

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR

Defendants.

**PLAINTIFFS' MOTION TO
REMAND PURSUANT TO 28
U.S.C. § 1447(c)**

Case No.: 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

MOTION BY:

Plaintiffs, Anita Yu, John Boyer and Mary Raab

RELIEF REQUESTED:

An order remanding this action to the Circuit Court for the County of Washtenaw, State of Michigan

SUPPORTING PAPERS:

Sponsoring Declaration of M. Michael Koroi, Esq. with exhibit and Memorandum of Law

BASIS FOR RELIEF REQUESTED:

The Plaintiffs respectfully submit that this Court lacks subject matter jurisdiction until such time as the Plaintiffs' claims have been determined in state court. Because the State of Michigan affords the Plaintiffs an adequate procedure to adjudicate their claims of inverse condemnation, the case is not ripe for review in the federal courts.

PLACE:

United States District Court
Eastern District of Michigan
Theodore Levin U.S. Courthouse
231 W. Lafayette Blvd.
Detroit, Michigan 48226

TIME:

To be set by the Court

Dated: April 3, 2014

By: /s/ M. Michael Koroi

M. MICHAEL KOROI (P44470)
150 N. Main St.
Plymouth, MI 48170
734-459-4040
mmkoroi@sbcglobal.net

WOODS OVIATT GILMAN LLP
Donald W. O'Brien, Esq.
700 Crossroads Building
2 State Street
Rochester, New York 14614
585.987.2800
dobrien@woodsoviatt.com

IRVIN A. MERMELSTEIN, ESQ
2099 Ascot Street
Ann Arbor, Michigan 48103
734-717-0383
nrglaw@gmail.com

Attorneys for Plaintiffs

TO:

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
301 E. Huron Street, P.O. Box 8647
Ann Arbor, Michigan 48107
spostema@a2gov.org
aelia@a2gov.org

Attorneys for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR

Defendants.

CERTIFICATE OF SERVICE

Case No.: 2:14-cv-11129-AC-MKM

Hon. Avern Cohn

Magistrate Judge Mona K. Majzoub

I, Salem F. Samaan hereby certify that I have on this 3rd day of April, 2014, electronically filed Plaintiffs' Motion to Remand Pursuant to 28 U.S.C. §1447(c), Memorandum of Law in Support of the Plaintiffs' Motion to Remand, the Declaration of M. Michael Koroi and the instant Certificate of Service by utilizing the CM/ECF system established by the court, which sent notification of the filing to:

OFFICE OF THE CITY ATTORNEY
Stephen K. Postema (P38871)
Abigail Elias (P34941)
301 E. Huron Street, P.O. Box 8647
Ann Arbor, Michigan 48107
spostema@a2gov.org
aelia@a2gov.org

Attorneys for Defendant

By: /s/Salem F. Samaan
SALEM F. SAMAAAN (P31189)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

vs.

Case No.: 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

CITY OF ANN ARBOR

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF THE PLAINTIFFS' MOTION TO
REMAND**

DATED: April 3, 2014
Plymouth, Michigan

M. MICHAEL KOROI
150 N. Main St.
Plymouth, MI 48170
734-459-4040
mmkoroi@sbcglobal.net

WOODS OVIATT GILMAN LLP
Donald W. O'Brien, Jr., Esq.
Attorneys for Plaintiffs
700 Crossroads Building
2 State Street
Rochester, New York 14614
585.987.2800
dobrien@woodsoviatt.com

IRVIN A. MERMELSTEIN, ESQ.
2099 Ascot Street
Ann Arbor, Michigan 48103
734-717-0383
nrglaw@gmail.com

TABLE OF CONTENTS

	<i>Page</i>
CONCISE STATEMENT OF THE ISSUES PRESENTED	i
CONTROLLING OR MOST APPROPRIATE AUTHORITIES	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE.....	1
ARGUMENT.....	2
POINT I: THE STANDARDS ON A MOTION TO REMAND	2
POINT II: THE CLAIMS FOR RELIEF IN THE PLAINTIFFS' COMPLAINT ALLEGE INVERSE CONDEMNATION BY THE CITY.....	3
POINT III: THE PLAINTIFFS' INVERSE CONDEMNATION CLAIMS ARE NOT RIPE FOR FEDERAL REVIEW.....	4
POINT IV: COSTS AND EXPENSES.....	8
CONCLUSION	9

CONCISE STATEMENT OF THE ISSUES PRESENTED

This motion to remand is brought pursuant to 28 U.S.C. §1447(c) and seeks the remand of this action in its entirety to the Circuit Court for the County of Washtenaw in the State of Michigan on the grounds that the claims of the plaintiffs, Anita Yu, John Boyer and Mary Raab (hereinafter “Plaintiffs”) and any defenses of the defendant, City of Ann Arbor (“the City”) are not ripe for review in federal court. Ripeness is a threshold jurisdictional issue of the Court’s subject matter jurisdiction. According to 28 U.S.C. §1447(c), “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded” (emphasis added).

