code for the collection of something that was never a *bona fide* tax.

However, such a result was not intended by Congress and cannot be reasonably gleaned from § 7422. Accordingly, the Court's supervisory guidance is required to correct the trajectory of § 7422, bringing it in line with congressional intent, federalism, and precepts of fundamental fairness.

B. The Lower Courts' Decisions Cannot Be Reconciled with the Text or Purpose of the Federal Tax Code

By classifying these amounts as a "tax," the courts below ignored Congress's clear intent that employers would pay their own excise taxes. The lower courts' reading of § 7422 undercuts the entire purpose of the FICA and SECA regimes. Congress established separate employee, employer, and independent contractor duties towards Medicare and Social Security for a reason; the purpose was not to set up a safe haven for scurrilous employers wishing to ignore the mandates of the law; it also was not to foreclose remedies to employees subjected to unsanctioned wage conversion. Indeed, if the alleged purpose of § 7422 is to protect the sanctity of the IRS's administrative procedures, the construction of § 7422 should have some concern for the actual content of the laws and regulations it is seeking to protect. Here, there is no protection of a non-existent administrative scheme for a non-existent tax on the employees. On the other hand, the lower courts' position completely undermines FICA's administrative scheme, allowing employers to act outside of it with impunity.

As noted by the Sixth Circuit's Judge Batchelder, even "[i]f the IRS is the *bona fide* receiver of tax

payments consisting of skimmed wages, there is no authority that requires the IRS to refund those taxes—which were in fact due—and then recoup the balance from the miscreant employer." (App.10a) Since Congress did not intend for the collection of an employer-owed tax from an employee, the tax code is silent on whether the IRS can refund these amounts to the employees. Among the vast administrative and criminal deterrents, remedies, and penalties at the disposal of the IRS, the refund and recoupment strategy recommended by the Sixth Circuit is not to be found. There is also no trigger for the IRS's enforcement and/ or refund authority here, because the IRS was made whole and had no reason to believe that it was being paid with tainted funds.

By crafting a solution for which there is no positive authority, thus immunizing the tortfeasor, the courts below have deviated substantially from congressional intent on the payment and administration of the federal tax system. However, the courts' decisions go further than a deviation from congressional intent; they provide authority where there was an utter absence of authority, thus substituting the judgment of the judiciary for the judgment of the legislature. The Sixth Circuit's decisions operate to make the IRS an arbiter of private disputes and the federal treasury the insurer of unpaid wages, but these significant expansions of both federal authority and federal responsibility should only be made by the legislature.

C. Unless This Court Acts, the Petitioners Will Be Left Without a Remedy

The availability of a colorable remedy from the IRS is instructive on § 7422's application, because

"the use of the term recover in the statute carries the implicit assumption that the funds, are, in fact, recoverable . . . " *In Re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d at 1137 (internal quotations omitted).

Here, although the employee was allegedly paying the employer share of FICA, this was not reflected on the employee W-2, precluding a refund from the IRS. *See* IRS Form 843; IRS Form 1040. The IRS's very procedure for an individual FICA tax refund is based upon the taxpayer's return, which would only reflect the FICA withholdings on the W-2. *Id.* In this case, the "wrongfully withheld taxes" are not accounted for on the W-2, preventing an individual from pursuing recovery under the pre-existing administrative remedy. In fact, each of the named Petitioners filed tax returns for each year of their employment with Mesa using their employer issued W-2. While Form 1040 clearly contemplates a return of overpaid Social Security and Medicare taxes on behalf of an employee, no return was given, because their official tax documents reflected no overpayment. *See* Line 59, IRS Form 1040.

This case is distinguishable from past cases where there was a misclassification of the employee as an independent contractor or at least a colorable argument that the employee overpaid her own tax liabilities. In this situation, the IRS's administrative scheme does not contemplate a refund to an employee for the employer share of FICA or FUTA, particularly when the overpayment is not credited to the employee on her individual W-2.

Furthermore, the remedy proposed by the Sixth Circuit greatly limits the ability of the Petitioners to

receive an adequate recovery. First, there is a three year statute of limitations on tax refund claims. Thus, while Mesa has been stealing employee wages since 2005, the employees would only be able to recoup the amounts from the last three years. *See* 26 U.S.C. § 6511. In addition, shortly after the institution of this lawsuit in 2013, Mesa was sold to Team Health Holdings. Therefore, Mesa has not been a tax collecting employer for nearly two years, meaning that two out of three tax years will likely be ineligible for a refund. Similarly, neither Berera nor Ednacot have worked with Mesa since 2012, meaning they will likely receive no recovery at all.

Second, this is precisely the type of case where a victim should be entitled to recover punitive damages under Kentucky law. Punitive damages are a protected jural right under Kentucky's constitution and cannot be struck down lightly. *See Williams v. Wilson*, 972 S.W.2d 260, 260 (Ky. 1998). By classifying this as a tax refund claim and granting Mesa immunity, the courts below have foreclosed the possibility of punitive damages being assessed against a miscreant employer whose conduct was both intentional and reprehensible.

Third, the courts' determination could prevent the ability of these claims to be brought as a class action. Class certification is critical in cases such as these, because while there is clear and unconscionable misconduct on behalf of the tortfeasor, the labor of bringing individual claims most likely outweighs any potential recovery. *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace* v. *Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997)).

Here, if each employee's only recourse is an administrative claim for the last three years' unpaid wages and then a lawsuit against the United States, there is significantly less incentive for any litigant or attorney to expend energy on these otherwise worthy claims.

This Court is truly the Petitioners' last chance of reviving their state law remedy. The state law civil remedies are the only ones for which there is legal authority; they are the only remedies that make sense; and they are the only remedies that will make the employees whole. As noted by Judge Batchelder's concurrence in the Sixth Circuit, "[t]he employee's only chance of remedy lies with the employer, not with the IRS," and the Sixth Circuit's recoupment strategy "leaves the plaintiffs without any plausible avenue for redress." (App.10a-11a)

II. THE COURT SHOULD GRANT REVIEW TO ENSURE THAT REASONABLE LIMITS ON FEDERAL JURSIDICTION ARE ENFORCED

Despite the lack of a federal cause of action on the face of Berera and Ednacot's well-pled complaints, the District Court found federal question jurisdiction on the basis of complete pre-emption and artful pleading.[4] The Sixth Circuit, on the other hand, stated that it did not need to address pre-emption, because of the one reference to "payroll taxes" in Berera's Complaint. This was error, because (1) Berera did

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[4] The Petitioners contend that artful pleading cannot be found absent a completely preemptive federal issue. *See Federated Dep't Stores v. Moitie*, 452 U.S. 394, 407-408 (U.S. 1981) (Brennan, J. dissenting)).

not plead a federal cause of action; (2) federal and state causes of action can share the same or similar underlying facts; and (3) the unpled federal cause of action must necessarily preempt the pled state cause of action if federal jurisdiction is created and state law recovery is completely foreclosed.

Here, § 7422 should not completely nor ordinarily preempt the employees' state law claims, because there is a lack of congressional intent for a federal tax refund claim to be the exclusive remedy for the recovery of unpaid wages. While complete preemption should not be confused with ordinary preemption, congressional purpose is the touchstone of all preemption. *See Medtronic, Inc. v. Lohn* 518 U.S. at 485 (1996). *See also Roddy v. Grand Trunk W.R.R.*, 395 F.3d 318, 323 (6th Cir. Mich. 2005).

Complete pre-emption is a narrow jurisdictional doctrine and courts should be reluctant to find complete pre-emption without an express statement from Congress. *Id.* To conjure complete pre-emption, the underlying federal statute must provide "an exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *See Ben. Nat'l Bank v. Anderson,* 539 U.S. 1, 7-9 (2003). This Court has only found clear congressional intent of an exclusive remedy in three federal statutes: § 301 of the Labor Management Relations Act (LMRA), § 185 of the Employee Retirement Income Security Act (ERISA), and §§ 1001-1461 of the National Bank Act (NBA). Beyond that, the Sixth Circuit has only extended complete pre-emption to the National Flood Insurance Act (NFIA). Thus, within the Sixth

Circuit, only these four statutes would allow a court to look behind the face of a well-pled complaint to find a federal question.

However, even those areas subject to complete pre-emption will not warrant removal where the state law cause of action exists independently, *i.e.*, where it does not actually implicate the federal interest. *See, e.g., Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (U.S. 1988); *See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (U.S. 1985); *Bowen v. USPS,* 459 U.S. 212 (U.S. 1983). The cause of action here was clearly created by state law. However, assuming there was some factual analog to a tax issue, "parallelism does not render the state law analysis dependent." *See Lingle*, 486 U.S. at 408. Here, the only factual similarity is the tenuous nexus between the employees' damages and a tax that was never assessable to the employee.

In the realm of ordinary preemption, an express statement from Congress is typically required. Absent a clear congressional statement that state law recovery is forbidden, any implied pre-emption must be based upon either field pre-emption or conflict pre-emption. Conflict pre-emption arises "where it is impossible for a private party to comply with both state and federal requirements . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (U.S. 1995) (*internal citations and quotations omitted*). Field pre-emption exists where "the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to

supplement it.'" *Medtronic, Inc.* 518 U.S. at 508 (citing *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

Here, Congress may very well have intended to occupy the entire field of federal tax law. However, Mesa's adjustments for its own FICA and FUTA expenses were not a tax and this is not a tax refund case. Further, unlike tax cases that implicate the federal government's "prompt and certain collection of delinquent taxes," this case has nothing to do with the actual collection of a *bona fide* tax. *See, e.g., Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). This case involves very clear provisions and those provisions are factually inapposite to the conduct at issue, providing no more than general background. Accordingly, there is no risk that the employer will be subject to multiple liability from the employee and the IRS. There is also no risk that the employer will seek subrogation from the IRS.

A. The Courts Below Federalized an Entire Class of State Law Claims, thus Upsetting the Balance of Federal and State Power

In order to both create federal jurisdiction and wipe out a state law cause of action, there must be more than an incidental reference to federal law. *See, e.g., Grable & Sons,* 545 U.S. 308; *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986); *Gunn v. Minton,* 133 S.Ct. 1059, 1068 (2013). At most, the wage theft at issue here requires a collateral reference to federal law to provide general factual background; otherwise, it is a "garden variety" state law case. Mesa's duty to pay the

employees a certain hourly rate emanated from the employment contract, not federal tax law. However, even if Ednacot incidentally referenced a violation of federal law, that violation would not open the door to federal jurisdiction. *See Grable*, 545 U.S. at 318.

By shifting the entire burden onto the United States and limiting state law recovery, the Sixth Circuit has disrupted the federal-state division of labor. The influx of refund claims will first overburden the IRS, because the amounts at issue are not easily ascertainable and are not within the government's coffers.[5] If the refund is denied—as it likely will be—the federal judiciary will then be overburdened with the influx of lawsuits to recover these amounts, lawsuits that also require federal resources to defend.

However, federal-state harmony is not merely about the administrative and budgetary burdens on the federal government. With that expenditure also comes an expansion of power, one that necessarily infringes upon the rights of states and their citizens. The lower courts' decisions deprive states of the ability to govern in a field in which they have traditionally occupied—*i.e.*, labor—thus superseding states' historic police powers without a clear and manifest statement from Congress. *See, e.g., Medtronic,* 518 U.S. at 485. By immunizing an intentional

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[5] The Sixth Circuit's recoupment strategy not only lacks a legal basis, it is not viable. (App.8a) As evidenced by the attached Kraska affidavit, the IRS would need to sort through a minimum of 254 claims amounts to approximately $2.8 million in unpaid wages to effectuate a return. (App.113a) The ability of the IRS to then recoup those funds will be frustrated by the lack of clearly applicable civil and criminal penalties.

tortfeasor and wiping out an entire class of state law claims, those decisions also greatly limit states' abilities to provide judicial remedies to their citizens. Yet, there is no countervailing federal interest—particularly no stated interest from Congress—of which to speak.

B. The Courts Below Significantly Departed from This Court's Standards for Federal Jurisdiction

This Court's decision in *Grable & Sons* warned on the dangers of allowing what are quintessentially state law claims into federal court merely because they embrace some aspect of federal law, stating:

> One only needed to consider the treatment of federal violations generally in garden variety state tort law. The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings. A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts.

Grable, 545 U.S. at 318-319 (internal citations and quotations omitted). Because the state law claims here cannot be considered pre-empted, the more appropriate inquiry here is likely the substantial federal question doctrine, which centers on whether a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any

congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314.

There are three primary elements to this inquiry: (1) contestation; (2) substantiality; and (3) federal-state harmony of judicial responsibilities. Here, these elements all turn against a finding of federal jurisdiction. Mesa has not contested who owed which taxes and why; the duties of an employer under federal law are so clear that they are indisputable. The substantiality factor can also be easily disposed, because the IRS is not involved in this dispute and its compliance is not at issue. More importantly, the merits of this case do not turn on the resolution of any federal issue.

As discussed above, the impact on federal-state harmony is the most significant here. The propriety of federal jurisdiction can only be decided "after considering the welter of issues regarding interrelation of federal and state authority and the proper management of the federal judicial system." *Grable* 545 U.S. at 314*, (citing Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 8 (1983)). "There must always be an assessment of any disruptive portent in exercising federal jurisdiction." *Id.* Here, if an employer's subjective motivation for wage theft is enough to create federal jurisdiction, a tremendous number of cases could be allowed into federal court while also preempting state law recovery.

In *Gunn v. Minton*, this Court applied its teachings from *Grable* to a state law malpractice claim, which arose from a federal patent case. *See Gunn v. Minton,* 133 S.Ct. at 1068. While the malpractice turned on

whether the attorney at issue should have raised a specific patent argument, the Court determined that allowing the state court to resolve that issue had no effect on the uniform body of federal patent law. *Id.* at 1067. The Court reaffirmed that "the Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not all questions in which a patent may be the subject-matter of the controversy." *Id.* at 1068 (*citing New Marshall Engine Co. v. Marshall Engine Co.,* 223 U.S. 473, 478 (1912)). The Court also balanced the lack of a substantial federal interest with the strong state interest in resolving such claims, ultimately finding there is "no reason to suppose that Congress—in establishing exclusive federal jurisdiction over patent cases—meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue." *Id.*

This Court's reasoning in *Merrell Dow, Grable*, and *Minton* should be dispositive here. This case involves no more than a general reference to federal tax law and the decision of this case by a state court would have no effect on the uniform body of federal tax law. The Sixth Circuit departed significantly from these teachings, allowing the door to federal jurisdiction to stand wide open. Now, this Court's supervisory authority is required to ensure its prior rulings are followed and to curtail this expansion of federal jurisdiction.

III. THE LOWER COURTS ERRED IN ALLOWING MESA'S UNTIMELY REMOVAL

Mesa's September 11, 2013 removal of the *Berera* case was untimely. According to 28 U.S.C.

§ 1446(b)(2)(B), "if the case stated by the initial pleading is removable, then notice of removal must be filed within thirty days from the receipt of the initial pleading by the defendant." If the initial pleading is not removable as stated, 28 U.S.C. § 1446(b)(3) provides that "a notice of removal may be filed within 30 days after receipt by the defendant, . . . of 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."

Mesa falsely asserted removal was accomplished "[o]ut of an abundance of caution . . . within 30 days of the August 26, 2013 settlement conference, the date upon which Plaintiffs' counsel first acknowledged the federal nature of their claim and the amount of damages sought. . . . " Mesa's Notice also incorrectly claimed that Plaintiffs' August 29, 2013 Notice for a Fed.R.Civ.P. 30.02(6) representative constitutes an "other paper" under 28 U.S.C. § 1446(b)(3) that triggered their removal time. However, the facts of this case clearly demonstrate that Mesa was aware of the precise factual underpinnings of this matter as early as June 25th and as late as August 9th.

The lower courts' treatment of the Complaint is inconsistent and contradictory. Regarding the classification of this matter as a tax refund suit, the court made reference to the class allegations in the June 25th Complaint, stating: "The Class consists of current and former employees who have been designated as employees but for which the employees have been forced to pay the employer's share of payroll taxes and other taxes and withholdings." (App.101a) In

that pre-emption vein, the court determined this was a clear statement that FICA was involved. (App.89a) However, for the purposes of removability, the very same statement was deemed too unclear for Mesa to be aware of the supposed federal nature of this case. (App.94a)

Additionally, on August 9, 2013, counsel for Mesa wrote that he already had been investigating the Complaints and had asked Mesa to "focus their attention on Mesa's practices as they relate to its federal income tax withholding, as well as its FICA, FUTA and SUTA withholding practices . . . " (App.125a) That letter's narrative describes the precise facts giving rise to this matter. While the subject adjustments are in actuality unlawful withholdings veiled as a tax, Mesa itself identified the adjustment as the employer share of FICA in the letter, providing gross detail on how the alleged employer share was deducted from the employee wages. If Mesa, by counsel, was capable of pinpointing the exact accounting at issue, it certainly knew of the alleged federal nature of this action on August 9, 2013.

In sum, Mesa had already come to the conclusion that Plaintiffs' claims arose under FICA once the Complaint was filed on June 25, 2013. Accordingly, a notice of removal would have needed to be filed no later than July 25, 2013. At the latest, Mesa should have filed its Notice of Removal on September 9, 2013, thirty days after it described the factual basis of the alleged federal issue in clear and abundant detail. However, the Notice of Removal was not filed until September 11, 2013. For this reason, any

removal claiming federal question jurisdiction under FICA was untimely.

CONCLUSION

Unless this Court acts, a secondary fact referencing federal law will be enough to create federal jurisdiction in future cases, contravening the teachings of *Grable & Sons*, *Merrell Dow*, and *Gunn v. Minton*. In fact, federal jurisdiction will arise any time that a defendant subjectively deems a stolen amount a federal tax or argues without evidence that the amount eventually went to the IRS. Without the Court's supervisory powers, the dockets of lower federal courts will swell with those promised a remedy by the judiciary that were ultimately denied by the IRS. When the United States defends these claims, it will most certainly ask for dismissal, citing its total lack of wrongdoing. That procedural avenue will leave the Petitioners without relief.

While allowing every case that collaterally references federal law upsets the state-federal division of labor, it also infringes upon a state's ability to provide judicial remedies to its citizens, pre-empting every garden variety tort that is tenuously related to federal law. The pre-emption of state law claims—as opposed to a regime of concurrent state and federal authority—makes this expansion of federal power zero-sum. When, as here, the infringement occurs without an affirmative and constitutionally permissible statement from Congress, it is particularly violative

of the Tenth Amendment's reservation of power to the states and to the people.

Respectfully submitted,

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JULY 27, 2015

APPENDIX TABLE OF CONTENTS

KATISHA EDNACOT
v.
MESA MEDICAL GROUP, PLLC

TAMMY BERERA, Individually and on Behalf of All Others Similarly Situated,
v.
MESA MEDICAL GROUP, PLLC

OPINION OF THE SIXTH CIRCUIT (MAY 12, 2015)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATISHA EDNACOT,

Plaintiff-Appellant,

v.

MESA MEDICAL GROUP, PLLC,

Defendant-Appellee.

Decided and Filed: May 12, 2015*

Case No. 14-5692

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.
No. 5:14-cv-00096—Joseph M. Hood, District Judge.

Before: SILER, BATCHELDER, and ROGERS, Circuit Judges.

SILER, Circuit Judge.

Katisha Ednacot is a physician's assistant who used to work for Mesa Medical group, a staffing service for hospitals. Ednacot sued Mesa in Kentucky state

* This decision was originally issued as an "unpublished decision" filed on May 12, 2015. The court has now designated the opinion as one recommended for full-text publication.

court, alleging that Mesa had failed to pay her full salary. Ednacot alleged that Mesa had withheld money from her paycheck to cover its own overhead expenses, primarily Mesa's own federal FICA and FUTA taxes.[1] Ednacot's claim was removed to federal court and assigned to the same judge who had recently dismissed a similar lawsuit that Ednacot's attorneys had brought against Mesa on behalf of Ednacot's former co-worker, Tammy Berera.

As in Berera's case, the district court found that Ednacot's claims that related to Mesa's federal employer taxes were preempted by federal law because, in substance, they were claims to recover wrongfully withheld taxes. Because Ednacot did not first take these tax claim to the IRS, as required by 26 U.S.C. § 7422, the district court found that it lacked subject matter jurisdiction. Berera and Ednacot both appealed these dismissals. In a recently published opinion, another panel of this court affirmed (with modification) the *Berera* dismissal. *Berera v. Mesa Med. Grp.* (*Berera III*), 779 F.3d 352, *reh'g en banc denied* (6th Cir. April 27, 2015). Because *Berera* controls the analysis in this case, we must likewise AFFIRM, as modified, the district court's decision to dismiss.

I.

This case is closely related to a putative class action lawsuit Tammy Berera brought in Kentucky state court (Fayette County) on behalf of former employees of Mesa. Berera sought damages for

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[1] FICA is the Federal Insurance Contribution Act, *see* 26 U.S.C. §§ 3101-3128. FUTA is the Federal Unemployment Tax Act, *see* 26 U.S.C. §§ 3301-3311.

conversion and negligence, and asserted that Mesa failed to pay the full amount of wages and overtime in violation of Ky. Rev. Stat. § 337.385. In a second amended complaint, Berera attempted to add Katisha Kabalen (now Katisha Ednacot) as a member of the potential class.

Mesa was unsure whether Berera's complaint accurately encompassed her claims, and the state court granted Mesa's Motion for a More Definite Statement. In August 2013, Mesa determined that Berera's allegations were essentially that Mesa was withholding the employer (in addition to the employee) share of FICA taxes, and Mesa removed the case to federal court. *See Berera v. Mesa Med. Grp.* (*Berera I*), 985 F. Supp. 2d 836, 838 (E.D. Ky. Dec. 6, 2013).

The district court denied Berera's motion to remand and gave Berera 21 days to show why the complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) because (1) section 7422 requires that a claim to recover federal taxes must be brought to the IRS before a lawsuit can be filed, and (2) FICA does not create a private cause of action. *Berera I*, 985 F. Supp. 2d at 843-44. The district court then dismissed the suit with prejudice. *Berera v. Mesa Med. Grp.* (*Berera II*), No. 5:13-cv-294-JMH, 2014 WL 29386, at *3 (E.D. Ky. Jan. 3, 2014).

One month later, Berera's attorneys filed this action on behalf of Ednacot in Boyle County Circuit Court. Ednacot's complaint was factually and legally similar to Berera's,[2] except that Ednacot also

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[2] Ednacot characterized her action as one for breach of contract, conversion, fraud, fraud in the inducement, and a violation of

claimed that Mesa had wrongfully withheld funds from her paycheck to pay Kentucky state taxes and wrongfully withheld money to pay for travel and cellphone expenses that she did not incur. This case was removed to federal court, and Ednacot moved to remand.[3]

The district court first determined that Ednacot's claim was not barred by res judicata. Although the district court had previously described Ednacot as a member of the *Berera* class, *Berera I*, 985 F. Supp. 2d at 838; *Berera II*, 2014 WL 29386, at *1, upon looking further the district court determined that it had not given Berera's attorneys permission to re-amend their complaint. The second amended complaint therefore had no legal effect, and Ednacot was not a party to Berera's lawsuit. *Ednacot v. Mesa Med. Grp.*, No. 5:14-cv-96-JMH, 2014 WL 2527095, at *5 (E.D. Ky. June 4, 2014) (citing Ky. R. Civ. P. 15.01).

As in *Berera*, the district court found that, although Ednacot's complaint did not facially contain

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Ky. Rev. Stat. § 337.385 (establishing employer liability for unpaid wages).

[3] On April 10, 2014, around the same time Ednacot moved to remand her action to the state court, the Berera/Ednacot attorneys filed a third lawsuit against Mesa, *Wagner v. Team Holdings, Inc.*, No. 5:14-cv-176-JMH, 2014 WL 3586265 (E.D. Ky. July 21, 2014), naming Team Holdings, a company of which Mesa is a subsidiary. This case was also removed to federal court. However, Wagner's complaint was substantively different from Berera's and Ednacot's, and the court found no federal cause of action. *See id.* at *3 ("[T]he filings before this Court make clear that Plaintiff is only attempting to recover damages after a contract addendum Defendant presented to Plaintiff and other former Mesa employees on March 24, 2014. . . . Essentially, all of Plaintiff's claims seek to recover for a breach of contract.").

a federal claim, the "artful pleading" exception to the "well-pleaded complaint rule" allowed the court to look behind the face of the complaint and determine that it contained a veiled federal tax claim that preempted the related state statutory and tort claims. *Ednacot*, 2014 WL 2527095, at *3. Ednacot claimed that Mesa, through an intermediate step in the accounting process, was deducting Mesa's own employer FICA and FUTA taxes before assessing her employee payroll deductions. *See id.* at *3-4. Because the money Ednacot sought to have returned was tagged as money to pay federal taxes, the district court determined that the suit implicated 26 U.S.C. § 7422 and preempted the state law claims. *Id.*

As the district court explained:

> All of Plaintiff's claims, as they relate to federal taxes, must be dismissed because they seek damages for an excessive withholding of FICA taxes and damages for an illegal assessment of FUTA taxes, for which there is no private remedy and because Plaintiff has not first pursued her administrative remedy. Plaintiff first claims that Defendant breached the employment contract. Even assuming Defendant breached the contract by not compensating Plaintiff the full amount she was owed, the reason Plaintiff would not have received the full amount owed is that Defendant was excessively withholding or improperly assessing federal taxes. Plaintiff also makes a claim for fraud and fraud in the inducement. Any damages Plaintiff may be awarded on this claim would be equal to the amount of the tax excessively or improperly

> withheld, and, therefore, Plaintiff again seeks to recover federal taxes excessively or improperly withheld. . . .
>
> Plaintiff's claims of conversion, violation of [Ky. Rev. Stat. §] 337.385, and negligence likewise seek to recover the amount of excessively or improperly withheld federal taxes.

Ednacot, 2014 WL 2527095, at *7. Because she did not first file a claim for a refund or credit with the IRS, as required by 26 U.S.C. § 7422, the court found it lacked jurisdiction on account of Ednacot's failure to exhaust her administrative remedies. *Ednacot*, 2014 WL 2527095, at *8-9. In its judgment order, the court dismissed the federal claims with prejudice.

The court remanded Ednacot's claims that concerned Kentucky taxes and the claims that Mesa improperly withheld travel and cellphone funds. Mesa does not cross-appeal this remand order.

II.

The district court's analysis described above is essentially identical to the analysis this court affirmed in the *Berera* case. Although our sister panel did not go so far as to conclude that section 7422(a) "preempts, regardless of type, an[y] artfully pleaded FICA claim," *Berera III*, 779 F.3d at 360, it held that the court properly found jurisdiction under the artful pleading exception to the well-pleaded complaint rule. *Id.* at 357-58.

While Ednacot's claim does contain one wrinkle that distinguishes it from Berera's, this distinction makes little difference. *Berera* concerned FICA taxes,

which are split between the employer and the employee. Ednacot also claims that Mesa stole money to cover Mesa's federal unemployment insurance taxes under FUTA—taxes wholly borne by the employer.

The employer FICA taxes and FUTA taxes, however, warrant the same analysis. Both claims fit within the terms of 26 U.S.C. § 7422, as interpreted by *Berera III*. This provision states:

> **(a) No suit prior to filing claim for refund.**—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Here, like the employer FICA taxes at issue in *Berera*, the FUTA taxes would be "any sum alleged to have been . . . wrongfully collected." It matters not, under *Berera III*, that the employee herself is not liable for FUTA taxes. Ednacot must begin her quest with the IRS.

Ednacot claims that because the taxes were employer (not employee) taxes and because she does not know whether Mesa actually paid the taxes to the IRS, she has no remedy from the IRS. But we rejected this argument in *Berera*, 779 F.3d at 363.

The IRS could refund to Ednacot any wrongfully withheld employer FICA or FUTA taxes and then pursue Mesa to recover the money. *See id.* Ednacot is therefore not without a remedy. Section 7422 was designed to funnel claims like Ednacot's through the administrative machinery of the IRS rather than piecemeal through individual state and federal lawsuits. *See Mejia v. Verizon Mgmt. Pension Plan*, No. 11-C-3949, 2012 WL 1565336, at *8 (N.D. Ill. May 2, 2012).

As we did in *Berera III*, 779 F.3d at 360 n.10, we modify the judgment against Ednacot from a dismissal with prejudice to a dismissal without prejudice.

AFFIRMED.

CONCURRING OPINION OF JUSTICE ALICE M. BATCHELDER (MAY 12, 2015)

ALICE M. BATCHELDER, Circuit Judge, concurring in the judgment. Because this court is bound by its recent precedent in *Berera v. Mesa Medical Group*, 779 F.3d 352 (6th Cir. 2015), I concur in the judgment of this panel. Nevertheless, I write separately to express my strong disagreement with the rationale upon which this case and the *Berera* case rest.

Ednacot's complaint alleged breach of contract, conversion, fraud, negligence, and a violation of Kentucky's wage laws. In order for the federal district court to have jurisdiction over the case, the court had to recast that complaint into one claiming a federal tax refund. While there may be cases in which such a reconstruction is proper in light of the artful pleading doctrine, this is not such a case. The specter of a tax refund claim only arises from the secondary fact that Mesa Medical Group used the money it skimmed—i.e., stole—from Ednacot's wages to pay the employer's—i.e., Mesa Medical's—share of FICA and FUTA taxes. But what a thief does with his loot is immaterial to the victim's claim against him.

By reclassifying this as a tax refund claim, we force Ednacot—like other similarly unfortunate employees—to seek an administrative remedy with the IRS. But Ednacot has no complaint against the IRS, and the IRS has no reason to grant a refund. The FICA taxes that were due for Ednacot's employment—both the employee's and employer's

shares—have been paid. In fact, Ednacot positively *does not* want a tax refund, since such a refund would mean that she has an unpaid tax liability and her benefits are no longer properly covered. Essentially, a tax refund would mean she has recouped her skimmed wages at the cost of her benefit coverage.

Moreover, it is not the IRS's concern if the funds with which these taxes were paid were somehow tainted. If the IRS is the *bona fide* receiver of tax payments consisting of skimmed wages, there is no authority that requires the IRS to refund those taxes—which were in fact due—and then recoup the balance from the miscreant employer. The employee's only chance of remedy lies with the employer, not with the IRS. Yet the court's disposition of this case precludes an action by the employee against the employer wherever the employer claims to have used the skimmed funds to pay its taxes.

It is true that the protections of § 7422(a) have been extended to shield airline companies to the extent that they "effectively act as agents for the IRS by collecting excise taxes from passengers." *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 564-65 (6th Cir. 2007). But the position of an employer who concocts a scheme to cover its own tax liability by skimming funds from its employees' wages is entirely different from the position of an airline company that was specifically entrusted with the responsibility of collecting taxes for the IRS. *Berera* forces us to treat these disparate situations as being the same. Essentially, the *Berera* line of reasoning deputizes every employer to enjoy the same immunity that the

United States government enjoys under 26 U.S.C. § 7422(a). Rather than filing suit against the employer—who would now be regarded as acting as an agent of the IRS—the employee must file for an administrative remedy with the IRS. And we are assured that the IRS will chasten the sticky-fingered employer. Even if this is not an empty assurance, it hardly seems like the proper solution.

Furthermore, even if Mesa Medical Group is supposed to be treated as an agent of the IRS (insofar as it is required to collect and pay FICA and FUTA taxes on behalf of its employees), then the proper remedy is still not for Ednacot to file a tax refund claim with the IRS. Rather, this case would fall under 26 U.S.C. § 7433, which creates a cause of action for civil damages for certain unauthorized collection actions, assuming that Mesa Medical's action can be thus characterized.

There is no reason to recast a very simple state law claim as a highly complicated federal tax refund claim. In the end, such a reconstruction leaves the plaintiffs without any plausible avenue for redress and it federalizes an entire class of cases that should properly remain within the jurisdiction of the state courts.

ORDER OF THE DISTRICT COURT OF KENTUCKY DENYING DEFENDANT'S MOTIONS FOR SANCTIONS AND TO ALTER JUDGMENT (AUGUST 7, 2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

KATISHA EDNACOT,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 5:14-cv-96-JMH

This matter is before the Court upon Defendant's Motion to Alter Judgment [D.E. 27] and Motion for Sanctions. [D.E. 28]. These matters being fully briefed, [D.E. 30, 31, 32, 33], and the Court being otherwise sufficiently advised, they are ripe for review.

Defendant first asks this Court to alter the portion of the judgment it entered on June 4, 2014 that remands the state law claims and retain jurisdiction over the remaining state law claims or, alternatively, retain jurisdiction and dismiss the remaining state law claims. Defendant makes this request based upon its belief that Plaintiff is attempting to mislead the

Boyle Circuit Court and persuade that court to allow Plaintiff recovery for the federal claims this Court dismissed with prejudice. "Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change of controlling law, or to prevent manifest injustice." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted). The Court believes the Boyle Circuit Court is more than capable of reading this Court's remand order and properly applying the law to that order. Thus, Defendant can adequately protect itself from being held liable on the dismissed claims through appropriate filings in state court. Accordingly, altering or amending the judgment is not warranted.

Defendant also asks this Court to sanction Plaintiff's counsel for attempting to circumvent this Court's order dismissing Plaintiff's federal tax claims. Defendant contends that by ignoring the *Berera* ruling and by filing a Complaint and Motion to Remand in this matter, Defendant has been forced to waste time and resources. Thus, Defendant would like to be recouped its legal fees for preparing a Notice of Removal, Motion to Dismiss, and response to Plaintiff's Motion to Remand. However, as this Court has previously discussed, Ms. Ednacot was never made a party to the *Berera* matter and every person is afforded their day in court. Furthermore, Ms. Ednacot brought forth claims and evidence not included in the *Berera* action.

Defendants further argue that Plaintiff's counsel should be sanctioned because he has shown disregard for this Court and its orders. The Court simply notes that "sticks and stones may break my bones, but

words will never hurt me." Thus, the Court declines to sanction Plaintiff's counsel.

Accordingly, IT IS ORDERED:

(1) that Defendant's Motion to Alter Judgment [D.E. 27] be, and the same hereby is, DENIED;

(2) that Defendant's Motion for Sanctions [D.E. 28] be, and the same hereby is, DENIED.

Signed By

/s/ Joseph M. Hood
Senior U.S. District Judge

This the 7th day of August, 2014.

JUDGMENT OF THE DISTRICT COURT OF KENTUCKY (JUNE 4, 2014)

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

KATISHA EDNACOT,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Case No. 5:14-cv-96-JMH

In accordance with the Court's Order of even date and entered contemporaneously herewith, IT IS HEREBY ORDERED:

(1) that Plaintiff's claims of breach of contract, conversion, violation of KRS 337.385, fraud and fraud in the inducement, and negligence are DISMISSED WITH PREJUDICE in so far as they seek damages for an alleged excessive withholding of FICA taxes and an illegal withholding of FUTA taxes;

(2) That Plaintiff's claims of breach of contract, conversion, violation of KRS 337.385, fraud and fraud in the inducement, and negligence seeking damages for an excessive withholding of state unemployment

taxes and expenses withheld from Plaintiff's paycheck be, and the same hereby are, REMANDED to the Boyle County Circuit Court pursuant to 28 U.S.C. § 1447(c);

(3) that all scheduled proceedings are CONTINUED GENERALLY;

(4) that this Order is FINAL AND APPEALABLE and THERE IS NO JUST CAUSE FOR DELAY;

(5) that this matter shall be, and the same hereby is, STRICKEN FROM THE ACTIVE DOCKET.

Signed By

/s/ Joseph M. Hood
Senior U.S. District Judge

This the 4th day of June, 2014.

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT OF KENTUCKY (JUNE 4, 2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

KATISHA EDNACOT,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 5:14-cv-96-JMH

This matter is before the Court upon Defendant's Motion to Dismiss [D.E. 5] and Plaintiff's Motion to Remand. [D.E. 13]. The motions being fully briefed.[1] and the Court being otherwise sufficiently advised, these motions are ripe for review.

I. Procedural Background

Plaintiff Katisha Ednacot filed this suit in Boyle County Circuit Court on February 18, 2014. [D.E. 1-

[1] Defendant filed a Motion to Amend/Correct its Motion to Dismiss. [D.E. 21]. That Motion, which is unopposed, will be granted. The Court has considered those arguments herein.

1]. Ednacot's complaint alleged breach of contract, conversion, violation of KRS 337.385, and fraud and fraud in the inducement. [D.E. 1-1 at 3-4]. Plaintiff also seeks punitive damages. [D.E. 1-1 at 6]. Defendant filed a notice of removal on March 12, 2014. [D.E. 1].

Once removed, Defendant moved to reassign the case to the undersigned, alleging that this matter is related to *Berera v. Mesa Medical Group, PLLC,* No. 5:13-cv-294-JMH (E.D. Ky.). Defendant's motion was granted on March 17, 2014. [D.E. 4]. Subsequently, Defendant filed its Motion to Dismiss [D.E. 5] and Plaintiff filed her Motion to Remand. [D.E. 13].

Plaintiff brings her claims based upon allegations that Defendant incorrectly withheld improper amounts from Plaintiff's paychecks, in essence, Defendant's share of state and federal taxes, and expenses for benefits that Plaintiff did not incur. Specifically, Plaintiff alleges that Federal Insurance Contributions Act (FICA) taxes, the Federal Unemployment Tax Act (FUTA) tax, the State Unemployment Insurance (SUI) tax, and expenses for a cell phone and travel were improperly deducted from Plaintiff's paychecks. Thus, according to Plaintiff, her paycheck did not reflect the proper amount of wages owed.

II. Standard of Review

A. Plaintiff's Motion to Remand

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the

place where such action is pending." 28 U.S.C. § 1441. "The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." *Id.* § 1446(b)(1). "[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of 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." *Id.* § 1446(b)(3).

> Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. . . . The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (citing *Gully v. First Nat'l Bank,* 299 U.S. 109, 112-13 (1936)). "[A] case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Id.* at 393 (alteration in original). However, "[o]n occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* (quoting *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987)). "Once an area

of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.,* 463 U.S. 1, 24 (1983)).

"The party seeking removal bears the burden of establishing its right thereto." *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit,* 874 F.2d 332, 339 (6th Cir. 1989) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98 (1921)). "The removal petition is to be strictly construed, with all doubts resolved against removal." *Id.* (citations omitted).

B. Defendant's Motion to Dismiss

A party may present the defense of failure to state a claim upon which relief can be granted through motion. Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the plaintiff's complaint. The Court views the complaint in the light most favorable to the plaintiff and must accept as true "well-pleaded facts" set forth in the complaint. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987) (citations omitted). "A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." *Weiner v. Klais & Co.,* 108 F.3d 86, 88 (6th Cir. 1997) (citations omitted). If it appears beyond doubt that the plaintiff's complaint does not state facts sufficient to "state a claim to relief that is plausible on its face," then the claims must be

dismissed. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *see also Weisbarth v. Geauga Park Dist.,* 499 F.3d 538, 542 (6th Cir. 2007). Further, the complaint must establish "enough fact to raise a reasonable expectation that discovery will reveal evidence" to show the averments are factually plausible. *Twombly,* 550 U.S. at 556. While the Court presumes all factual allegations to be true and makes all reasonable inferences in favor of Plaintiffs, the Court does not have to "accept unwarranted factual inferences." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 434 (6th Cir. 2008) (citations omitted). If the "complaint does not contain any factual allegation sufficient to plausibly suggest" each essential element of the averred violation, it does not contain enough factual content to nudge the claim across the line from conceivable to plausible, and must be dismissed. *Ashcroft v. Iqbal,* 556 U.S. 662, 680-83 (2009).

III. Analysis

A. Plaintiff's Motion to Remand

This matter was properly removed on the basis of federal question jurisdiction. *See* 28 U.S.C. § 1331. Plaintiff has attempted to artfully plead state law claims, but the bulk of Plaintiff's claims amount to a federal tax refund suit, thereby giving this Court jurisdiction under the complete preemption doctrine. *See Mikulski v. Centerior Energy Corp.,* 501 F.3d 555, 560 (6th Cir. 2007) ("[P]laintiffs may not 'avoid removal jurisdiction by artfully casting their essentially federal law claims as state-law claims.'" (quoting *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 397 n.2 (1981))).

> Twenty-six U.S.C. § 7422 provides that:
>
> [n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422. Section 7422 completely preempts Plaintiff's state law claims pertaining to an excessive withholding of FICA taxes.

> [Plaintiff] alleges that the amount withheld from her paycheck was excessive, and that the 7.65 percent at issue was wrongfully collected from her. These allegations track the language of § 7422. That statute required [plaintiff] to seek a refund from the IRS, which would in turn seek to collect the employer FICA tax due from [defendant]. Moreover, even if we did not hold that the language of § 7422 expressly preempted [plaintiff's] claim, the broad sweep of § 7422—especially as described by the Supreme Court . . . —suggests that Congress intended the IRS to occupy the field of tax refunds, preempting claims such as [plaintiff's].