The State of Michigan provides, in the form of inverse condemnation actions, an adequate procedure for seeking just compensation for the Plaintiffs’ claims. Under the United States Supreme Court’s opinion in *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), this case is not ripe for federal review until there is a final determination in state court. The Supreme Court’s holding in *Williamson County Reg’l Planning Comm’n* has been followed by both the United States Circuit Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan. It is respectfully submitted that, in addition to remand, the Plaintiffs should also be awarded their attorneys’ fees and costs associated with the City’s improvident removal.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Cases

Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, et al., 729 F. 2d 402 (6th Cir. 1984)7

Her Majesty the Queen in Right of the Province of Ontario v. The City of Detroit, 874 F. 2d 332 (6th Cir. 1989).....2

Macene v. County of Wayne, 951 F. 2d 700 (6th Cir. 1991)8

Merkur Steel Supply, Inc. v. City of Detroit, 261 Mich. App. 116 (Mich. Ct. App. 2004).....8

Oakland 40, LLC v. City of South Lyon, No. 10-14456(JCO), 2011 U.S. Dist. LEXIS 53158 (E.D. Mich., May 18, 2011).....9

River City Capital, L.P. v. Bd. of County Comm'ers, Clermont County, Ohio, 491 F. 3d 301 (6th Cir. 2007).....9

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 1055.ct.3108, 87 L. Ed. 2d 126 (1985)..... passim

Statutes

28 U.S.C. §1447(c)1, 3, 7, 8

Other Authorities

Article 10 §2 of the Michigan Constitution4, 7

MCL §213.234

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Pfizer, Inc.</i> , 861 F. Supp. 2d 866, 873 (W.D. Mich. 2012)	12
<i>Armstrong v. Armstrong</i> , 508 F. 2d 348, 350 (1 st Cir. 1974)	4
<i>Balzer v. Bay Winds Fed. Credit Union</i> , 622 F. Supp 2d 628 (W.D. Mich. 2009)	4
<i>Digital 1 Media, Inc. v. Van Almen</i> , No. 8:09-cv-1097-33(TBM), 2010 U.S. Dist. LEXIS 83536 at *11 (M.D. Fl., July 27, 2010)	11
<i>Eaton v. Charter Twp. of Emmett</i> , No. 06-1542, 2008 U.S. App. LEXIS 6603 (6 th Cir., March 21, 2008)	8
<i>Fox & Horan v. Beiny</i> , No. 92-cv-2067(LJF), 1992 U.S. Dist. LEXIS 9621 at *6 (S.D.N.Y., June 29, 1992)	6
<i>Glendora v. Pinkerton Sec. and Detective Serv.</i> , 25 F. Supp. 2d 447, 450 (S.D.N.Y. 1998)	5
<i>Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, et al.</i> , 729 F. 2d 402, 406 (6 th Cir. 1984)	7
<i>Her Majesty the Queen in Right of the Province of Ontario v. The City of Detroit</i> , 874 F. 2d 332, 339 (6 th Cir. 1989)	2
<i>Lewis v. Exxon Mobil Corp.</i> , 348 F. Supp. 2d 932, 933 (W.D. Tenn. 2004)	3
<i>Macene v. County of Wayne</i> , 951 F. 2d 700, 704 (6 th Cir. 1991)	8
<i>Martin v. Franklin Capital Corp.</i> , 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 547, (2005)	11
<i>Merkur Steel Supply, Inc. v. City of Detroit</i> , 261 Mich. App. 116 (Mich. Ct. App. 2004)	8
<i>Miranti v. Lee</i> , 3 F. 3d 925, 928 (5 th Cir. 1993)	11
<i>Oakland 40, LLC v. City of South Lyon</i> , No. 10-14456(JCO), 2011 U.S. Dist. LEXIS 53158 (E.D. Mich., May 18, 2011)	9
<i>Pullman v. Jenkins</i> , 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334, (1939)	3
<i>River City Capital, L.P. v. Bd. of County Comm'ers, Clermont County, Ohio</i> , 491 F. 3d 301, 307 (6 th Cir. 2007)	9
<i>Rosecrans v. William S. Lozier, Inc.</i> , 142 F. 2d 118, 124 (8 th Cir. 1944)	3
<i>Rosenberg v. GWV Travel, Inc.</i> , 480 F. Supp. 95, 96 (S.D.N.Y. 1979)	5
<i>Southern Pacific Trans. Co. v. City of Los Angeles</i> , 922 F. 2d 498, 508 (9 th Cir. 1990)	12
<i>State of Tennessee v. C.C. Manifest of Tennessee, Inc.</i> , 362 F. Supp. 759, 763 (E.D. Tenn. 1973)	3
<i>The Bar Ass'n of Baltimore City v. Posner</i> , 391 F. Supp. 76, 79 (D. Md. 1975)	5
<i>Union Planters Nat'l Bank v. CBS, Inc.</i> , 557 F. 2d 84, 89 (6 th Cir. 1977)	3
<i>Warthman v. Genoa Twp. Bd. of Trs.</i> , 549 F. 3d 1055, 1059 (6 th Cir. 2008)	11
<i>Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City</i> , 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)	passim
<i>Willman v. Riceland Foods, Inc.</i> , 630 F. Supp. 2d 999, 1000-1001 (E.D.Ark. 2007)	3
<i>Wilson v. Republic Iron & Steel Co.</i> , 257 U.S. 92, 97-98, 42 S. Ct. 35, 66 L. Ed. 144 (1921)	2