Umland v. PLANCO Fin. Servs., Inc., 542 F.3d 59, 69 (3d Cir. 2008) (citations omitted); *see also Crouch v. Guardian Angel Nursing, Inc.,* No. 3:07-cv-541, 2009 WL 3738095, at *5 (M.D. Tenn. Nov. 4, 2009) ("Those few courts that have done so with any degree of depth have overwhelmingly come down on the side of preemption, regardless of whether the claims at issue are asserted directly under FICA or are framed as state-law claims . . . ."). Therefore, because Plaintiff seeks monies wrongfully collected as a federal tax, but veils her claims in state law causes of action, the Court has federal question jurisdiction.

Plaintiff's assertions before this Court establish that she is seeking to recover taxes excessively withheld from her paychecks. First, Plaintiff states that the "Compensation Schedule does not state 'employer share,' which ultimately aids in the disguise as a legitimate deduction." [D.E. 13 at 6]. Later, Plaintiff states that "the artificially created 'wages' here were in fact a function of subtracting the employer's share." [D.E. 13 at 27]. In effect, Plaintiff is admitting that the full 15.3% of FICA taxes was withheld from Plaintiff rather than the 7.65% owed by the employee. Thus, Plaintiff acknowledges that she overpaid her portion of the FICA tax and she seeks a return of the excessive withholding. Therefore, the claims, as they relate to FICA, are preempted and the Court has federal question jurisdiction under 28 U.S.C. § 1331. *See Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393 (1987) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

As to the FUTA tax, the Court has federal jurisdiction because Plaintiff, despite alleging state law causes of action, has filed a federal tax refund suit to recover federal taxes wrongfully or illegally assessed. Twenty-six U.S.C. § 7422 "means that if someone wrongfully collects money as a tax, then a suit to recover the suit constitutes a tax refund suit, even if the sum did not literally constitute an 'internal revenue tax.'" *Brennan v. Sw. Airlines Co.,* 134 F.3d 1405, 1410 (9th Cir. 1998), *amended by Brennan v. Sw. Airlines Co.,* 140 F.3d 849 (9th Cir. 1998) (quoting *Flora v. United States,* 362 U.S. 145, 149 (1960)). Plaintiff alleges that Defendant wrongfully withheld portions of Plaintiff's paycheck as a FUTA tax. Therefore, Plaintiff's claim amounts to a tax refund suit. Tax refund suits, even if cloaked in state law claims, are preempted. *See id.* at 1409 ("It is well established that the IRS provides the exclusive remedy in tax refund suits and thus preempts state-law claims that seek tax refunds." (citations omitted)). Therefore, this Court has federal question jurisdiction over the claims relating to an illegal or wrongful withholding of FUTA taxes. *See Caterpillar, Inc.,* 482 U.S. at 393 ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

Not all of Plaintiff's claims involve a federal issue. Plaintiff also alleges that Defendant excessively withheld state unemployment taxes, as well as withheld money as reimbursement for expenses never incurred. These claims form part of the "same case or controversy," thereby giving the Court supplemental

jurisdiction over these claims. *See* 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ."); *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725 (1966) ("But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole."). This Court having jurisdiction over all the claims, Plaintiff's Motion to Remand must be denied.

B. Defendant's Motion to Dismiss

Having established that it has jurisdiction, the Court turns to Defendant's Motion to Dismiss. Plaintiff's claims alleging that federal taxes were excessively withheld or illegally assessed must be dismissed. The remaining claims involving state taxes and reimbursed expenses will be remanded because the Court, in its discretion, will not exercise supplemental jurisdiction over those claims. *See Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 351 (1988) ("When the single federal-law claim in the action was eliminated at an early state of the litigation, the District Court had a powerful reason to choose not to exercise jurisdiction.").

Defendant first alleges that the case must be dismissed because it is barred by the doctrine of res judicata.

> For res judicata to apply, the following elements must be present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

Bragg v. Flint Bd. of Educ., 570 F.3d 775, 776 (6th Cir. 2009) (quoting *Bittinger v. Tecumseh Prods. Co.,* 123 F.3d 877, 880 (6th Cir. 1997)).

Defendant alleges that a final decision on the merits was reached by this Court in *Berera v. Mesa Medical Group, PLLC,* No. 5:13-cv-294-JMH, (E.D. Ky.). The Court dismissed the complaint in *Berera* finding that it failed to state a claim upon which relief could be granted. *See Berera v. Mesa Medical Group, PLLC,* No. 5:13-cv-294-JMH, 2014 WL 29386, at *3 (E.D. Ky. Jan. 3, 2014). "The sustaining of a motion to dismiss for failure to state a claim upon which relief can be granted is a judgment on the merits." *Durham v. Mason & Dixon Lines, Inc.,* 404 F.2d 864, 865 (6th Cir. 1968) (citations omitted). Thus, the first element is met.

Defendant alleges that Ednacot was a party in the *Berera* case and Plaintiff alleges that Ednacot was never made a party.[2] The Court finds that res judicata does not apply because, despite Plaintiff's counsel's representations to the contrary in the *Berera* matter, Ednacot was never made a party to

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[2] At the time of the *Berera* suit, Plaintiff, Katisha Ednacot, went by the name Katisha Kabalen.

the *Berera* suit. In the *Berera* matter, before the action was removed to this Court, Plaintiff's counsel filed a second amended complaint adding Ednacot as a party. According to Kentucky Rule of Civil Procedure 15.01, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party . . . ." Ky. CR 15.01. Because Berera had already filed one amended complaint and the second amended complaint was filed without leave or written consent, the second amended complaint was "without legal effect." 6 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1484 (3d ed.) ("[I]f an amendment that cannot be made as of right is served without obtaining the court's leave or the opposing party's consent, it is without legal effect."). Plaintiff's counsel later filed a motion to file the second amended complaint, which had not been ruled upon when Defendant removed the case to this Court. This motion was denied as moot when the case was dismissed. *Berera v. Mesa Medical Group, PLLC,* No. 5:13-cv-294-JMH (E.D. Ky.), at [D.E. 21]. Thus, the second amended complaint, filed without leave of court, was of no legal effect and Ednacot was not made a party to the Berera suit because this Court denied the motion for leave. While the Court believed, based, in part, on Plaintiff's counsel's assertions to that effect, that Ednacot was a party to the matter and indicated in its multiple orders that Ednacot was a party, the Court will not prejudice Ednacot due to the Court's oversight.[3]

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[3] The Court is especially sensitive to prejudicing Plaintiff

While the Court will not punish Plaintiff and takes ultimate responsibility for its oversight, the Court points out to Plaintiff's counsel that candor to the Court is not only appreciated, it is required. *See* Ky. SCR 3.3. Counsel's Response to Defendant's Motion for Summary Judgment in the *Berera* matter was purportedly filed on behalf of "Tammy Berera and Katisha Kabalen." *Berera v. Mesa Medical Group, PLLC,* No. 5:13-cv-294-JMH (E.D. Ky.), at [D.E. 9 at 1]. Plaintiff's counsel went on to state that "Plaintiffs filed a Second Amended Complaint setting forth the same allegations and adding Katisha Kabalen as an additional named Plaintiff." [D.E. 9 at 2]. Furthermore, it was obvious from the Court's Show Cause Order that the Court believed Ednacot had been made a party to the *Berera* suit. *Berera v. Mesa Medical Group, PLLC,* No. 5:13-cv-294-JMH, 2013 WL 6383013, at *1 (E.D. Ky. Dec. 6, 2013) ("Berera filed a second amended complaint to add Katisha Kabalen as a member of the class."). Plaintiff's counsel filed a response to the Court's Show Cause Order and failed to advise the Court that Ednacot was not a party to the action. It is only now, when it serves Plaintiff's counsel's interests, that Plaintiff's counsel felt the need to properly advise the Court of its misunderstanding. Finally, without comment on the wholly unsupported, speculative accusations that Defendant willfully stole

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because the *Berera* matter is now on appeal and Plaintiff is not a party to that appeal. *See* [D.E. 14 at 6] ("[H]er counsel filed the Brief for Appellant in the *Berera* appeal which, tellingly, described the claims in the complaint and amended complaint, but . . . did not mention Ms. Kabalen/Ednacot."). The Court confirmed that Plaintiff is not a named party to the *Berera* appeal by reviewing the Sixth Circuit public docket sheet.

from its employees to cover overhead expenses, Plaintiff's counsel has asserted in briefs before this Court that Defendant has withheld from Plaintiff's paycheck "bogus" travel and cell phone expenses. [D.E. 10 at 2, 7]. Defendant has filed documents under seal showing that the only thing bogus is Plaintiff's counsel's argument. The Court will not tolerate similar conduct from Plaintiff's counsel in the future.

Nevertheless, Plaintiff's claims alleging that FICA taxes were withheld must be dismissed because FICA does not provide a private right of action. *Umland,* 542 F.3d at 67 ("FICA does not create a private right of action."); *McDonald v. S. Farm Bureau Life Ins. Co.,* 291 F.3d 718, 726 (11th Cir. 2002) ("[W]e hold that no private right of action may be implied under FICA."); *Salazar v. Brown,* 940 F. Supp. 160, 166 (W.D. Mich. 1996) ("I conclude that the Sixth Circuit would likewise refuse to imply a cause of action under FICA."). Additionally, § 7422 provides that "[n]o suit or proceeding shall be maintained in any court for the recovery . . . of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary." 26 U.S.C. § 7422(a). Plaintiff seeks to recover a sum that was excessive or wrongfully collected, and has failed to file a claim for a refund with the Secretary. Therefore, pursuant to § 7422, Plaintiff cannot maintain this suit as it relates to FICA taxes.

Plaintiff's claims as they relate to FUTA taxes must also be dismissed because, like FICA, FUTA does not expressly or impliedly create a private right of action. *See Wanken v. Wanken,* No. 3:12-cv-2107-

BK, 2013 WL 1828840, at *7 (N.D. Tex. May 1, 2013) ("[T]his Court finds that there is no implied private right of action under FUTA."); *Glanville v. Dupar, Inc.,* 727 F. Supp. 2d. 596, 602 (S.D. Tex. 2010) ("This court finds that there is no implied private right of action under FUTA."); *Bendsen v. George Weston Bakeries Distrib. Inc.,* No. 4:08-cv-50-JCH, 2008 WL 4449435, at *4 (E.D. Mo. Sept. 26, 2008) (citations omitted) ("While the Eighth Circuit has not addressed whether FICA and FUTA create private rights of action, the majority of courts considering the issue has held they do not."); *White v. White Rose Food, a Div. of DiGiorgio Corp.,* 62 F. Supp. 2d 878, 887 (E.D.N.Y. 1999) ("The Court agrees with the decision of the Seventh Circuit Court of Appeals . . . and finds its rationale applicable to FUTA, FICA, and SUI. . . . [T]he Seventh Circuit stated that '[e]mployees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.'" (quoting *Edgar v. Inland Steel Co.,* 744 F.2d 1276, 1278 (7th Cir. 1984))).

Furthermore, pursuant to § 7422, Plaintiff may not maintain this action as it relates to a recovery of an alleged illegal withholding of FUTA taxes. While Plaintiff makes much of the fact that an employee is not liable for FUTA taxes, it does not change the fact that, according to Plaintiff, she was assessed the amount as a tax. By the plain language of § 7422, the statute applies to suits "for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been . . . in any manner wrongfully collected." 26 U.S.C. § 7422. The Court finds that

Plaintiff's allegations meet this "expansive" statute because Plaintiff alleges that an internal revenue tax was illegally assessed against her or, at the very least, that a sum was wrongfully collected from her. *See United States v. Clintwood Elkhorn Mining Co.,* 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach."); *see also Flora v. United States,* 362 U.S. 145, 149 (1960) ("[T]he function of the phrase ['any sum'] is to permit suit for recovery of items which might not be designated as either 'taxes' or 'penalties' by Congress or the courts."). Thus, even if FUTA created a private right of action, Plaintiff may not maintain her action for a recovery of amounts withheld as a FUTA tax in a United States court until she has sought a tax refund from the IRS. *See* 26 U.S.C. § 7422.

All of Plaintiff's claims, as they relate to federal taxes, must be dismissed because they seek damages for an excessive withholding of FICA taxes and damages for an illegal assessment of FUTA taxes, for which there is no private remedy and because Plaintiff has not first pursued her administrative remedy. Plaintiff first claims that Defendant breached the employment contract. [D.E. 1-1 at 3]. Even assuming Defendant breached the contract by not compensating Plaintiff the full amount she was owed, the reason Plaintiff would not have received the full amount owed is that Defendant was excessively withholding or improperly assessing federal taxes. Plaintiff also makes a claim for fraud and fraud in the inducement. [D.E. 1-1 at 4]. Any damages Plaintiff may be awarded on this claim would be equal to the amount of the tax excessively

or improperly withheld, and, therefore, Plaintiff again seeks to recover federal taxes excessively or improperly withheld. *See Radioshack Corp. v. ComSmart, Inc.,* 222 S.W.3d 256, 261 (Ky. Ct. App. 2007) (citations omitted) ("Where an individual is induced to enter into the contract in reliance upon false representations, the person may maintain an action for a rescission of the contract, or may affirm the contract and maintain an action for damages suffered on account of the fraud and deceit.").

Plaintiff's claims of conversion, violation of KRS 337.385, and negligence likewise seek to recover the amount of excessively or improperly withheld federal taxes. Plaintiff's conversion claim asserts that "Defendant has interfered with Plaintiff's lawful right to her property," the alleged violation of KRS 337.385 occurred because Defendant paid "an amount less than the wages to which she was entitled," and the negligence claim is based upon a negligent withholding of wages. [D.E. 1-1]. Thus, all of these claims are based upon an alleged failure to pay the full amount of wages. The reason the full amount of wages were allegedly not paid is because Defendant excessively or improperly withheld federal taxes. Therefore, all of Plaintiff's claims, as they relate to federal taxes, must be dismissed. *See Delue v. Scaife,* 775 F. Supp. 712, 717 (S.D.N.Y. 1991) ("[Plaintiff] asks this Court to grant damages based upon defendant's violations of employment-related tax laws. . . . Plaintiff cannot change the nature of her claim merely by calling it a tort; her claim is one for damages based upon violations of statutes that do not expressly [or impliedly] create a private cause of action.").

The Court emphasizes that it is in no way expressing an opinion on the merits of Plaintiff's claims. The Court simply holds that, based on the administrative and statutory scheme established, Plaintiff seeks a remedy from an improper forum. The proper avenue of relief is an administrative action before the IRS. Plaintiff complains that this may require a full-scale IRS investigation of Mesa's tax obligations.[4] [D.E. 10 at 33]. The Court will not ignore federal case law and federal statutes simply because Plaintiff prefers a different remedy.

Plaintiff argues that there is no remedy from the IRS because "the administrative scheme does not contemplate a refund to an employ*ee* for the employ*er* share of FICA." [D.E. 10 at 33] (alteration in original). However, Plaintiff fails to recognize that the recovery she seeks is a refund for an overpayment of the employee share. An employee owes 7.65% of the full 15.3% of the FICA tax assessed on an employee's wages. 26 U.S.C §§ 3101, 3111. Plaintiff alleges that she paid the full 15.3%. Thus, she overpaid her share by 7.65%. Simply because Plaintiff alleges the overpayment was equal to the employer's share of FICA does not mean that

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[4] Plaintiff's counsel's argument seems to ignore that if, as alleged, Defendant was contractually obligated to pay a higher wage and Plaintiff recovers, Plaintiff will also be forced to pay additional taxes to reflect recovery of the correct wage. *See United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 220 (2001) ("[W]e hold that, for FICA and FUTA tax purposes, back wages should be attributed to the year in which they are actually paid."); *Gerbec v. United States,* 164 F.3d 1015, 1025 (6th Cir. 1999) ("[W]e must nevertheless determine what portion of Plaintiffs' settlement awards were for back wages and therefore subject to income taxation." (citations omitted)).

she seeks a refund of the employer's share of FICA. The result would be the same if Plaintiff alleged 10% of her wages were withheld as a FICA tax. In short, the amount of the alleged overpayment does not change the fact that Plaintiff claims she overpaid her portion of the FICA tax and that she must first seek a remedy from the IRS. If the IRS awards Plaintiff a refund and decides MESA owes that money as its share of the FICA tax, the IRS will recover that money from MESA, and if the refund is denied, Plaintiff may then bring suit in federal court. *See* 26 U.S.C. § 7422; *Crouch v. Guardian Angel Nursing, Inc.,* No. 3:07-cv-541, 2009 WL 3738095, at *7 (M.D. Tenn. Nov. 4, 2009) ("The court there found that there was 'no need to recognize an equitable right for restitution as to federal employment taxes' in light of other available legal remedies, namely the plaintiff's ability to urge the IRS to enforce the legal obligations of the employer to pay the taxes, the ability to file an administrative claim for a refund from the IRS under 26 U.S.C. § 6511(a), and the ability to file suit under 28 U.S.C. § 1345(a) in the event the request for a refund is denied." (citing *McElwee v. Wharton,* 19 F. Supp. 2d 766, 771 (W.D. Mich. 1998))).

The Court also notes that, contrary to Plaintiff's assertions, the IRS is not an innocent third party. Mesa only had the power to withhold a portion of Plaintiff's wages because of the agency authority granted to it by the IRS. *See Eastman Kodak Co. v. United States,* No. 517-71, 1975 WL 3591, at *6 (Ct. Cl. Apr. 1, 1975), *aff'd as modified Eastman Kodak Co. v. United States,* 534 F.2d 252 (Ct. Cl. 1976) ("[T]he employer functions . . . as a statutory collection agent for purposes of the employee portion of

FICA."). Thus, Mesa was acting on behalf of the IRS when it allegedly made excessive withholdings.

The Court will remand the claims insofar as they are based upon an excessive withholding of state unemployment taxes and alleged unwarranted expenses. The Court has dismissed all the federal claims that give this Court jurisdiction and the Court declines to exercise its jurisdiction over the remaining claims. *See* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction . . . if the district court has dismissed all claims over which it has original jurisdiction."). Due to the Court's exercise of its discretion not to entertain jurisdiction over these claims, the Court does not rule on Defendant's argument that the claims should be dismissed due to a violation of the forum selection clause in the employment contract between Plaintiff and Defendant or that the expenses were properly deducted as pre-tax deductions to benefit Plaintiff. Rather, the claims, as they relate to state taxes and excessive withholding of taxes, are remanded to the Boyle County Circuit Court and Defendant is not prejudiced to making those arguments before that court. *See Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 351 (1988) ("This Court's crafting of the pendent jurisdiction doctrine in *Gibbs* strongly supports the conclusion that when a district court may relinquish jurisdiction over a removed case involving pendent claims, the court has discretion to remand the case to state court.").

IV. Conclusion

Accordingly, for the foregoing reasons, IT IS ORDERED:

(1) that Defendant's Motion to Amend its Motion to Dismiss [D.E. 21] be, and the same hereby is, GRANTED;

(2) that the Clerk shall FILE the Defendant's tendered Memorandum in Support of its Motion to Amend its Motion to Dismiss [D.E. 21-1] in the record;

(3) that Plaintiff's Motion to Remand [D.E. 13] be, and the same hereby is, DENIED;

(4) that Defendant's Motion to Dismiss [D.E. 5] be, and the same hereby is, GRANTED IN PART, in that Plaintiff's claims of breach of contract, conversion, violation of KRS 337.385, fraud and fraud in the inducement, and negligence are dismissed in so far as they seek damages for an alleged excessive withholding of FICA taxes and an illegal withholding of FUTA taxes, and DENIED IN PART, in that Plaintiff's claims of breach of contract, conversion, violation of KRS 337.385, fraud and fraud in the inducement, and negligence are not dismissed in so far as they seek damages for an alleged excessive withholding of state unemployment taxes and for expenses wrongfully withheld from Plaintiff's paychecks.

(5) That Plaintiff's claims of breach of contract, conversion, violation of KRS 337.385, fraud and fraud in the inducement, and negligence seeking damages for an excessive withholding of state unemployment taxes and expenses withheld from Plaintiff's paycheck be, and

the same hereby are, REMANDED to the Boyle County Circuit Court.

Signed By

/s/ Joseph M. Hood
Senior U.S. District Judge

This the 4th day of June, 2014.