Statutes

28 U.S.C. §1331	passim
28 U.S.C. §1367(a)	2, 5
28 U.S.C. §1441(a)	4
28 U.S.C. §1447(c)	1, 3, 7, 8
42 U.S.C. §1983	3, 5, 6

Other Authorities

Article 10 §2 of the Michigan Constitution	4, 7
Fifth Amendment to the United States Constitution	4, 7
MCL §213.23	4

PRELIMINARY STATEMENT

This motion to remand is brought pursuant to 28 U.S.C. §1447(c) and seeks the remand of this action in its entirety to the Circuit Court for the County of Washtenaw in the State of Michigan on the grounds that the claims of the plaintiffs, Anita Yu, John Boyer and Mary Raab (hereinafter “Plaintiffs”) and any defenses of the defendant, City of Ann Arbor (“the City”) are not ripe for review in federal court. The causes of action set forth in Plaintiffs’ complaint are based on the inverse condemnation of the Plaintiffs’ property by the City and, under well-established law from the United States Supreme Court, the Sixth Circuit Court of Appeals and the United States District Court for the Eastern District of Michigan, this Court lacks subject matter jurisdiction so long as the Plaintiffs’ claims remain adjudicated in state court. Because it is incontrovertible that the State of Michigan provides an adequate procedure for inverse condemnation claims, the Plaintiffs’ federal takings and due process claims are not ripe for review under the test set forth in *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) and its progeny. Accordingly, because this Court lacks subject matter jurisdiction, the Plaintiffs’ motion to remand this action to the Circuit Court for the County of Washtenaw should be granted and the Plaintiffs should be awarded their costs and attorneys’ fees.

STATEMENT OF THE CASE

On February 24, 2014, the Plaintiffs commenced their action against the City in the 22nd Circuit Court, County of Washtenaw, Michigan under the caption: “Anita Yu, John Boyer and Mary Raab v. City of Ann Arbor” with Case Number 14-181-CC, and assigned to Circuit Court Judge Donald E. Shelton. The Summons and Complaint was served upon the City on March 7, 2014.

On March 17, 2014, the City removed the action to the United States District for the Eastern District of Michigan (Southern Division) by filing a Notice of Removal and Supporting Petition which asserted that this Court has jurisdiction over the action based on federal question jurisdiction under 28 U.S.C. §1331. Supplemental jurisdiction over the state court claims was asserted pursuant to 28 U.S.C. §1367(a).

On March 24, 2014, the City filed a motion to dismiss for failure to state claims upon which relief may be granted and for lack of subject matter jurisdiction (Docket No. 2). The City's arguments in support of its motion to dismiss will not be addressed in the Plaintiffs' papers filed in support of its motion to remand, except where otherwise noted.

ARGUMENT

POINT I

THE STANDARDS ON A MOTION TO REMAND

“The party seeking a removal bears the burden of establishing its right thereto.” *Her Majesty the Queen in Right of the Province of Ontario v. The City of Detroit*, 874 F. 2d 332, 339 (6th Cir. 1989), *citing Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98, 42 S. Ct. 35, 66 L. Ed. 144 (1921); *see also, Lewis v. Exxon Mobil Corp.*, 348 F. Supp. 2d 932, 933 (W.D. Tenn. 2004), *citing Pullman v. Jenkins*, 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334, (1939). Any doubt as to whether removal is proper should be resolved in favor of remand to state court. *Union Planters Nat'l Bank v. CBS, Inc.*, 557 F. 2d 84, 89 (6th Cir. 1977).