TRANSFER ORDER OF THE DISTRICT COURT OF KENTUCKY (MARCH 17, 2014)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

KATISHA EDNACOT,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 5:14-96

On the Court's own motion, the above-referenced civil case is hereby TRANSFERRED to the docket of the Honorable Joseph M. Hood, United States District Judge, for all further proceedings.

Dated this 17th Day of March, 2014.

/s/ Karen K. Caldwell
Chief Judge
United States District Court
Eastern District of Kentucky

COMPLAINT
(FEBRUARY 18, 2014)

COMMONWEALTH OF KENTUCKY
BOYLE CIRCUIT COURT
CIVIL BRANCH DIVISION

KATISHA EDNACOT,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 14-CI-00049

Comes the Plaintiff, Katisha Ednacot, by counsel, and for her Complaint against the Defendant, Mesa Medical Group, PLLC (hereinafter "MESA"), hereby states the following:

INTRODUCTION

1. Plaintiff, Katisha Ednacot (formerly known as Katisha Kabalen), is and was at all times pertinent to this Complaint, a citizen and resident of the state of Kentucky. Plaintiff Ednacot performed services for her former employer, MESA Medical Group, PLC, in Danville, Boyle County, Kentucky. Therefore, venue is appropriate pursuant to KRS 452.450.

2. MESA at all times pertinent to this Complaint is and was a Kentucky limited liability company with a principal place of business located in Lexington, Fayette County, Kentucky. MESA conducted business throughout the Commonwealth of Kentucky. MESA can be served through its principal registered agent, CSC-Lawyers, Incorporating Service Company, 421 West Main Street, Frankfort, Kentucky 40601.

COUNT I.
BREACH OF CONTRACT

3. Plaintiff agreed to perform services on behalf of the Defendant for a set rate of pay.

4. MESA breached the contract of employment with the Plaintiff by failing to compensate her for the full amount she was entitled based on the agreement.

5. Plaintiff has suffered damages as a result of MESA's breach of contract.

COUNT II.
CONVERSION

6. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

7. Plaintiff, Katisha Ednacot, is owed wages in accordance with her employment with the Defendant. Plaintiff held the right to possess and owned the property at the time of the conversion, and the Defendant has failed to return the property.

8. Defendant has interfered with Plaintiffs lawful right to her property and intentionally held dominion or control over her property.

9. This intentional interference has deprived Plaintiff of possessory use of her lawful property and that interference has caused damage to the Plaintiff as more fully set forth herein.

COUNT III.
VIOLATION OF KRS 337.385

10. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

11. MESA violated KRS 337.385 by paying Plaintiff an amount less than the wages to which she was entitled by virtue of KRS Chapter 337, *et seq*. As a direct and proximate result of this violation, the Plaintiff is entitled to all amounts wrongfully withheld and for an additional equal amount as liquidated damages, is entitled to costs, penalties, interest, and reasonable attorneys' fees, as set forth in KRS 337.385(1).

COUNT IV.
FRAUD AND FRAUD IN THE INDUCEMENT

12. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

13. Prior to entering the employment agreement, Defendant MESA made material misrepresentations to Plaintiff which include, but are not limited to, her rate of compensation.

14. Defendant MESA made these representations to induce the Plaintiff to sign an employment contract, knowing that it was not going to pay Plaintiff the proper rate of wages.

15. Alternatively, Defendant MESA recklessly made the representations regarding compensation to Plaintiff.

16. Defendant MESA knew, or should have known, the true condition of the amount of compensation that it intended to pay to the Plaintiff.

17. Defendant MESA falsely made the material misrepresentations to induce the Plaintiff to enter the employment contract and to defraud her of the wages that she was entitled to receive.

18. Plaintiff relied on the Defendant MESA's representations in signing and operating under the employment agreement.

19. As a result of the fraudulent misrepresentations made by the Defendant MESA, Plaintiff was induced to enter into the employment contract, and received compensation in a lesser amount than was bargained for and earned by the Plaintiff.

20. As a result of these misrepresentations, Plaintiff has suffered damages more fully outlined in Plaintiffs prayer for relief.

COUNT V.
NEGLIGENCE

21. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

22. MESA negligently withheld wages from Plaintiff and paid her an amount less than the wages and compensation to which she was entitled. As a direct and proximate result of the negligence of MESA, the Plaintiff has suffered damages.

23. As a direct and proximate result of MESA's violation of KRS 337.385 and conduct described in Counts I through V, the Plaintiff is entitled to relief pursuant to KRS 446.070 and as a result of MESA's negligence, the Plaintiff is entitled to damages, including but not limited to:

a. Wages that have been unpaid;

b. Penalties and interest as a result of wages being unpaid;

c. Liquidated damages in the amount up to double the amount that has been wrongfully withheld;

d. Attorney's fees;

e. Costs;

f. All actual, incidental, and foreseeable damages;

g. All equitable relief the Court may deem appropriate; and

h. Punitive damages as a result of the willful, wanton, and grossly negligence conduct of the Defendant MESA.

COUNT VI.
PUNITIVE DAMAGES

24. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

25. The conduct of the Defendant MESA in this action was so reckless, wanton, willful and grossly negligent that Plaintiff is entitled to an award of punitive damages against the Defendant MESA.

WHEREFORE, the Plaintiff, Katisha Ednacot, prays the Court as follows:

1. For a judgment against the Defendant, MESA Medical Group, PLLC, with the Plaintiff reserving the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence;
2. For a trial of this cause by a jury;
3. That Plaintiff be awarded all of the damages enumerated above, including attorneys' fees, costs herein expended, actual, incidental, consequential, compensatory, foreseeable, and any and all other damages and equitable relief that may be appropriate; and
4. Any and all other relief to which this Court may deem Plaintiff to be entitled.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ J. Dale Golden
J. Dale Golden
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COUNSEL FOR PLAINTIFF,
KATISHA EDNACOT

OPINION OF THE SIXTH CIRCUIT (FEBRUARY 19, 2015)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAMMY BERERA, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

MESA MEDICAL GROUP, PLLC,

Defendant-Appellee.

No. 14-5054

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.
No. 5:13-cv-00294—Joseph M. Hood, District Judge.

Before: KEITH, MOORE, and STRANCH, Circuit Judges.

DAMON J. KEITH, Circuit Judge

The basic issue in this case is whether Plaintiff Tammy Berera asserted state-law claims for unpaid wages or a federal claim for a refund of taxes under the Federal Insurance Contribution Act ("FICA"). *See generally* 26 U.S.C. §§ 3101-3128. FICA imposes a 7.65% tax on the wages of employees to fund Social Security and Medicare. *See* 26 U.S.C. § 3101.

Employers must collect this tax from their employees' wages. *Id.* § 3102(a). FICA also imposes a matching tax on employers equal to the 7.65% tax imposed on employees' wages. *See* 26 U.S.C. § 3111. Berera asserts that her employer, Defendant Mesa Medical Group, PLLC ("Mesa"), wrongfully collected both her share and Mesa's share of the FICA tax from her wages.

Applying the artful-pleading doctrine, the district court held that the plaintiff's purported state-law claims were FICA claims in disguise. Consequently, the district court dismissed the plaintiff's claims under 26 U.S.C. § 7422(a), which requires parties seeking a refund of federal taxes to file a claim with the IRS before bringing a federal tax refund suit. Because we agree that the plaintiff's purported state-law claims are truly FICA claims, we AFFIRM, as modified, the district court's judgment.

I. Background

Mesa is a health care organization. Berera worked at Mesa as a nurse practitioner from July 2011 to February 2013. After Berera's employment ended, she allegedly discovered that the wages on her W-2 did not reflect the amount of wages that Mesa owed her.

On June 25, 2013, Berera filed a class-action Complaint against Mesa in Kentucky state court. Berera alleged that the class consisted of current and former employees whom Mesa "forced to pay [Mesa's] share of payroll taxes and other taxes and

withholdings." R. at 21, ¶ 4.[1] Berera further alleged that this "forced payment resulted in the employees receiving less money than they earned and were entitled to as wages." *Id.* Likewise, Berera alleged that Mesa paid its current and former employees "an amount less than the wages and overtime compensation to which the employees were entitled . . . ." R. at 22, ¶ 14. The Complaint contained no additional substantive allegations. Based on these allegations, Berera asserted: (1) an unpaid wages claim under section 337.385 of the Kentucky Revised Statutes; and (2) a negligence claim under Kentucky law. Berera twice amended her Complaint, adding (1) a claim for conversion under Kentucky law and (2) Katisha Kabalen as a class member. *See* R. at 51, 178.[2]

Mesa filed a motion for a more definitive statement, arguing that the nature of Berera's claims was unclear. On August 9, 2013, while this motion was pending, Mesa's counsel, Hunter Hughes, wrote Berera's counsel, Dale Golden, a letter. R. at 303. In the letter, Hughes refers to a conversation with Golden on August 8, 2013. During this conversation, Hughes allegedly asked Golden to clarify the factual basis of Berera's claims. According to Hughes, Golden responded that Hughes might be able to

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[1] "R." designates citations to the paginated record of the proceedings below. Thus, "R. at 21" refers to PageID 21.

[2] Unless otherwise noted, "Complaint" refers to the Second Amended Complaint, which is the controlling pleading. *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013) ("An amended complaint supersedes an earlier complaint for all purposes." (citing *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009))).

identify the basis of Berera's claims by reviewing company records of employee complaints to the IRS. Hughes further states that this conversation "led [him] to conclude that the conduct at issue related to federal withholding matters." *Id.* Thus, Hughes declares that Mesa would assume that the Complaint contained at least one FICA claim unless Golden notified him otherwise by August 13, 2013. R. at 304.

On August 14, 2013, Berera's counsel responded to the letter via email. R. at 87. The email stated, without further elaboration, that Berera's counsel disagreed with the "characterizations and assumptions contained within the letter." R. at 87.

On August 26, 2013, Mesa's counsel met with Berera's counsel to discuss a potential settlement. At this meeting, Mesa produced a sample of Berera's payroll documents for the month of October 2011. The sample consists of: (1) a document showing hours, hourly wages, gross wages, and adjustments to gross wages ("Wage Table"); (2) a check stub; and (3) an employer copy of Berera's W-2. R. at 380, 722-23.

The Wage Table indicates that, in October 2011, Berera worked a total of 227 hours at an hourly rate of $45.00. Thus, Berera's total, unadjusted compensation was $10,215 (227 x $45). We refer to Berera's total, unadjusted compensation of $10,215 as "Total Gross Wages." Further, the Wage Table shows that Mesa made two adjustments totaling $1,328.76 to the Total Gross Wages of $10,215. One of these adjustments, the "Benefits Adjustment," is $648.96. The Benefits Adjustment represents the

cost of Berera's benefits (e.g., health insurance).[3] The other adjustment, the "First Adjustment," is $679.80.

Berera asserts that the First Adjustment of $679.80 is an excessive withholding of her wages. Berera's check stub for October 2011 shows that Mesa paid her $8,886.24. This payment of $8,886.24, the "Adjusted Gross Wages," is the difference of the Total Gross Wages minus the Benefits Adjustment and First Adjustment ($10,215—[$648.96 + $679.80]). But the check stub shows that Mesa withheld an additional $502.77 from the Adjusted Gross Wages of $8,886.24. R. at 722. This additional adjustment of $502.77, the "Second Adjustment," reflects the amount of FICA taxes that Berera owed in 2011. For, while employees currently must pay 7.65% of their wages in FICA taxes, Congress lowered the FICA tax on employees to 5.65% in 2011-12.[4][5] Berera contends that, because Mesa made the Second Adjustment

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[3] Berera asserts, in passing, that the Benefits Adjustment is excessive. However, she failed to adequately raise this argument before the district court or present it in her Appellant Brief. Therefore, we deem it waived. *Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 462 (6th Cir. 2003) (citation omitted) ("An appellant waives an issue when he fails to present it in his initial briefs before this court."); *Sigmon Fuel Co. v. Tenn. Valley Auth.*, 754 F.2d 162, 165 (6th Cir. 1985) (citing cases) ("[W]e have declined to review arguments not presented to the district court in the first instance.").

[4] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 601(a)(2), (c), 124 Stat. 3296 (2010), *amended by* Pub. L. No. 112-96, § 1001(a), 126 Stat. 156 (2012).

[5] However, in 2011-12, the employer share of the FICA tax remained 7.65% of the employee's wages. *See* statutes cited *supra* note 4.

equaling her share of the FICA tax, it had no basis to make the First Adjustment of $679.80. Thus, Berera concludes that the First Adjustment is an improper withholding of her wages.

On August 30, 2013, the state court held a hearing on Mesa's motion for a more definitive statement. *See* R. at 214. Attorney Justin Peterson represented Berera at this hearing. Peterson conceded at the hearing that the allegedly improper First Adjustment of $679.80 corresponded to Mesa's share of the FICA tax. *See* Hearing Tr., 15:9-15, 16:2-3, 16:18-25, 18:7-14, Doc. No. 1-7.[6]

On September 11, 2013, Mesa removed the case to the United States District Court for the Eastern District of Kentucky. *See* R. at 1. In its Notice of Removal, Mesa asserted that it removed the case within thirty days of receiving "other papers" under 28 U.S.C. § 1446(b)(3) that first demonstrated the presence of federal question jurisdiction under FICA and the Class Action Fairness Act ("CAFA"). R. at 6. According to Mesa, these "other papers" (i.e., court documents) included the transcript of the August 30 hearing.

On October 11, 2013, Berera filed a Motion to Remand. *See* R. at 454. Berera made three primary arguments in her Motion to Remand. First, Berera argued that her claims were state-law claims for unpaid wages and, hence, there was no basis on which to remove the case to federal court. Second, Berera argued that Mesa's Notice of Removal was untimely because Mesa filed it more than 30 days

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[6] Doc. 1-7 refers to the seventh attachment to the first entry on the district court docket.

after receiving notice of the supposed federal nature of her claims. *See generally* 28 U.S.C. § 1446(b). Third, Berera argued that there was no basis on which to remove the case under CAFA.

On December 6, 2013, the district court issued an opinion and order denying Berera's Motion to Remand and ordering her to show cause why it should not dismiss her claims for failure to state a claim. *See* R. at 681. The district court held that Berera's purported state-law claims amounted to a federal tax refund suit. The district court reasoned that the record clearly showed that Berera was attempting to recover FICA taxes that Mesa wrongfully withheld from her paycheck. *See* R. at 684, 686, 694. In so holding, the district court relied primarily on two factors: (1) the Complaint's allegation that Mesa forced Berera to pay Mesa's "share of payroll taxes and other taxes and withholdings"; and (2) Berera's counsel's concession at the August 30 hearing that the First Adjustment "was equal to [Mesa's] obligation under FICA." R. at 686-87. Further, the district court concluded that, even if Mesa did not remit the withheld wages to the IRS, the suit was still a tax refund suit because Mesa "collected [the wages] as a tax." R. at 688. Given its determination that Berera asserted a FICA claim and that federal question jurisdiction existed, the district court declined to consider Mesa's alternative argument that jurisdiction was proper under CAFA. R. at 695 n.4.

The district court also addressed Berera's argument that Mesa untimely filed its Notice of Removal. Based on the August 9, 2013 letter, the district court suggested that Mesa lacked adequate

notice that it could remove the case until August 13, 2013. *See* R. at 694 n.3. The district court then noted that Mesa filed the Notice of Removal on September 11, 2013, which is within 30 days after August 13. Therefore, the district court concluded that the Notice was timely under § 1446(b).

After concluding that Berera truly asserted FICA claims, the district court held that taxpayers seeking a refund of FICA taxes must file an administrative claim with the IRS before bringing an action in federal court. R. at 696. Accordingly, as Berera failed to file a claim with the IRS, the district court ordered her to show cause why it should not dismiss her claims under Federal Rule of Civil Procedure 12(b)(6) R. at 697. On December 19, 2013, Berera responded to the show cause order. Unconvinced by the response, the district court dismissed Berera's Complaint, with prejudice, in an order filed on January 3, 2014. *See* R. at 713.

Berera appealed, largely repeating the arguments that she made in her Motion to Remand. However, Berera raises a series of new arguments in connection with the Wage Table. These arguments, which are fact-intensive and rely heavily on algebra, purport to show that the First Adjustment is a fraudulent reduction of Berera's wages. Mesa responded, likewise repeating many of the arguments it made before the district court. Further, Mesa argues that Berera waived several of the new arguments she raises on appeal.

II. Standard of Review

"[W]e review denials of remand motions *de novo*." *Her Majesty The Queen In Right of the*

Province of Ontario v. City of Detroit, 874 F.2d 332, 338 (6th Cir. 1989) (citations omitted). Likewise, we review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6). *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (citation omitted). We also review *de novo* whether removal was timely under § 1446(b). *See Music v. Arrowood Indem. Co.*, 632 F.3d 284, 286 (6th Cir. 2011).

III. Analysis

In deciding whether the district court erred in dismissing Berera's suit, we must address three fundamental questions. The first question is whether Berera's purported state-law claims for unpaid wages are a FICA refund claim in disguise. Second, if Berera asserted a FICA refund claim, the question is whether § 7422(a) dictates dismissal of said claim for failure to exhaust remedies with the IRS. Third, we must consider whether Mesa timely removed the case. We answer these questions affirmatively.

A. Federal Question Jurisdiction—Artful Pleading

Where, as here, there is no diversity jurisdiction, a defendant may remove an action to federal court only if the plaintiff's allegations establish federal question jurisdiction. *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007). To determine whether federal question jurisdiction exists, we consider the "well-pleaded" allegations of the complaint. *Id.* (citation omitted) (internal quotation marks omitted). Under the well-pleaded complaint rule, the plaintiff "is master to decide what

law he will rely upon." *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 515 (6th Cir. 2003) (citation omitted) (internal quotation marks omitted). Thus, ordinarily, the plaintiff may obviate removal to federal court by exclusively pleading state-law claims. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987) ("[T]he plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court."); *Loftis*, 342 F.3d at 515 (citation omitted) (internal quotation marks omitted) ("Generally, a state law claim cannot be recharacterized as a federal claim for the purpose of removal."). The corollary of this rule is that federal question jurisdiction exists when the plaintiff's "statement of his own cause of action shows that it is based upon [federal law]." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (citation omitted) (internal quotation marks omitted).

The well-pleaded complaint rule has exceptions. *Mikulski*, 501 F.3d at 560. One is the artful-pleading doctrine. *Id.* Under the artful-pleading doctrine, "plaintiffs may not avoid removal jurisdiction by artfully casting their essentially federal law claims as state-law claims." *Id.* (citation omitted) (internal quotation marks omitted). Where it appears that the plaintiff may have carefully crafted her complaint to circumvent federal jurisdiction, "we consider whether the facts alleged in the complaint actually implicate a federal cause of action." *Id.* at 561.

Here, the Complaint's allegations show that Berera artfully pleaded a FICA claim as state-law claims for unpaid wages. The Complaint unequivocally states that the putative class on whose behalf Berera sues consists of Mesa employees whom

Mesa has "forced to pay [Mesa's] share of payroll taxes and other taxes and withholdings." Although Berera also alleged that this forced payment caused the employees to receive an underpayment of wages, the Complaint states that the underpayment of wages "resulted" from the forced payment of payroll taxes. Therefore, the allegation regarding the forced payment of payroll taxes is the factual foundation of Berera's purported state-law claims. Furthermore, although the Complaint does not expressly mention FICA taxes, it is well understood that the employer must calculate its share of the FICA tax by reference to "wages paid by the employer." 26 C.F.R. § 31.3111-2(c). Thus, we read Berera's reference to "payroll taxes" as an artful reference to FICA taxes. Indeed, Berera conceded at the August 30 hearing that the First Adjustment corresponded to Mesa's share of the FICA tax. Accordingly, Berera's purported state-law wage claims are truly a FICA refund claim.[7][8]

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[7] The district court dismissed Berera's Complaint pursuant to Rule 12(b)(6). Generally, when ruling on a Rule 12(b)(6) motion to dismiss, courts may not consider information outside the complaint. *See* Fed. R. Civ. P. 12(d). Therefore, Berera argued below that the district court erred by considering her counsel's concession at the August 30 hearing that the First Adjustment corresponded to Mesa's share of FICA. However, Berera did not raise this argument on appeal, thereby waiving it. *Marks*, 342 F.3d at 462 (citation omitted). Also, we do not rely on this concession for the truth of the matter asserted, i.e., that the First Adjustment actually corresponds to Mesa's share of FICA. Rather, we rely on it only to clarify Berera's artful allegations. *Cf. Pegram v. Herdrich*, 530 U.S. 211, 230 n.10 (2000) (stating that courts may use a party's brief "to clarify allegations in her complaint whose meaning is unclear"); *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 475 (6th Cir. 2008) (per curiam) (stating that, under the artful-pleading doctrine, courts may "look past

B. 26 U.S.C. § 7422(a)—Failure to Exhaust

Section 7422(a) places restrictions on tax-refund lawsuits. It provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the [IRS], according to the provisions of law in that regard, and the regulations of the [IRS] established in pursuance thereof.

26 U.S.C. § 7422(a).

The exhaustion-of-remedies requirement in § 7422(a) is mandatory. Under § 7422(a), a taxpayer is barred from bringing an action in federal court for a refund of any internal revenue tax or sum erroneously, illegally, or wrongfully assessed "until a claim for refund . . . has been duly filed with the [IRS]." *Compare id., with United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) (alteration in original) (citation omitted); *see also Comm'r v.*

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the words of a complaint to determine whether the allegations, no matter how the plaintiff casts them, ultimately involve a federal question").

8 Based on our conclusion that the district court had federal question jurisdiction under the artful-pleading doctrine, we decline to address Mesa's alternative argument that federal question jurisdiction existed under CAFA.

Lundy, 516 U.S. 235, 240 (1996) (citation omitted); *United States v. Dalm*, 494 U.S. 596, 609-10 (1990).

At least two circuits have indicated that § 7422(a) mandates dismissal of an employee's unexhausted FICA refund claim against her employer. *See Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 68-69 (3d Cir. 2008); *Johnson v. S. Farm Bureau Life Ins.*, No. 99-30808, 2000 WL 553958, at *1-2 (5th Cir. Apr. 10, 2000) (per curiam). In *Umland*, the Third Circuit held that § 7422(a) mandated dismissal of an employee's claim that her employer wrongfully collected its FICA tax from her. 542 F.3d at 68. The employee filed a class-action complaint against her employer in federal district court. *Id.* at 62. The complaint asserted a claim for, among others, unjust enrichment. To support her purported unjust enrichment claim, the employee alleged that her employer withheld an extra 7.65% of her salary. *Id.* at 67. The employee called this extra withholding "an illegal assessment of the employer FICA tax on the wrong people." *Id.* at 68. The *Umland* court held that this allegation amounted to a FICA refund claim. *Id.* In so holding, the court emphasized the breadth of § 7422(a), including the language that it applies to "any suit for *any* sum wrongfully collected in *any* manner." *Id.* (citation omitted); *see also Clintwood*, 553 U.S. at 7 (stating that "Congress meant [§ 7422(a)] to have expansive reach"). Based on this broad language, the court reasoned that § 7422(a) expressly preempted the employee's purported unjust enrichment claim. *See id.* at 68-69. Accordingly, because the employee failed to first file a claim with the IRS as required by § 7422(a), the court affirmed the district court's

dismissal of her complaint. *See id.* at 69; *see also Edgar v. Inland Steel Co.*, 744 F.2d 1276, 1278 (7th Cir. 1984) (per curiam) (citations omitted) ("Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability."). In *Johnson*, the Fifth Circuit similarly concluded that § 7422(a) mandated dismissal of an employee's unexhausted claim that his employer misclassified him as an independent contractor, thus causing him to pay excessive FICA taxes. *See* 2000 WL 553958, at *1-2. In reaching this conclusion, the court reasoned that "the artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Id.* at *2 (citing *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)). The court then held that § 7422(a) completely preempted the claim at issue and affirmed the district court's dismissal thereof.[9] *Id.*

In this case, § 7422(a) mandates dismissal of Berera's FICA claim. The essence of Berera's allegations is that Mesa wrongfully collected its FICA tax from her. By its plain language, § 7422(a) bars such a claim where, as here, the taxpayer fails to first file a refund claim with the IRS. *Umland* and *Johnson* support this straightforward reading of § 7422(a) because those courts dismissed the employees' unexhausted claims that their employers

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[9] Complete preemption is the rule that, in rare cases, "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *See Caterpillar*, 482 U.S. at 393 (citation omitted) (internal quotation marks omitted).

wrongfully/erroneously collected their FICA tax from them. Granted, in so concluding, the *Umland* and *Johnson* courts respectively stated that § 7422(a) expressly and completely preempted the employees' claims. However, as discussed more fully below, we need not decide whether § 7422(a) preempts, regardless of type, an artfully pleaded FICA claim. The fundamental issue is whether Berera complied with § 7422(a)'s mandatory exhaustion requirement. Because she did not, the district court did not err in dismissing her FICA claim.[10]

Berera makes several unpersuasive counter-arguments. Berera argues that § 7422(a) does not apply to her claims because the artful-pleading doctrine is limited to cases of complete preemption and § 7422 does not completely preempt her purported state-law claims. However, although "artful pleading and [complete] preemption are closely aligned," they are separate exceptions to the well-pleaded complaint rule. *See Mikulski*, 501 F.3d at 562[11]. For example, in the "airline cases," the

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[10] The district court dismissed Berera's FICA claim "with prejudice." R. at 713. But Berera could potentially bring an action against the United States for a refund of the FICA taxes at issue if she exhausted administrative remedies with the IRS. *See* 26 U.S.C. § 7422(f)(1); *but see id.* § 6511(a) (prescribing time limitations on the filing of refund claims with the IRS). Therefore, because the issue of any potential time bar is not before us, we modify the district court's judgment to make the dismissal of Berera's FICA claim without prejudice.

[11] *See also Burda v. M. Ecker Co.*, 954 F.2d 434, 438-39 (7th Cir. 1992) (declining to address district court's determination that federal tax law completely preempted a purported worker's compensation claim and holding that § 7422 dictated dismissal of the claim on the basis that it was "artfully pleaded"); 14B

Ninth, Seventh, and Fifth Circuits held that § 7422 allowed the airlines to remove purported state-law claims that were truly claims for a refund of taxes that the airlines erroneously collected on airline tickets. *See generally Brennan v. Sw. Airlines Co.*, 134 F.3d 1405 (9th Cir. 1998); *Kaucky v. Sw. Airlines Co.*, 109 F.3d 349 (7th Cir. 1997); *Sigmon v. Sw. Airlines Co.*, 110 F.3d 1200 (5th Cir. 1997). While these courts stated or indicated that § 7422 "preempted" the purported state-law claims, they did not reach this conclusion based on complete preemption. *See Brennan*, 134 F.3d at 1409 n.3, 1412; *Kaucky*, 109 F.3d at 351; *Sigmon*, 110 F.3d at 1204. In fact, in *Brennan*, the court held that the district court had jurisdiction under the "artful pleading doctrine" and expressly declined to consider whether removal was proper under the complete-preemption doctrine. 134 F.3d at 1409 & n.3. Therefore, to conclude that removal was proper, we need not decide whether § 7422(a) completely preempts Berera's disguised FICA claim.[12] Accordingly, Berera's first argument lacks merit.

Charles Alan Wright et al., *Federal Practice and Procedure* § 3722.1 (4th ed. 2009) (stating that the view that artful pleading and complete preemption are coextensive "has not been expressly embraced by most federal courts"); 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 103.43 (3d ed. 2014) (stating that a better expression of the idea that artful pleading and complete preemption are coextensive "is that the complete preemption doctrine is a specific application of the artful pleading doctrine").

[12] Indeed, we need not decide that § 7422(a) "preempts," irrespective of type, disguised FICA claims. *See generally Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987) (discussing categories of preemption). The cases above likely

Berera also argues that § 7422 does not apply because the First Adjustment is not a tax. Rather, Berera suggests that the First Adjustment constitutes a fraudulent reduction of her wages. Berera contends that Mesa perpetrated the fraud through "creative math" in its payroll accounting process. Appellant Br. at 36. Although Berera's demonstration of Mesa's math is not fully clear, Berera suggests the following: the Wage Table shows that Mesa sought to adjust the difference of her Total Gross Wages less her Benefits Adjustment ("Preadjusted Gross Wages") by an undetermined amount ("First Adjustment") that would equal 7.65% of her Preadjusted Gross Wages minus the First Adjustment. Mesa then subtracted the First Adjustment from Berera's Preadjusted Gross Wages to calculate her Adjusted Gross Wages, from which it made the Second Adjustment. According to Berera, Mesa devised this math to make the First Adjustment correspond to 7.65% of her Adjusted Gross Wages. In Berera's estimation, this correspondence served to hide the fraudulent nature of the First Adjustment, making it look like a legitimate tax or an accounting error.

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referenced preemption in holding that § 7422(a) mandated dismissal of the purported state-law claims because "the artful pleading doctrine lacks precise definition and has bred considerable confusion." Wright et al., *supra*, § 3722.1. But preemption is an unnecessary analytical framework for this case because (1) the express allegations of Berera's Complaint, as clarified by her counsel's concession, show that she pleaded a FICA claim; (2) Berera failed to exhaust administrative remedies with the IRS; and (3) § 7422(a) mandates dismissal of unexhausted FICA claims.

Without reaching its merits, we hold that Berera waived this argument. We may decline to review an argument that a party fails to properly "present[ ] to the district court in the first instance." *Sigmon Fuel*, 754 F.2d at 165 (citing cases). Here, Berera "had a full opportunity to raise [the] argument related to" Mesa's allegedly fraudulent accounting and "offers no explanation for [her] failure to do so." *See United States v. Lawson*, No. 05-5598, 2006 WL 1538889, at *5 (6th Cir. June 5, 2006) (citing *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 589-90 (6th Cir. 2002)). For instance, although the Wage Table was in the record at the outset of removal and Berera filed several motions and briefs challenging removal, Berera made only a "vague, [one-sentence] reference" to her mathematical argument in her response to the district court's show cause order. *Compare Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1398 (6th Cir. 1995), *with* R. at 701 (Berera stating on brief below that "[Mesa] had demonstrated in settlement negotiations that it could calculate a figure that it could tie to an amount that appeared to correlate to an appropriate tax withholding amount"). Furthermore, Berera's math-based arguments implicate factual issues, making them ill-suited to be considered for the first time on appeal. *See Taft Broad. Co. v. United States*, 929 F.2d 240, 244-45 (6th Cir. 1991) (citations omitted). Therefore, we decline to review these intricate arguments for the first time on appeal.

Relatedly, Berera argues that Mesa's alleged fraud removes this case from the scope of § 7422(a). Berera notes that § 7422(a) applies not only to "any

internal revenue tax . . . erroneously or illegally . . . collected," but to "any sum . . . wrongfully collected." *See* 26 U.S.C. § 7422(a). Berera then suggests that, even if the First Adjustment is a sum in an ordinary sense, it is not a sum under § 7422(a). To support this argument, Berera characterizes Mesa as a fraudulent "collection agent." *See Kaucky*, 109 F.3d at 351-52. Due to Mesa's alleged fraud, Berera asserts that Mesa lacked even "colorable" authority to collect the First Adjustment. *See id.* at 352. Consequently, Berera concludes that the First Adjustment falls outside of § 7422(a)'s ample ambit. But this argument amounts to an assertion that Mesa wrongfully collected taxes from Berera and, on its face, § 7422(a) applies to "any sum . . . wrongfully collected." Similarly, the *Umland* court held that § 7422(a) applied to the employee's claim that her employer "wrongfully" collected its FICA tax from her. *Umland*, 542 F.3d at 68. Furthermore, in *Kaucky*, the court did not expressly consider whether § 7422(a) would apply if the plaintiff alleged that the tax collector fraudulently collected the sum and simply suggested in dicta that it would not. *See* 109 F.3d at 353. And the *Umland* court rejected the applicability of *Kaucky's* dicta to cases where the employer wrongfully collects FICA taxes from its employees. *See* 542 F.3d at 68. Moreover, Berera's sparse and vague allegations are equally, if not more, amenable to an inference of "erroneous[ ] or illegal[ ]" conduct, *see* 26 U.S.C. § 7422(a), and she waived the argument that the Wage Table shows fraud. Thus, Berera's suggestion that this case involves fraud finds scant support in the record. Accordingly, the

argument that Mesa's alleged fraud removes this case from the ambit of § 7422(a) lacks merit.[13]

Berera's argument that the First Adjustment is not a tax also fails because it contradicts an express allegation in her Complaint. To reiterate, the Complaint states that the putative class consists of Mesa employees whom Mesa has "forced to pay [Mesa's] share of payroll taxes and other taxes and withholdings." Although Berera intimates that she misphrased this allegation, she amended the Complaint twice without substantive change. Where, as here, "the complaint itself gives reasons to doubt [the] plaintiff's theory, and when later pleadings confirm those doubts, it is not our task to resuscitate the claim but to put it to rest." *See NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (en banc) (citation omitted) (internal quotation marks omitted).

Additionally, Berera argues that § 7422(a) is inapplicable because there is no evidence that Mesa paid the First Adjustment to the IRS. Hence, in Berera's estimation, the IRS would be unable to provide a remedy. *See In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133, 1137 (D. Minn. 1999). But, assuming that Mesa did not remit the First Adjustment to the IRS, Berera presumably could

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[13] We acknowledge that § 7422 might not apply to a claim that an employer wrongfully and/or fraudulently withheld FICA taxes when the claim is based on stronger allegations and/or evidence of fraud. *See Brennan*, 134 F.3d at 1410 n.5 (suggesting that, in an "extreme" case, § 7422 might have a narrower reach); *see also In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (stating that courts interpreting a statute need not always apply its literal meaning where doing so "would lead to absurd results").

"seek a refund from the IRS, which would in turn seek to collect the employer FICA tax due from [Mesa]." *Umland*, 542 F.3d at 69; *see also Kaucky*, 109 F.3d at 352 (citation omitted) ("It makes no difference whether the firm is still holding the money it erroneously collected or has passed it on to the IRS. . . . The IRS has plenty of remedies against its collection agents who fail to remit taxes that they collect."). Therefore, the contention that the IRS would be unable to provide a remedy is unconvincing.

Finally, Berera argues that our decision in *Mikulski* demonstrates the inapplicability of § 7422 to her claims. *See generally Mikulski*, 501 F.3d 555. In *Mikulski*, we held that § 7422 did not completely preempt claims for fraud and breach of contract. *Id.* at 565. However, the facts in *Mikulski* are distinguishable. The plaintiffs alleged that the defendant, a corporation whose shares they owned, intentionally misreported its taxable earnings to make itself appear more profitable. *Id.* at 558. Consequently, the plaintiffs paid more in taxes than they would have had to otherwise. *Id.* Whether the defendant intentionally misreported its taxable earnings turned on an interpretation of the federal tax code. *Id.* at 557-58. The court found no indication that Congress intended § 7422 "to be a security holder's exclusive remedy for a company's misreporting of dividends." *Id.* at 564 (citation omitted). Here, by contrast, § 7422(a) clearly shows Congress's intent to require parties asserting FICA refund claims to first file a claim with the IRS. Furthermore, noting that courts had broadened § 7422 in the airline cases, the court reasoned that such an "expansive application" did not apply

because the defendant "did not collect or withhold any taxes." *Id.* at 564-65. Here, however, the Complaint indicates that Mesa excessively withheld FICA taxes. Accordingly, *Mikulski* is inapposite.

In sum, because Berera asserted a FICA refund claim, § 7422(a) required her to first file a claim with the IRS. But Berera failed to do so. Hence, the district court did not err in dismissing her Complaint.[14]

C. Removal

The third, and final, fundamental question is whether Mesa timely filed its Notice of Removal. We hold that it did.

Berera contends that Mesa's Notice of Removal was untimely. To support this contention, Berera asserts that more than 30 days elapsed between Mesa's receipt of notice of the alleged federal nature of her claims and its September 11, 2013 filing of the Notice of Removal. According to Berera, the August 9, 2013 letter shows that Mesa had notice of the alleged federal nature of her claims by August 8-9, 2013, which comes more than 30 days before September 11, 2013. Berera also suggests that Mesa had notice of the alleged federal nature of her claims as early as June 25, 2013—the date on which she originally filed the Complaint. Mesa responds that the Complaint failed to give it adequate notice of the federal nature of Berera's claims. Rather, Mesa maintains that it filed its Notice of Removal within

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[14] We have carefully reviewed Berera's remaining arguments regarding federal question jurisdiction and the meaning of § 7422 and find them unpersuasive.

30 days after receiving "other papers" under 28 U.S.C. § 1446(b)(3) that first showed the federal nature of Berera's claims. Pertinently, one of these papers is the transcript of the August 30 hearing in which Berera conceded that the First Adjustment corresponded to Mesa's share of the FICA tax. Mesa also disputes Berera's interpretation of the August 9 letter.

A defendant removing an action to federal court must file a notice of removal. *Id.* § 1446(a). Generally, the defendant must file the notice of removal "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." *Id.* § 1446(b)(1). The 30-day period in § 1446(b)(1) starts to run only if the initial pleading contains "solid and unambiguous information that the case is removable." *Holston v. Carolina Freight Carriers Corp.*, No. 90-1358, 1991 WL 112809, at *3 (6th Cir. June 26, 1991) (per curiam). If the initial pleading lacks solid and unambiguous information that the case is removable, the defendant must file the notice of removal "within 30 days after receipt . . . of a copy of an amended pleading, motion, order or other paper" that contains solid and unambiguous information that the case is removable. *See* 28 U.S.C. § 1446(b)(3); *see also Walker v. Philip Morris USA, Inc.*, 443 F. App'x 946, 950 (6th Cir. 2011). Section 1446(b)'s requirement of solid and unambiguous information is akin to actual notice. *Cf. Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 466 (6th Cir. 2002) (citation omitted) (internal quotation marks omitted) ("The intent of § 1446(b) is to make sure that a

defendant has an opportunity . . . to remove upon being given notice in the course of the case that the right exists."); Charles Alan Wright et al., 14C *Federal Practice and Procedure* § 3731 (4th ed. 2009) ("The statute requires 'an amended pleading, motion, order, or other paper' to act as a trigger to commence the running of a new 30-day period once the defendant has received actual notice, through one of the documents described in Section 1446(b), that a previously unremovable case has become removable.").

Here, Mesa removed the case on September 11, 2013. Therefore, for Mesa's Notice of Removal to be timely, it must have received solid and unambiguous information that it could remove the case on or after August 12, 2013.

Berera's pleadings, per se, failed to solidly and unambiguously inform Mesa that it could remove the case. Berera filed the Complaint and Amended Complaint before August 12, 2013. But, as noted above, these pleadings were sparse and vague and asserted purported state-law claims. Hence, they lacked solid and unambiguous information that Berera was asserting a FICA refund claim.

Nor does the August 9 letter show that Mesa had solid and unambiguous information that it could remove the case by August 8-9, 2013. Therein, Mesa's counsel asserts that he spoke with Berera's counsel on August 8 to clarify the factual basis of Berera's claims. According to the letter, during this conversation, Berera's counsel stated that "Mesa might be able to identify the factual basis of the claim by reviewing company records of employee complaints to the IRS." R. at 303. Although this statement might have "led [Mesa] to conclude that

the conduct at issue related to federal withholding matters," *id.*, it did not constitute solid and unambiguous information that the case was removable. Mesa was faced with a Complaint that (1) failed to use "federal" or any similar descriptor to describe the "payroll taxes and other taxes and withholdings" and (2) asserted purported state-law claims. Moreover, as of August 9, 2013, Berera had not confirmed Mesa's suspicion that the claims related to federal taxes. *See* R. at 87, 303. Therefore, the August 9 letter fails to show that Mesa had solid and unambiguous information that the case was removable on August 8 or 9.

Actually, the August 9 letter may support the district court's suggestion that Berera lacked solid and unambiguous information that the case was removable until August 13, 2013. Mesa's counsel stated in the letter that Mesa would assume that the Complaint contained at least one FICA claim unless Berera notified him otherwise by August 13. Setting this deadline was reasonable. On the one hand, Mesa's counsel had started to suspect that the case involved a FICA claim. Thus, due diligence required Mesa to take steps to confirm or dispel this suspicion. *Cf.* Wright et al., *supra*, § 3731. On the other hand, Berera deserved a reasonable amount of time to respond to the August 9 letter. August 13 is after August 12, the date on or after which Mesa had to receive solid and unambiguous information that Berera was asserting a FICA claim.

The record lends even stronger support for the conclusion that Mesa lacked solid and unambiguous information about removability until August 30, 2013. For, on August 14, 2013, Berera's counsel

wrote Mesa and stated that he disagreed with the "characterizations and assumptions contained within the [August 9] letter." R. at 87. Then, at the August 30 hearing, Berera's counsel conceded that the First Adjustment corresponded to Mesa's share of FICA taxes. The Complaint's artful allegations, coupled with this clarifying concession at a formal hearing, gave Mesa solid and unambiguous information that it could remove the case. August 30 falls well after the August 12 commencement of § 1446(b)(3)'s 30-day period.

The remaining issue is whether the August 9 letter, the August 30 hearing transcript, or both, are "other papers" under § 1446(b)(3). Because we hold that the hearing transcript is an "other paper" under § 1446(b)(3), we decline to decide whether the letter is as well.

We have yet to fully expound the meaning of "other paper" under § 1446(b)(3). One treatise states that this term is "expansive" and includes "a wide array of documents within its scope." Wright et al., *supra*, § 3731. Thus, as a general matter, "documents such as deposition transcripts, answers to interrogatories and requests for admissions, . . . amendments to ad damnum clauses of complaints, and correspondence between the parties and their attorneys or between the attorneys" may constitute "other papers" under § 1446(b)(3). *Id.* Consistent with these principles, we have held that "a plaintiff's responses to deposition questioning may constitute an 'other paper' under [§] 1446(b)." *Peters*, 285 F.3d at 466.

The term "other paper" under § 1446(b)(3) encompasses the hearing transcript at issue. As noted, courts have held that § 1446(b)(3) applies to

similar court documents. We extend these holdings to the hearing transcript because it is (1) highly relevant to the issue of removability and (2) "involved in," not external to, "the case being removed." *See Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 969 (8th Cir. 2007). In so holding, we also give weight to the fact that the transcript involves "oral statements made in the courtroom during the course of the action." Wright et al., *supra*, § 3731.[15]

For the foregoing reasons, the district court did not err in holding that Mesa timely filed its Notice of Removal.

IV. Conclusion

We held above that: (1) federal question jurisdiction existed because Berera pleaded a FICA refund claim; (2) Berera had to file a claim with the IRS before bringing her FICA refund action in federal court; and (3) Mesa's Notice of Removal was timely. Therefore, the district court did not err in denying Berera's Motion to Remand and dismissing

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15 Berera argues that the district court's conclusion that the Complaint failed to solidly and unambiguously inform Mesa of the federal nature of her claims is "inconsistent and contradictory" with its conclusion that the Complaint plainly asserted a FICA claim. But this argument oversimplifies the district court's reasoning. The district court relied on both the Complaint's plain allegations and Berera's counsel's concession during the August 30 hearing in holding that the Complaint asserted a FICA refund claim. R. at 686-87. Although the district court stated in its order dismissing the case that it did not have to rely on the hearing transcript to conclude that Berera asserted a FICA claim, R. at 709, it did not err in doing so under these circumstances. *See supra* n.7.

the case. Consequently, we AFFIRM, as modified, the district court's judgment.

JUDGMENT OF THE DISTRICT COURT OF KENTUCKY (JANUARY 3, 2014)

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

TAMMY BERERA, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Case No. 5:13-cv-294-JMH

In accordance with the Court's Order of even date and entered contemporaneously herewith, IT IS HEREBY ORDERED:

(1) that Plaintiff's claims are hereby DISMISSED WITH PREJUDICE;

(2) that all scheduled proceedings are CONTINUED GENERALLY;

(3) that all pending motions are DENIED AS MOOT;

(4) that this Order is FINAL AND APPEALABLE and THERE IS NO JUST CAUSE FOR DELAY;

(5) that this matter shall be, and the same hereby is, STRICKEN FROM THE ACTIVE DOCKET.

This the 3rd day of January, 2014.

Signed By:

/s/ Joseph M. Hood
Senior U.S. District Judge

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT OF KENTUCKY DISMISSING PLAINTIFF'S CLAIM WITH PREJUDICE (JANUARY 3, 2014)

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

TAMMY BERERA, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Case No. 5:13-cv-294-JMH

This matter is before the Court upon Plaintiff's Response [D.E. 19] to the Court's Order to Show Cause why the Complaint should not be dismissed for failure to state a claim upon which relief can be granted. [D.E. 18]. The Court having reviewed the Response, and being otherwise sufficiently advised, this matter is now ripe for the Court's review.

I. Procedural Background

Plaintiff Tammy Berera filed this suit in Fayette Circuit Court on June 25, 2013, asserting her claims

"on behalf of all current and former employees of MESA and any predecessor company of MESA." [D.E. 1-1 at 5]. Berera asserted a violation of KRS 337.385, claiming Defendant did not pay the full amount of wages and overtime compensation earned, and a claim of negligence. [D.E. 1-1 at 6-7]. Berera then filed an amended complaint, incorporating the original complaint in full, and adding claims for conversion and punitive damages. [D.E. 1-1 at 35-36]. Berera filed a second amended complaint to add Katisha Kabalen as a member of the class. [D.E. 1-2 at 67]. Defendant filed a Notice of Removal [D.E. 1], and Plaintiffs filed a Motion to Remand [D.E. 10], which this Court denied. [D.E. 18].

In ruling on Plaintiffs' Motion to Remand, the Court found that Plaintiffs' claims were based upon an alleged excessive withholding of Federal Insurance Contributions Act (FICA) taxes. [D.E. 18 at 14]. The Court further found that FICA did not create a private cause of action and that Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief can be granted [D.E. 18 at 16]. Thus, the Court ordered Plaintiffs to show cause why the complaint should not be dismissed. Plaintiffs have not presented the Court with any arguments sufficient to rebut the Court's earlier reasoning. Accordingly, this matter will be dismissed upon the Court's own motion.

II. Standard of Review

When reviewing a complaint the Court must accept as true all well-pleaded factual allegations contained within it. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly,*

550 U.S. 544, 570 (2007)). In determining whether the complaint should be dismissed for failure to state a claim upon which relief can be granted, the Court "must construe the complaint in the light most favorable to the plaintiff . . . and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir. 1993) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Aschcroft,* 556 U.S. at 678 (citing *Bell Atlantic Corp.*, 550 U.S. at 570).

III. Analysis

Plaintiffs first contend that the Complaint should not be dismissed because the Complaint does not assert that this is a tax refund suit and all causes of action are founded upon state law. However, the artful pleading doctrine will not allow Plaintiffs to "avoid removal jurisdiction by artfully casting their essentially federal law claims as state-law claims." *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007) (*quoting Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 397 n.2 (1981)). Thus, the Court has taken jurisdiction over the claims only upon a finding that the Complaint asserts federal law claims, despite the fact that Plaintiffs have artfully tried to plead their way around federal jurisdiction. Plaintiffs' desire for the claims to be based on state law has no bearing on the Court's analysis. *See Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir. 1998), *amended by Brennan v. Sw. Airlines,* 140 F.3d 849 (9th Cir. 1998) ("It is well

established that the IRC provides the exclusive remedy in tax refund suits and thus preempts state-law claims that seek tax refunds."); *Crouch v. Guardian Angel Nursing, Inc.,* No. 3:07-cv-541, 2009 WL 3738095, at *5 (M.D. Tenn. Nov. 4, 2009) ("Those few courts that have done so with any degree of depth have overwhelmingly come down on the side of preemption, regardless of whether the claims at issue are asserted directly under FICA or are framed as state-law claims to recover moneys owed directly to the plaintiffs by the defendant-employers as a result of their failure to pay their share of FICA taxes.")

Plaintiffs argue that the Court erred in finding the case involved federal law because the Court relied only a portion of the Complaint, rather than reading it as a whole. Specifically, Plaintiffs assert that "[t]he Court simply cannot pull one factual assertion . . . out of the Complaint and conclude that it alone merits dismissal of all claims." [D.E. 19 at 4]. However, the one factual assertion Plaintiffs reference, that the class consists of "employees who have been forced to pay the employer's share of payroll taxes and other taxes and withholdings," [D.E. 1-1 at 5], which the Court must take as true, establishes that Plaintiffs' claims amount to a tax refund suit.

In their Complaint, and through arguments filed with the Court, Plaintiffs attempt to gain class certification by stating that all of the class members had payroll taxes excessively withheld. Then, when asserting their claims, Plaintiffs attempt to claim they do not know where the money went or how it was used, simply that the employees were not paid what they were owed, and thus, this case does not

concern taxes. The Court cannot find that this case does not concern taxes by ignoring Plaintiffs' statement that the suit arises because payroll taxes were excessively withheld. Therefore, Plaintiffs' argument that the Complaint should be read as a whole is not persuasive.

Plaintiffs next take issue with the Court relying on the transcript of the hearing that took place in Fayette Circuit Court because it is outside of the pleadings. However, the Court does not need to rely on the hearing transcript to determine this is a tax refund suit for purposes of a Rule 12(b)(6) dismissal, as the four corners of Plaintiffs' Complaint clearly establishes that Plaintiffs wish to recover excessively withheld payroll taxes. *See* [D.E. 1-1 at 5] ("[T]he employees have been forced to pay the employer's share of payroll taxes and other taxes and withholdings.").

Furthermore, the Court may consider the hearing transcript because it is a public record that is capable of judicial notice. "In deciding a motion to dismiss, the Court may consider all papers and exhibits appended to the complaint, as well as any matters of which judicial notice may be taken." *Koli v. Gonzales,* No. 4:06-cv-54-M, 2007 WL 710130, at *1 (W.D. Ky. March 2, 2007) (citing *Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1092 (2d Cir. 1995)); *see also Eubank v. Wesseler,* No. 10-cv-210-DLB-JGW, 2011 WL 3652558, at *4 (E.D. Ky. Aug. 19, 2011) (citations omitted) ("The Court may . . . take judicial notice of 'matters of public record' without converting a 12(b)(6) motion into one for summary judgment."). "The court may judicially notice a fact that is not subject to reasonable dispute because it

can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "In the context of defendants' motion to dismiss under Rule 12(b)(6), the Court may judicially notice the transcript of the hearing . . . , not for the truth of any matters asserted therein, but rather for the fact that certain things were said, argued, and decided in that court. *Can v. Goodrich Pump & Engine Control Sys., Inc.,* 711 F. Supp. 2d 241, 250 n.12 (D. Conn. 2010) (citations omitted); *see also Passa v. City of Columbus,* 123 F. App'x 694, 697 (6th Cir. 2005) (finding that courts may take judicial notice of some documents of public record, but "not for the truth of the matters asserted therein"). Thus, the Court may consider the hearing transcript because it is subject to judicial notice.

The Court does not rely on the transcript for the purposes of the truth of the matter asserted by the transcript, that the calculation is equal to the FICA tax, but merely that Plaintiffs' counsel agrees the calculation is equal to Defendant's portion of the FICA tax. Plaintiffs have asserted in their Complaint that Defendant excessively withheld payroll taxes and agreed in a hearing that the amount withheld is equal to Defendant's obligations under FICA. Based on these facts, the Court finds that this is a tax refund suit for which there is no private right of action. Therefore, Plaintiffs' claims must be dismissed for failure to state a claim upon which relief can be granted.

Finally, Plaintiffs argue, in the event the Court finds dismissal is appropriate, that the pendent state law claims for violations of KRS 337.385, negligence, and conversion should not be dismissed, but

remanded, or in the alternative, held in abeyance. Plaintiffs' argument is flawed in that all of the state law claims attempt to recover for the same conduct, namely that Defendant excessively withheld payroll taxes. *See* [D.E. 18 at 15-16] (discussing each claim individually and finding that each attempted to recover excessively withheld payroll taxes). Thus, all of the claims invoke a tax refund suit for which there is no private right of action. *See, e.g., McDonald v. S. Farm Bureau Life Ins. Co.,* 291 F.3d 718, 726 (11th Cir. 2002) ("[W]e hold that no private right of action may be implied under FICA."). There are no pendent claims to remand or hold in abeyance because each claim arises under federal law and is preempted by 26 U.S.C. § 7422. Therefore, all of Plaintiffs' claims are subject to dismissal.

IV. Conclusion

Accordingly, for the foregoing reasons, IT IS ORDERED that Plaintiffs' claims are DISMISSED WITH PREJUDICE for failure to state a claim upon which relief can be granted.

Signed By:

/s/ Joseph M. Hood
Senior U.S. District Judge

This the 3rd day of January, 2014.

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT OF KENTUCKY DENYING PLAINTIFF'S MOTION TO REMAND (DECEMBER 6, 2013)

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

TAMMY BERERA, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Case No. 5:13-cv-294-JMH

This matter is before the Court upon Plaintiffs' Motion to Remand. [D.E. 10].[1] This matter being fully briefed, and the Court being otherwise sufficiently advised, it is now ripe for review.

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[1] The Defendant has filed a Motion for Summary Judgment [D.E. 2], which remains pending. The Court will rule on the Motion for Summary Judgment after Plaintiffs have responded to the Court's show cause order, if necessary.

I. Procedural Background

Plaintiff Tammy Berera filed this suit in Fayette Circuit Court on June 25, 2013, asserting her claims "on behalf of all current and former employees of MESA and any predecessor company of MESA." [D.E. 1–1 at 5]. Berera asserted a violation of KRS 337.385, claiming Defendant did not pay the full amount of wages and overtime compensation earned, and a claim of negligence. [D.E. 1–1 at 6–7]. Berera then filed an amended complaint, incorporating the original complaint in full, and adding claims for conversion and punitive damages. [D.E. 1–1 at 35–36]. Berera filed a second amended complaint to add Katisha Kabalen as a member of the class. [D.E. 1–2 at 67].

Based on the Motions and other materials submitted to this Court, there has been much contention as to whether the claims asserted on the face of the complaint accurately encompass Plaintiffs' claims. A letter filed with the Court from Mr. Hunter Hughes, outside counsel for Defendant, memorializes a conversation with Plaintiffs' counsel, where Defendants attempted to discern the nature of Plaintiffs' claims. [D.E. 1–3]. Subsequently, the Fayette Circuit Court granted Defendant's Motion for a More Definite Statement. [D.E. 1–7 at 7]. Defendants contend that the federal nature of Plaintiffs' claims became apparent only after the parties' counsel met on August 26, 2013. [D.E. 1 at 4–5]. Defendant claims it was further evident that Federal Insurance Contributions Act (FICA) taxes were in issue when it received Plaintiffs' Notice for Designated Representatives to Give Video Taped Deposition on August 29, 2013. [D.E. 13 at 8].

Defendant filed a Notice of Removal on September 11, 2013. [D.E. 1].

II. Standard of Review

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441. "The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant through service or otherwise." *Id.*§ 1446(b)(1). "If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of 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." *Id.* § 1446(b)(3).

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant . . . . The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112–13 (1936)). "[A] case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Id.* at 393. However, "[o]n occasion, the

Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24 (1983)).

"The party seeking removal bears the burden of establishing its right thereto." *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir.1989) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97–98 (1921)). "The removal petition is to be strictly construed, with all doubts resolved against removal." *Id.*

III. Analysis

Plaintiffs' claims amount to a tax refund suit, giving the Court federal question jurisdiction based on complete preemption. Defendant relies on 26 U.S.C. § 7422 in arguing that Plaintiffs' claims are preempted. That section states that:

> [n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner

> wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422. Defendant further relies on *Umland v. PLANCO Financial Services, Inc.*, from the Third Circuit, for the proposition that § 7422 preempts Plaintiffs' claims. In holding that complete preemption applied, the *Umland* court reasoned:

> [Plaintiff] alleges that the amount withheld from her paycheck was excessive, and that the 7.65 percent at issue was wrongfully collected from her. These allegations track the language of § 7422. That statute required [plaintiff] to seek a refund from the IRS, which would in turn seek to collect the employer FICA tax due from [defendant]. Moreover, even if we did not hold that the language of § 7422 expressly preempted [plaintiff's] claim, the broad sweep of § 7422—especially as described by the Supreme Court—suggests that Congress intended the IRS to occupy the field of tax refunds, preempting claims such as [plaintiff's].

Umland v. PLANCO Fin. Servs., Inc., 542 F.3d 59, 69 (3d Cir.2008). Our sister court was called upon to decide a similar issue and also found § 7422 completely preempted plaintiff's claims. *See Crouch v. Guardian Angel Nursing, Inc.*, No. 3:07–cv–541, 2009 WL 3738095, at *7 (M.D.Tenn. Nov. 4, 2009) ("This Court concurs with the reasoning of the Third Circuit and the Western District of Michigan. As a matter of common sense, the appropriate avenue of

redress for overpayment or erroneous payment of taxes is to appeal directly to the IRS.").

> The Sixth Circuit has not been called upon to address this issue. Those few courts that have done so with any degree of depth have overwhelmingly come down on the side of preemption, regardless of whether the claims at issue are asserted directly under FICA or are framed as state-law claims to recover moneys owed directly to the plaintiffs by the defendant-employers as a result of their failure to pay their share of FICA taxes.

Id. at *5. Thus, the issue becomes whether Plaintiffs' claims are an attempt to recover FICA taxes that were wrongly withheld, but veiled in state law causes of action. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."); *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir.2007) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n. 2 (1981)) ("[P]laintiffs may not 'avoid removal jurisdiction by artfully casting their essentially federal law claims as state-law claims.'").

The record clearly shows that Plaintiffs are attempting to recover taxes excessively withheld from their paychecks. First, and most detrimental to Plaintiffs' arguments for remand, the Complaint expressly provides that the class consists of "employees who have been forced to pay the employer's share of payroll taxes and other taxes and

withholdings." [D.E. 1–1 at 5]. Thus, Plaintiffs' right to recover is based on federal law. This is not a situation in which the taxes at issue are solely state taxes. *See Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). The amount alleged to be withheld is a federal tax and is preempted by operation of 26 U.S.C. § 7422.

Furthermore, at a hearing in Fayette Circuit Court, Plaintiffs' counsel agreed that the excessive withholding was equal to Defendant's obligation under FICA.

> THE COURT: Okay. And that more likely than not at this point in time, it appears that it's going to relate back to FICA and—and the half, the employer's half.
>
> MR. PETERSON: The—if you're talking about the calculation?
>
> THE COURT: Yeah.
>
> MR. PETERSON: Yes, the calculation, yes.

[D.E. 1–7 at 5]. Then later:

> MR. DANFORD: So the employees have been forced to paid [sic] the employer's share of FICA. I mean, that's what Mr. Golden said the claim—the claim, as he knows it, not the other claims—
>
> THE COURT: That's not to say—
>
> MR. PETERSON: That's agreed. That's agreed. I mean, that's what the calculation comes to. That's what we're agreeing on.

[D.E. 1–7 at 6].

Plaintiffs attempt to skirt federal jurisdiction by asserting that Plaintiffs do not know why the money was withheld, and it could have been withheld for any reason.[2] *See* [D.E. 9 at 3]. The Court has no evidence with which to determine how Defendant spent the money, however, Plaintiffs own complaint belies the assertion that Plaintiffs do not know where the money went. The complaint clearly states that the purported class was "forced to pay the employer's share of payroll taxes and other taxes and withholdings." [D.E. 1–1 at 5]. Furthermore, § 7422 "means that if someone wrongfully collects money as a tax, then a suit to recover the sum constitutes a tax refund suit, even if the sum did not literally constitute an 'internal revenue tax.'" *Brennan v. Sw. Airlines Co.*, 134 F.3d 1405, 1410 (9th Cir.1998), *amended by Brennan v. Sw. Airlines*, 140 F.3d 849 (9th Cir.1998) (citing *Flora v. United States*, 362 U.S.

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[2] Plaintiffs also claim that Defendant removal. However, none of the case actually found that a party had waived the case law does not support a finding precluded from removing this matter to has waived its right to law cited by Plaintiffs its right to removal and that Defendant should be federal court. Wrapped up in Plaintiffs' argument is the assertion that Defendant's actions in this case should be considered "stonewalling" because they have not responded to written discovery requests filed in the Fayette Circuit Court. [D.E. 10 at 8]. The Court notes that Plaintiffs' counsel's response to an invitation to attend an informal settlement conference included the following transmission. "If you want to meet, withdraw the requests for admission. If that is a problem, then obviously you were not serious about the meeting and it would probably not be fruitful. If you will withdraw discovery, I am willing to meet Monday at 10:00 a.m. Otherwise, we can discuss settlement later as discovery proceeds if you decide to get serious about the case later." [D.E. 1–2 at 11].

145, 149 (1960)). Therefore, if the monies wrongfully withheld from Plaintiffs' paychecks were not really a tax, but were collected as a tax, § 7422 makes this a tax refund suit. *See id.* ("Here, the airlines may not have collected an internal revenue tax, but they nevertheless collected a 'sum' as a tax. Therefore, Plaintiffs have filed a tax refund suit within the meaning of the IRC."); *see also Kaucky v. Sw. Airlines Co.*, 109 F.3d 349, 351 (7th Cir.1997) ("[Twenty-six] 26 U.S.C. § 6401(c) . . . provides that an overpayment of tax does not lose its character as a tax for which the taxpayer is entitled to a credit or refund merely because he was not liable for any part of the tax that was assessed against him.").

Plaintiffs attempt to rely on *Mikulski v. Centerior Energy Corporation* to show that this is not a tax refund suit. In *Mikulski*, the defendant misinterpreted the internal revenue code in such a way that the corporation's tax liability was increased, which was then passed on to its shareholders. *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 558 (6th Cir.2007). The Sixth Circuit simply found that Congress did not intend the "tax refund procedure [of § 7422] to be a security holder's exclusive remedy for a company's misreporting of dividends." *Id.* at 564. This is wholly inapposite to the case at bar. In this case, Plaintiffs are employees who allege taxes were withheld from their paychecks by their employer. The factual allegations alleged are not at all analogous to a shareholder derivative suit based upon an alleged incorrect dividend distribution.

Plaintiffs also rely on a decision from our sister court in the District of Minnesota. *See In re Air*

Transp. Excise Tax Litig., 37 F.Supp.2d 1133 (D.Minn.1999). The case was cited favorably by the Sixth Circuit, however, not for the proposition Plaintiffs would like the Court to rely upon. The Sixth Circuit, in *Mikulski*, only relied on *In re Air Transportation Excise Tax Litigation* for the proposition that § 7422 did not apply because the corporation was not acting as a collection agent. *See Mikulski*, 501 F.3d at 565. However, in this case, Defendant, in excessively withholding payroll taxes, was acting as a collection agent. *See* 26 U.S.C. § 3102 ("The tax imposed by section 3101 [FICA] shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid."); *Eastman Kodak Co. v. United States*, No. 517–71, 1975 WL 3591, at *6 (Ct.Cl. Trial Div. Apr. 1, 1975) ("[T]he employer functions only as a statutory collection agent for purpose of the employee portion of FICA, denominated an income tax imposed on the employee, whereas it is the taxpayer as to its matching portion of FICA.").

Furthermore, there are many more distinctions between the facts in the case before the District of Minnesota and the case at hand. The District of Minnesota did not find tax code preemption because the defendant had never paid any amounts to the IRS and that the amount of the refund was not readily ascertainable. *In re Air Transp. Excise Tax Litig.*, 37 F.Supp.2d at 1136. The court went on to hold that § 7422 only applies to taxes "actually 'assessed' or 'collected' on behalf of the government *and that was actually paid to the government.*" *Id.* at 1137 (emphasis in original).

Here the amount of the refund was readily ascertainable. Plaintiffs' counsel has already indicated that they agree with the exact amount of the withholding. *See* [D.E. 2–9 at 5–6]. While Plaintiffs repeatedly point out that they do not yet know where the money went or if it was actually paid to the IRS, this requirement imposed by the District of Minnesota, which is not binding on this Court, has been criticized. *See Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 n. 8 (1st Cir.2007) (finding that *In re Air Transportation*, in holding that preemption did not apply, was "mistaken"); *Matthew v. RCN Corp.*, No. 12 Civ. 0185(JMF), 2012 WL 5834917, at *6 (S.D.N.Y. Nov. 14, 2012) ("[T]he rationale and holding of *Air Transportation* are in conflict with the expansive language of Section 7422 and the great weight of authority construing the statute . . . . In particular, the *Air Transportation* Court relied on a narrow reading of the term 'any sum' in Section 7422 a reading that has been soundly rejected by other courts."); *Strategic Hous. Fin. Corp. v. United States*, 86 Fed.Cl. 518, 536 (Fed.Cl.2009) (refusing to limit the reach of § 7422, based on *In re Air Transportation*, because of the Supreme Court's determination that the statute was expansive); *see also In re Motor Fuel Temperature Sales Practices Litig.*, 534 F.Supp.2d 1214, 1238 (D.Kan.2008) (limiting *In re Air Transportation* to its facts by finding that the defendant, unlike in *In re Air Transportation*, had specified the amount of the excise tax collected). The Court finds the reasoning of *Umland* to be more persuasive. Moreover, the Court believes the Sixth Circuit would agree with the *Umland* decision because in *Mikulski* the Sixth Circuit recognized that § 7422 has been broadened

when defendants are acting as tax collectors. *Mikulski*, 501 F.3d at 564–65 (citations omitted) ("Although the federal courts have broadened § 7422 in the 'airline cases' and applied it to airlines that effectively act as agents for the IRS by collecting excise taxes from passengers, that expansive application does not extend to the present case because Centerior did not collect or withhold any taxes.").

Plaintiffs claim that the cause of action solely arises under Kentucky's wage and hour statute because that is what Plaintiffs rely on in stating the cause of action, and because Defendant paid "an amount less than the wages and overtime compensation to which the employees were entitled . . . ." [D.E. 1–1 at 6]. This argument ignores that the reason Plaintiffs were not paid the amount they were entitled, according to the allegations in Plaintiffs' complaint, is because Defendant was excessively withholding taxes. Plaintiffs argue that the claims do "not turn on the reason Defendants' [sic] may have made deductions from pay, but turn on whether Plaintiffs' [sic] were entitled to receive the deducted pay." [D.E. 10 at 12]. This is simply incorrect. If Plaintiffs were not paid what they were entitled to receive because Defendant was wrongfully withholding taxes, Plaintiffs' claims, no matter which Kentucky statute Plaintiffs choose to rely on, assert a claim under federal law. *See Brennan*, 134 F.3d at 1409 ("It is well established that the IRC provides the exclusive remedy in tax refund suits and thus preempts state-law claims that seek tax refunds.").

Plaintiffs also argue that "it is clear § 7422 only pertains to suits against the United States." [D.E. 14

at 7]. For this proposition, Plaintiffs rely on subsection (f), which provides that "[a] suit or proceeding referred to in subsection (a) may be maintained only against the United States." 26 U.S.C. § 7422(f). Plaintiffs' reading of this subsection is flawed. This subsection simply means that in a tax refund suit, as contemplated by subsection (a), the party must sue the United States, not a private party or individual, such as Mesa Medical. As is discussed further below, this statute supports a finding that there is no private right of action for a tax refund suit, and that Plaintiffs' claims can only be pursued before the IRS and then the United States. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) ("[The tax refund] scheme provides that a claim for a refund must be filed with the Internal Revenue Service (IRS) before suit [in either the United States district court or in the United States Court of Federal Claims] can be brought."); *Umland*, 542 F.3d at 69 ("[Section 7422] required Umland to seek a refund from the IRS, which would in turn seek to collect the employer FICA tax due from PLANCO.").

The Court finds that Plaintiffs' claims are an attempt to recover wrongfully withheld taxes, making this a tax refund suit. Therefore, Plaintiffs' claims are preempted and this suit was properly removed[3] based on federal question jurisdiction.[4]

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[3] Plaintiffs argue that Defendant's Notice of Removal was untimely filed because Defendant knew from the time of the filing of the initial complaint, June 25, 2013, that the claims arose under FICA. [D.E. 10 at 22]. On August 9, 2013, Hunter Hughes wrote a letter to Plaintiffs' counsel stating "Absent your advising me by August 13 both that we have not accurately

It is well settled that FICA does not create a private right of action. *Umland*, 542 F.3d at 67 ("FICA does not create a private right of action."); *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 726 (11th Cir.2002) ("[W]e hold that no private right of action may be implied under FICA."); *Salazar v. Brown*, 940 F.Supp. 160, 166 (W.D.Mich.1996) ("I conclude that the Sixth Circuit would likewise refuse to imply a cause of action under FICA."). The Court has already found that this is a tax refund suit based upon an alleged overpayment of FICA taxes. Because FICA does not create a private right of action, this suit must be dismissed for failure to state a claim upon which relief can be granted.

Plaintiff asserts three different claims, all of which are based upon the same conduct; namely, an

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identified the factual predicate for the complaint as now pled, and what in fact is your factual predicate if not FICA withholdings, then we will proceed on the basis that at least one of the matters alleged in your complaint . . . is that Mesa improperly caused its employees' wages to have deducted therefrom the employer's share of FICA." [D.E. 1–3 at 3]. Plaintiffs' response to this letter was "We disagree with your characterizations and assumptions contained within the letter." [D.E. 1–4 at 2]. The Court cannot find that Defendant had "solid and unambiguous information that the case was removable" at the time of the filing of the original complaint when Plaintiffs' counsel flatly denied that FICA taxes were involved. *Lindon v. Kakavand*, No. 5:13–cv–26–DCR, 2013 WL 5441981, at *3 (E.D.Ky. Sept. 27, 2013) (quoting *Walker v. Philip Morris USA, Inc.*, 443 Fed.Appx. 946, 950 (6th Cir.2011)). Thus, the Notice of Removal was timely filed.

4 Based upon its finding that federal question jurisdiction exists, the Court will not address Defendant's argument that jurisdiction exists under the Class Action Fairness Act. *See* 28 U.S.C. § 1332(d).

alleged excessive withholding of FICA taxes. The first claim, a violation of KRS 337.385, is based upon an allegation that Defendant paid its employees "an amount less than the wages and overtime compensation to which the employees were entitled." [D.E. 2–3 at 4]. The negligence claim alleges that Defendant "negligently withheld wages from former and current employees and paid to them an amount less than the wages and overtime compensation to which the current and former employees were entitled." [D.E. 2–3 at 4]. Finally, the amended complaint sets forth a claim for conversion based upon Defendant "interfer[ing] with Plaintiff's lawful right to her [wages]." [D.E. 2–4 at 2]. All of the claims arise out of the same conduct which gives rise to the class allegations. Specifically, that the employees were "forced to pay the employer's share of payroll taxes and other taxes and withholdings." [D.E. 1–1 at 5]. Thus, all of the claims are subject to dismissal for failure to state a claim because they all allege that Defendant excessively withheld FICA taxes, which is an action that must be pursued in front of the IRS.

In accordance with Sixth Circuit precedent, Plaintiffs will be given twenty-one days to respond to the Court's finding that Plaintiffs' claims should be dismissed. *Morrison v. Tomano*, 755 F.2d 515, 517 (6th Cir. 1985) ("We therefore conclude that the district court should not have dismissed the case without affording plaintiffs some opportunity to address the perceived shortcomings in the complaint.").

IV. Conclusion

Accordingly, for the foregoing reasons, IT IS ORDERED:

(1) that Plaintiffs' Motion for Remand [D.E. 10] be, and the same hereby is, DENIED;

(2) that Plaintiffs shall have twenty-one (21) days from the date of entry of this Order to SHOW CAUSE why their complaint should not be dismissed for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Signed By:

/s/ Joseph M. Hood
Senior U.S. District Judge

This is the 6th day of December, 2013.

ORDER OF SIXTH COURT DENYING PETITION FOR REHEARING EN BANC (APRIL 27, 2015)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAMMY BERERA, individually and
on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

MESA MEDICAL GROUP, PLLC,

Defendant-Appellee.

No. 14-5054

Before: KEITH, MOORE, and
STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision on the cases. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

BERERA COMPLAINT
(JUNE 25, 2013)

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 9

TAMMY BERERA, Individually, and
on behalf all others similarly situated,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 13-CI-2632

Comes the Plaintiff, Tammy Berera, Individually, and on behalf of all others similarly situated, by counsel, and for her Class Action Complaint (the "Complaint") against the Defendant, Mesa Medical Group, PLLC (hereinafter "MESA"), hereby states the following:

Introduction

1. Plaintiff, Tammy Berera, is and was at all times pertinent to this Complaint, a resident and citizen of Lexington, Fayette County, Kentucky.

2. MESA at all times pertinent to this Complaint is and was a Kentucky limited liability

company with a principal place of business located in Lexington, Fayette County, Kentucky. MESA can be served through its principal registered agent, CSC-Lawyers, Incorporating Service Company, 421 West Main Street, Frankfort, Kentucky 40601.

Class Allegations

3. Tammy Berera hereby brings this class action on behalf of all current and former employees of MESA and any predecessor company of MESA.

4. The Class consists of current and former employees who have been designated as employees but for which the employees have been forced to pay the employer's share of payroll taxes and other taxes and withholdings. The forced payment resulted in the employees receiving less money than they earned and were entitled to as wages.

5. The Class is so numerous that joinder of all members is impractical.

6. There are questions of law or fact common to the Class.

7. The claims or defenses of the representative, Tammy Berera, are typical of the claims or defenses of the Class.

8. Tammy Berera, as a representative party, will fairly and adequately protect the interests of the Class.

9. The prosecution of separate actions by or against individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for any party opposing the Class,

10. Adjudications with respect to the individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests if this matter is not brought as a Class Action.

11. MESA has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate, final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

12. The questions of law or fact common to the members of the Class predominate over any questions affecting only individual members and a Class Action is superior to other available methods for the fair and efficient adjudication of the controversy.

Count I. Violation of KRS 337.385

13. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

14. MESA violated KRS 337.385 by paying to former and current employees an amount less than the wages and overtime compensation to which the employees were entitled under, or by virtue of, KRS Chapter 337, *et seq*. As a direct and proximate cause of this violation, the Class Members are entitled to all amounts wrongfully withheld and for an additional equal amount as liquidated damages, are entitled to costs, penalties, interest, and reasonable attorneys' fees, as set forth in KRS 337.385(1).

Count II. Negligence

15. Plaintiff adopts and incorporates herein by reference each and every preceding paragraph of this Complaint as though set forth fully herein.

16. MESA negligently withheld wages from former and current employees and paid to them an amount less than the wages and overtime compensation to which the current and former employees were entitled. As a direct and proximate result of the negligence of MESA, the Class Members have suffered damages.

17. As a direct and proximate result of MESA's violation of KRS 337.385, the Class is entitled to relief pursuant to KRS 446.070, and as a result of MESA's negligence, the Class is entitled to damages, including, but not limited to,

a. Wages that have been unpaid;

b. Penalties and interest as a result of wages being unpaid;

c. Liquidated damages in an amount up to double the amount the amount that has been wrongfully withheld from each employee;

d. Attorneys' fees;

e. Costs;

f. All actual, incidental, and foreseeable damages;

g. All equitable relief the Court may deem appropriate;

h. Punitive damages as a result of the willful, wanton and grossly negligent conduct of the Defendant, MESA.

WHEREFORE, the Plaintiff, Tammy Berera, Individually, and on behalf of others similarly situated, prays the Court as follows:

1. For a judgment against the Defendant, MESA Medical Group, PLLC, with the Plaintiff reserving the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence;

2. For a trial of this cause by a jury;

3. That Plaintiff be awarded all of the damages enumerated above, including attorneys' fees, costs herein expended, actual, incidental, consequential, compensatory, foreseeable, and any and all other damages and equitable relief that may be appropriate; and

4. Any and all other relief to which this Court may deem Plaintiff to be entitled.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ J. Dale Golden
J. Dale Golden
Justin S. Peterson
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
COUNSEL FOR PLAINTIFF,
TAMMY BERERA

BERERA FIRST AMENDED COMPLAINT (MARCH 12, 2014)

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 9

TAMMY BERERA, Individually, and on behalf all others similarly situated,

Plaintiff,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 13-CI-2632

Comes the Plaintiff, Tammy Berera, Individually, and on behalf of all others similarly situated, by counsel, and for her Amended Complaint against the Defendant, Mesa Medical Group, PLLC, hereby states the following:

1. Plaintiff hereby incorporates by reference all paragraphs, averments, and allegations contained within the Plaintiff's original Complaint.

Count I. Conversion

2. Plaintiff, Tammy Berera, re-avers, re-alleges, and reasserts each and every allegation contained

within the original Complaint as though set forth fully herein.

3. Plaintiff, Tammy Berera, is owed wages in accordance with her employment with the Defendant. Plaintiff held the right to possess and owned the property at the time of the conversion, and requested return of the property.

4. Defendant has interfered with Plaintiff's lawful right to her property and intentionally held dominion or control over her property.

5. This intentional interference has deprived Plaintiff of possessory use of her lawful property and that interference has caused damage to the Plaintiff as more fully set forth herein.

Count II. Punitive Damages

6. Plaintiff, Tammy Berera, repeats, re-alleges, and reasserts each and every allegation contained within the preceding paragraphs as though set forth fully herein

7. The conduct of the Defendant in this action was so reckless, wanting, willful and grossly negligent that Plaintiff is entitled to an award of punitive damages against the Defendant.

WHEREFORE, the Plaintiff, Tammy Berera, Individually, and on behalf of others similarly situated, prays the Court as follows:

1. For a judgment against the Defendant, MESA Medical Group, PLLC, with the Plaintiff reserving the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence;

2. For a trial of this cause by a jury;
3. That she be awarded all of the damages enumerated above, including attorneys' fees, costs herein expended, actual, incidental, consequential, compensatory, foreseeable, and any and all other damages and equitable relief that may be appropriate; and
4. Any for and all other relief to which this Court may deem her to be entitled.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ J. Dale Golden
J. Dale Golden
Justin S. Peterson
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
COUNSEL FOR PLAINTIFF,
TAMMY BERERA

BERERA SECOND AMENDED COMPLAINT (MARCH 12, 2014)

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 9

TAMMY BERERA, Individually, and on behalf all others similarly situated, and KATISHA KABALEN, Individually, and on behalf all others similarly situated,

Plaintiffs,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Action No. 13-CI-2632

Comes the Plaintiff, Tammy Berera, individually and on behalf of all others similarly situated; and an additional class representative, Katisha Kabalen, individually and on behalf of all others similarly situated, and for their Second Amended Complaint against the Defendant, MESA Medical Group, PLLC, hereby state the following:

1. Plaintiffs hereby incorporate by reference all paragraphs, averments, allegations, class allegations, and all prayers for relief contained within the

original Complaint and the Amended Complaint and incorporate each of said paragraphs and prayers for relief as if copied fully herein and further plead as follows:

2. Katisha Kabalen worked for MESA Medical Group, PLLC from May or June 2009 until March or April 2010.

3. During that time period, Katisha Kabalen was to receive compensation for her for the work performed for MESA Medical Group, PLLC.

4. However, the Defendant MESA did not pay Katisha Kabalen all of the wages that each had agreed that would be paid.

Class Allegations

5. All class allegations from the original Complaint and Amended Complaint are hereby incorporated by reference as if copied fully herein. In addition, the class allegations include all former, current, and future employees of the Defendant, MESA Medical Group, PLLC, who have not been paid all of their wages as required by Kentucky law.

Count I

6. Each of the Plaintiffs in their individual capacity and on behalf of others similarly situated that constitute the class, adopt all allegations contained in the original Complaint and Amended Complaint, regarding the violations of KRS 337.385, the allegations of negligence, the allegations of conversion, the allegations of punitive damages, and all requests for damages and prayers for relief.

Damages

7. As a direct and proximate result of MESA's violation of KRS 337.385, the class is entitled to relief pursuant to KRS 446.070, and as a result of MESA's negligence and conversion, the class is entitled to damages, including, but not limited to:

a. Wages that have been unpaid;

b. Penalties and interest as a result of wages being unpaid;

c. Damages pursuant to KRS 337.385, including an amount of double the wages that should have been paid, costs, and attorney's fees;

d. Costs;

e. Liquidated damages up to double the amount that has been wrongfully withheld from each employee;

f. All actual, incidental, foreseeable and consequential damages;

g. Prejudgment interest and post-judgment interest;

h. All equitable relief the Court may deem appropriate;

i. Punitive damages as a result of the willful, wanton and grossly negligent conduct of the Defendant, MESA.

WHEREFORE, the Plaintiffs/Class Representatives, Tammy Berera, Individually, and on behalf of others similarly situated, and Katisha Kabalen, individually, and on behalf of others similarly situated, pray the Court as follows:

1. For a judgment against the Defendant, MESA Medical Group, PLLC, with the Plaintiffs reserving the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence;
2. For class certification, allowing the matter to proceed as a class action;
3. For a trial of this cause by a jury;
4. That Plaintiffs be awarded all of the damages enumerated above, including attorneys' fees, costs herein expended, actual, incidental, consequential, compensatory, foreseeable, and any and all other damages and equitable relief that maybe appropriate; and
5. Any for and all other relief to which this Court may deem them to be entitled.

Respectfully submitted,

GOLDEN & WALTERS, PLLC

/s/ J. Dale Golden
J. Dale Golden
Justin S. Peterson
771 Corporate Drive, Suite 905
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
COUNSEL FOR PLAINTIFFS,
TAMMY BERERA AND
KATISHA KABALEN

AFFIDAVIT OF LAWRENCE P. KRASKA (SEPTEMBER 9, 2013)

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

TAMMY BERERA, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MESA MEDICAL GROUP, PLLC,

Defendant.

Civil Case No. :
Electronically Filed

The Affiant, Lawrence P. Kraska, being of lawful age and duly sworn, deposes and states the following:

1. I am the Chief Executive Officer for the Defendant, Mesa Medical Group, PLLC. ("Mesa"), and my office is located at 1792 Alysheba Way, Suite 150, Lexington, KY 40509.

2. I have been involved on Mesa's behalf with the identification of potential damages for purposes of determining whether the amount in controversy in this putative class action, in the aggregate, exceeds the sum or value of $5,000,000, exclusive of interest and costs. As such, I have knowledge regarding the

facts and status related to the matters described in this Affidavit.

3. I understand that Plaintiffs are seeking as statutory damages twice the aggregated amount of the deducted "employment taxes" that equate to the employer's share of FICA taxes paid with regard to all former or current Mesa employees,

4. To derive the amount in controversy, I first determined that over the past three years Mesa has paid such "employment taxes" with regard to 254 former or current Mesa employees, as detailed on the Spreadsheet attached hereto as Exhibit 1.

5. During that same time period, the total amount of "employment taxes" paid with regard to all former and current Mesa employees equals the sum of Two million eight hundred seventeen thousand six hundred and twenty five dollars ($2,817,625) as further disclosed on Exhibit 1 attached hereto.

6. When that aggregated sum is doubled, the amount equals Five million six hundred thirty five thousand three hundred and fifty dollars ($5,635,350). Accordingly, without considering interest or costs, or the value of Plaintiffs' claimed attorney fees or punitive damages, the amount in controversy in this putative class action still exceeds the sum of $5,000,000 during the time period set forth above.

7. Mesa is a limited liability company organized and in good standing in Kentucky, with its principal place of business in Lexington, Kentucky. (*See* Secretary of State confirmation, attached as Exhibit 2).

8. MESA employs numerous healthcare providers practicing in the states of Ohio, West Virginia and Indiana (in addition to the Commonwealth of Kentucky). Thus, Mesa has more than one employee who is a citizen of a state other than Kentucky.

9. Based on the foregoing, I conclude that the amount in controversy in this putative class action, in the aggregate, exceeds the sum or value of $5,000,000, exclusive of interest and costs, the putative class consists of more than 100 members, and a number of those putative class members have citizenship different from Mesa.

Further, affiant sayeth naught.

/s/ Lawrence P. Kraska
Chief Executive Officer

COMMONWEALTH OF KENTUCKY
COUNTY OF FAYETTE

The foregoing instrument was acknowledged before me this 9th day of September, 2013, by Lawrence P. Kraska.

/s/ Heather Barnett
Notary Public
State at Large, Kentucky
My commission Expires on 11/4/14

EXHIBIT 1

Sum of Amount Number	Paycheck Year			
	2011	2012	2013	Grand Total
Employee001	6,659.22	8,613.91	7,205.22	22,478.35
Employee002			6,606.60	6,606.60
Employee003		126.73		126.73
Employee004			412.12	412.12
Employee005			4,092.02	4,092.02
Employee006	2,900.72	2,955.46	2,363.08	8,219.26
Employee007	2,654.50	8,649.35	7,734.49	19,038.34
Employee008		203.17		203.17
Employee009	7,898.35	7,972.28	4,812.99	20,683.62
Employee010	9,425.83	10,028.42	10,995.29	30,449.54
Employee011	4,237.10	7,907.70	6,835.16	18,979.96
Employee012	2,506.13	7,959.90	2,247.18	12,713.21
Employee013			1,634.56	1,634.56
Employee014	8,405.58	4,544.47		12,950.05
Employee015	4,876.47			4,876.47
Employee016	1,811.21	854.67	394.68	3,060.56
Employee017			2,679.68	2,679.68
Employee018		5,799.42		5,799.42
Employee019		1,386.40	192.31	1,578.71
Employee020			2,085.65	2,085.65
Employee021	9,509.31	6,319.43		15,828.74
Employee022		3,626.20	10,017.98	13,644.18
Employee023	1,825.51	2,057.14		3,882.65
Employee024		2,128.63	2,804.97	4,933.60
Employee025		404.53	5,241.53	5,646.06
Employee026		3,382.04	6,956.61	10,338.65
Employee027	4,275.55	1,277.62		5,553.17
Employee028		1,695.49	5,979.52	7,675.01
Employee029			3,544.50	3,544.50
Employee030	7,850.91	2,282.03	227.75	10,360.69
Employee031	3,732.29	613.25		4,345.54

Employee032		402.36	6,115.79	6,518.15
Employee033		2,967.23		2,967.23
Employee034	299.73	1,877.66	904.78	3,082.17
Employee035		1,414.95		1,414.95
Employee036	1,005.08	1,735.48		2,740.56
Employee037	323.61			323.61
Employee038	1,066.28	379.45		1,445.73
Employee039	1,902.36	8,702.43	7,729.42	18,334.21
Employee040	8,239.05	9,073.94	7,915.23	25,228.22
Employee041		30.84	7,691.05	7,721.89
Employee042			636.99	636.99
Employee043	4,709.18	3,207.19		7,916.37
Employee044	1,459.71	1,136.31		2,596.02
Employee045		763.12	2,622.40	3,385.52
Employee046	6,047.54	4,545.94	2,604.17	13,197.65
Employee047	976.06			976.06
Employee048	3,331.16			3,331.16
Employee049		1,484.98	1,162.42	2,647.40
Employee050		1,603.29	6,941.86	8,545.15
Employee051			2,663.95	2,663.95
Employee052			437.66	437.66
Employee053	8,521.28	9,412.84	9,049.93	26,984.05
Employee054		1,488.08	1,193.67	2,681.75
Employee055			4,222.17	4,222.17
Employee056		6,618.57	5,818.98	12,437.55
Employee057		1,820.00	2,095.07	3,915.07
Employee058		190.59	4,395.28	4,585.87
Employee059		5,866.40		5,866.40
Employee060	1,719.27	7,671.36	9,908.58	19,299.21
Employee061		8,547.87		8,547.87
Employee062			6,579.17	6,579.17
Employee063			7,542.81	7,542.81
Employee064		4,776.17	4,952.31	9,728.48
Employee065			1,984.24	1,984.24
Employee066		4,072.27	4,872.27	8,944.54
Employee067	7,755.28	8,960.55	7,870.00	24,585.83

Employee068	9,380.25	9,955.24	9,704.73	29,040.22
Employee069	288.16	4,185.68	4,272.95	8,746.79
Employee070	1,558.13	1,009.24		2,567.37
Employee071			116.43	116.43
Employee072			2,070.78	2,070.78
Employee073		679.17		679.17
Employee074		542.05	1,117.93	1,659.98
Employee075			397.83	397.83
Employee076			6,943.24	6,943.24
Employee077		3,761.67	3,977.53	7,739.20
Employee078	18,689.93	11,199.45	11,073.78	40,963.16
Employee079		5,308.75	5,463.58	10,772.33
Employee080	5,685.17			5,685.17
Employee081		2,034.63	6,442.53	8,477.16
Employee082	9,683.59	8,884.77	1,355.29	19,923.65
Employee083		970.41	7,500.27	8,470.68
Employee084		1,261.48	795.34	2,056.82
Employee085		8,192.24	4,975.24	13,167.48
Employee086			66.42	66.42
Employee087	9,083.93	9,731.28	7,032.72	25,847.93
Employee088	13,645.59	14,767.87	10,998.72	39,412.18
Employee089	24,589.21	10,791.94	10,568.12	45,949.27
Employee090			1,137.99	1,137.99
Employee091	4,767.45			4,767.45
Employee092		10,153.73	10,116.70	20,270.43
Employee093		7,771.15	5,861.82	13,632.97
Employee094	669.07	635.39		1,304.46
Employee095	11,242.67	10,220.49	4,707.35	26,170.51
Employee096	6,193.04	11,299.86	9,841.04	27,333.94
Employee097	10,149.57	10,259.92	3,781.69	24,191.18
Employee098			4,014.86	4,014.86
Employee099		9,421.83	9,068.38	18,490.21
Employee100	3,633.22			3,633.22
Employee101	5,193.39	8,483.38	5,519.59	19,196.36
Employee102	10,258.01	11,315.72	10,340.92	31,914.65
Employee103		3,920.87	854.53	4,775.40

Employee104	1,333.17			1,333.17
Employee105	4,549.56	8,520.90	6,073.76	19,144.22
Employee106	10,388.33	11,919.25	2,697.96	25,005.54
Employee107	2,467.26	4,340.42	7,078.10	13,885.78
Employee108	9,788.31	9,634.20	9,816.50	29,239.01
Employee109	1,436.47			1,436.47
Employee110	2,583.43			2,583.43
Employee111			2,004.11	2,004.11
Employee112			5,022.95	5,022.95
Employee113	16,511.17	10,092.89	10,368.13	36,972.19
Employee114	1,450.21			1,450.21
Employee115	1,351.49	680.65		2,032.14
Employee116	8,080.22	4,057.12		12,137.34
Employee117			2,465.77	2,465.77
Employee118	11,074.09	9,229.61		20,303.70
Employee119			3,028.73	3,028.73
Employee120	8,706.66	8,718.56	10,012.01	27,437.23
Employee121	2,175.77	1,858.13	1,330.05	5,363.95
Employee122			1,493.90	1,493.90
Employee123	3,512.34	11.3		3,523.64
Employee124	4,208.42	421.36	0.23	4,630.01
Employee125	1,835.21	8,491.24	2,417.61	12,744.06
Employee126			1,594.42	1,594.42
Employee127	3,010.01	953.68	234.55	4,198.24
Employee128			2,289.61	2,289.61
Employee129		5,950.13	2,354.74	8,304.87
Employee130			4,438.42	4,438.42
Employee131		4,084.60	6,490.64	10,575.24
Employee132	13,249.86	12,077.58	10,560.30	35,887.74
Employee133	12,142.88	11,772.54	10,296.59	34,212.01
Employee134	5,356.97	3,034.44	2,379.50	10,770.91
Employee135	5,017.59			5,017.59
Employee136	9,100.87	9,280.29	8,574.43	26,955.59
Employee137	9,255.27	9,391.96	8,070.96	26,718.19
Employee138	1,127.99			1,127.99
Employee139	8,050.38	8,640.08	6,695.66	23,386.12

Employee140			6,014.11	6,014.11
Employee141	8,586.96	8,828.47	7,445.39	24,860.82
Employee142	9,999.12	10,209.99	1,701.35	21,910.46
Employee143	4,282.73	8,959.99	2,115.22	15,357.94
Employee144			1,004.36	1,004.36
Employee145	8,180.71	8,256.32	3,712.96	20,149.99
Employee146	7,358.11	8,372.28	6,042.47	21,772.86
Employee147			295.75	295.75
Employee148			1,706.40	1,706.40
Employee149	8,541.86			8,541.86
Employee150		802.03	5,522.92	6,324.95
Employee151			3,742.35	3,742.35
Employee152	2,264.07	8,590.59	6,422.02	17,276.68
Employee153	11,837.03	9,619.85	0	21,456.88
Employee154	11,683.91	11,324.54	10,627.53	33,635.98
Employee155	7,958.47	8,568.95	6,585.01	23,112.43
Employee156		2,609.45	3,495.87	6,105.32
Employee157	10,585.12	10,442.65	9,840.21	30,867.98
Employee158		17.59	2,032.79	2,050.38
Employee159	8,450.01	9,763.92	9,248.69	27,462.62
Employee160		1,446.85		1,446.85
Employee161	23,573.64	10,790.82	10,402.07	44,766.53
Employee162	6,993.75	7,014.15	2,335.36	16,343.26
Employee163		1,637.42	5,066.10	6,703.52
Employee164	4,320.49			4,320.49
Employee165	7,983.46	8,665.21	5,621.80	22,270.47
Employee166	2,648.96			2,648.96
Employee167	3,142.94	8,896.76	7,101.62	19,141.32
Employee168	777.09	10,522.65	9,634.91	20,934.65
Employee169	8,571.57	7,073.35	4,654.99	20,299.91
Employee170			76.29	76.29
Employee171			85.44	85.44
Employee172			1,990.11	1,990.11
Employee173	1,271.40	197.48		1,468.88
Employee174			2,615.64	2,615.64
Employee175	7,848.33	3,058.03		10,906.36

Employee176	3,906.23	7,500.71	1,448.71	12,855.65
Employee177	5,048.61	4,545.70	4,712.57	14,306.88
Employee178	2,903.30			2,903.30
Employee179	4,206.86			4,206.86
Employee180	8,143.54	1,257.71		9,401.25
Employee181	10,784.12	10,637.99	10,182.57	31,604.68
Employee182	4,445.52	6,542.48	1,032.42	12,020.42
Employee183	9,668.22	10,099.56	9,591.55	29,359.33
Employee184	22,917.10	10,817.54	11,769.46	45,504.10
Employee185	8,725.13	3,419.59		12,144.72
Employee186	10,597.99	6,022.49		16,620.48
Employee187	8,899.04	9,309.86	7,909.17	26,118.07
Employee188		212.51	5,985.08	6,197.59
Employee189		73.24		73.24
Employee190		5,878.65		5,878.65
Employee191			873.3	873.3
Employee192	8,522.45	8,679.41	5,829.04	23,030.90
Employee193		8.53		8.53
Employee194	10,997.45	10,650.11	9,836.11	31,483.67
Employee195	2,197.39	9,415.85	6,883.38	18,496.62
Employee196	9,839.24	11,975.02	10,731.48	32,545.74
Employee197		4,889.51	5,413.35	10,302.86
Employee198	5,120.70			5,120.70
Employee199		365.03		365.03
Employee200	2,724.36	4,481.44	2,703.65	9,909.45
Employee201			207.51	207.51
Employee202	427.73	2,433.51	1,240.60	4,101.84
Employee203		1,421.27		1,421.27
Employee204	4,820.02	8,573.87	5,807.71	19,201.60
Employee205	8,947.86			8,947.86
Employee206	1,775.23	1,139.19		2,914.42
Employee207			169.97	169.97
Employee208	3,583.71	886.25	71.49	4,541.45
Employee209		1,300.79	48.29	1,349.08
Employee210		8,443.12	10,799.02	19,242.14
Employee211	2,512.78			2,512.78

Employee212	9,385.02	9,409.17	8,992.82	27,787.01
Employee213	18,468.33	10,323.13	10,515.73	39,307.19
Employee214	3,751.63	474.1		4,225.73
Employee215	3,704.82	8,645.02	6,603.28	18,953.12
Employee216	9,564.96	9,532.97	9,114.41	28,212.34
Employee217	7,094.55	3,760.72	704.75	11,560.02
Employee218	2,211.29	2,973.16	1,212.04	6,396.49
Employee219	8,720.26	7,870.25	6,789.88	23,380.39
Employee220			1,951.51	1,951.51
Employee221		5,579.04	4,237.36	9,816.40
Employee222	9,949.26	9,931.96	9,464.25	29,345.47
Employee223	7,975.21	1,152.93		9,128.14
Employee224			5,612.43	5,612.43
Employee225			1,643.62	1,643.62
Employee226			1,718.33	1,718.33
Employee227	3,690.26	4,011.40	2,373.77	10,075.43
Employee228	4,337.65	8,517.29	6,250.46	19,105.40
Employee229			3,055.70	3,055.70
Employee230		2,839.16	2,988.56	5,827.72
Employee231	1,459.71	8,620.00	1,669.68	11,749.39
Employee232	1,582.66	1,306.87		2,889.53
Employee233	6,675.26	3,158.09	21.09	9,854.44
Employee234	1,786.25	5,665.59	4,800.68	12,252.52
Employee235		3,770.80	3,023.01	6,793.81
Employee236		2,072.06	5,648.19	7,720.25
Employee237			3,162.35	3,162.35
Employee238			4,037.74	4,037.74
Employee239	1,883.95	3,580.54	170.67	5,635.16
Employee240		1,818.92	1,921.99	3,740.91
Employee241	5,725.64	2,008.18	21.09	7,754.91
Employee242	2,270.96			2,270.96
Employee243	1,401.21	5,189.68	430.94	7,021.83
Employee244	1,430.08	677.03		2,107.11
Employee245			6,510.39	6,510.39
Employee246	6,594.20			6,594.20
Employee247	2,180.48	8,720.37	7,204.88	18,105.73

Employee248			10,026.55	10,026.55
Employee249	10,144.11	10,833.90	10,401.06	31,379.07
Employee250	8,026.26	8,763.58	6,041.63	22,831.47
Employee251		1,806.03	8,515.96	10,321.99
Employee252	3,897.80	5,340.47	3,391.58	12,629.85
Employee253		4,310.32	4,997.25	9,307.57
Employee254			11,475.79	11,475.79
Grand Total	**9,00,884.70**	**9,88,770.25**	**9,27,969.60**	**28,17,624.55**

HUGHES LETTER
(AUGUST 9, 2013)

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VIA EMAIL

J. Dale Golden, Esq.
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771 Corporate Drive, Suite 905
Lexington, KY 40503

Re: *Tammy Berera, et al, v. Mesa Medical Group, PLLC*

Dear Dale:

Following up on our conversation from yesterday, I have been in touch with Mesa's payroll personnel as well as both lawyers and accountants who are familiar with Mesa's personnel operations. I told them that I had had a discussion with you yesterday in which I stated that we were unsure of what Mesa conduct was being challenged in Ms. Berera's complaint and asked you to identify its factual predicate. I further told them that you were unwilling to share that information with me, but went on to say that you did, however, make it clear that your allegations were not based on pension or State of Kentucky payroll withholding issues. In addition, given that you stated that Mesa might be able to identify the factual basis of the claim by reviewing company records of employee complaints to the IRS, I told them (and you in our conversation) that this led me to conclude that the conduct at issue related to federal withholding matters.

Thus, as promised, and as noted above, I have gone back to Mesa and asked the involved individuals to focus their attention on Mesa's practices as they relate to its federal income tax withholding, as well as its FICA, FUTA and SUTA withholding practices, and to advise me which one or more of those items appear to constitute the factual bases underlying Ms. Berera's complaint. In communicating with these individuals today, and while there is a divergence of views, I am told that their best estimate is that the claim, albeit mistakenly, is based on FICA withholdings that Mesa makes to the IRS relative to employee wages.

To help you better understand the situation (assuming we have now correctly determined the factual basis of the complaint) and what is creating your client's confusion, I will here briefly explain in very general terms Mesa's payroll procedures. As we discussed yesterday, several years ago Mesa converted its workforce from an independent contractor status to employee status. In doing so, it adjusted its wage structure to address the fact that—unlike the situation where an individual is an independent contractor, and is responsible for directly paying Social Security tax on all remuneration received as reported on IRS form 1099 in the form of Self-Employment Tax (at the rate of 15.3% on annually increasing amounts)—as an employee, the worker is responsible for 7.65% of wages withheld as a FICA contribution, and the employer is responsible for a like amount 7.65% (together totaling 15.3% of wages). To address this issue caused by the employee status conversion, Mesa calculated the wages of its employee—as opposed to

gross compensation—by reducing from the gross amounts previously paid to them as an independent contractor an amount equal to the employer's share of the FICA and Medicare Tax. Mesa paid the employer's share of FICA and Medicare Tax directly to the IRS. Documentation showing the aforementioned adjustment is provided to employees monthly, and Mesa's withholdings are reflected on the employee's pay stub where it shows various customary deductions from the employee's wages that include withholding only for the employee's share of FICA. I note though that employees are informed in writing that Mesa pays the employer's share of FICA relative to their employment (not the employee), and that may be the source of the confusion. But, as noted, both the information expressly set forth on the employee's pay stub and on the employee's annual W-2 show the total wages and employee FICA (and other) withholding taken in respect thereto. No employer FICA is withheld from any Mesa employee wages.

That being said, perhaps we have still not correctly identified the factual basis for Ms, Berera's complaint. If that is the case, please advise me immediately (I understand you will be going on vacation in a few days) so that we can promptly look into the matters that in fact give rise to this litigation. Absent your advising me by August 13 both that we have not accurately identified the factual predicate for the complaint as now pled, and what in fact is your factual predicate if not FICA withholdings, then we will proceed on the basis that at least one of the matters alleged in your complaint (which we disagree with) is that Mesa improperly

caused its employees' wages to have deducted therefrom the employer's share of FICA.

Very truly yours,

/s/ Hunter R. Hughes