The merits of a plaintiff's claim should not be determined on a motion to remand. *See, e.g. Rosecrans v. William S. Lozier, Inc.*, 142 F. 2d 118, 124 (8th Cir. 1944) [“The merits of plaintiff's claim cannot, of course, be determined on a motion to remand”]; *Willman v. Riceland Foods, Inc.*, 630 F. Supp. 2d 999, 1000-1001 (E.D.Ark. 2007) [“...there is a strong presumption in favor of remand. Because of this presumption, the merits of a plaintiff's claim cannot be determined on a motion to remand, and a district court has no responsibility to settle an

ambiguous question of state law.”]; *State of Tennessee v. C.C. Manifest of Tennessee, Inc.*, 362 F. Supp. 759, 763 (E.D. Tenn. 1973) [“...the Court does not in any way pass on the federal constitutional claims sought to be asserted by the defendant. Rather, those claims are reserved for such consideration as may be proper upon remand.”]. Thus, the only issue properly before the Court at this juncture is whether or not it possesses subject matter jurisdiction.

Remand, rather than dismissal, is the appropriate remedy where the federal court lacks subject matter jurisdiction. According to 28 U.S.C. §1447(c), “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded” (emphasis added). Where a case has been removed from state court, remand, rather than dismissal, is warranted. *See, e.g. Armstrong v. Armstrong*, 508 F. 2d 348, 350 (1st Cir. 1974) [“[w]hile we agree with the district court’s conclusion that the action may not be entertained in a federal forum, this should have dictated a remand to the state court rather than a dismissal]. *Balzer v. Bay Winds Fed. Credit Union*, 622 F. Supp 2d 628 (W.D. Mich. 2009) [where a district court lacked subject matter jurisdiction over removed action, the case was remanded to the Circuit Court for the State of Michigan, rather than dismissed].

POINT II

THE CLAIMS FOR RELIEF IN THE PLAINTIFFS’ COMPLAINT ALLEGE INVERSE CONDEMNATION BY THE CITY

The Preliminary Statement in the Plaintiffs’ Complaint reads as follows:

- 1) This is an action commenced against the City of Ann Arbor (“the City”) pursuant to MCL §21323, Article 10 §2 of the Michigan Constitution, 42 U.S.C. §1983 and the Fifth Amendment to the United States Constitution. The Plaintiffs herein seek compensatory damages, injunctive relief and a declaration that Ann Arbor Ordinance 2:51.1 (“the Ordinance”), enacted to implement the City’s mandatory Footing Drain Disconnection Program (FDDP) is unconstitutional and has resulted in a taking of the Plaintiffs’ private property for public use without due process of law or just compensation.

(A copy of the Plaintiffs' Complaint is attached to the accompanying Declaration of M. Michael Koroï, Esq. as **Exhibit "1"**). The Complaint sets forth in detail the factual background supporting the Plaintiffs' claims and, in the paragraph immediately preceding the enumeration of the Plaintiffs' causes of action, indicates that those claims are predicated upon allegations of inverse condemnation by the City:

48) Due to the City's enactment, implementation and enforcement of the Ordinance, the Plaintiffs' properties have been unreasonably burdened, economically impaired, physically occupied and/or invaded or otherwise damaged, resulting in the *de facto* or **inverse condemnation** of the Plaintiffs' properties.¹

(See **Exhibit "1"**) (emphasis added). For the purposes of a motion to remand, the Court must assume the truth of all well-pleaded allegations. See, e.g. *The Bar Ass'n of Baltimore City v. Posner*, 391 F. Supp. 76, 79 (D. Md. 1975). "The issue of whether an action should be remanded to the State Court must be resolved by reference to the Complaint at the time the Petition for Removal was filed." *Rosenberg v. GWV Travel, Inc.*, 480 F. Supp. 95, 96 (S.D.N.Y. 1979); See also *Glendora v. Pinkerton Sec. and Detective Serv.*, 25 F. Supp. 2d 447, 450 (S.D.N.Y. 1998); *Fox & Horan v. Beiny*, No. 92-cv-2067(LJF), 1992 U.S. Dist. LEXIS 9621 at *6 (S.D.N.Y., June 29, 1992). The gravamen of the Plaintiffs' complaint is that they have been deprived of just compensation to which they are entitled as a result of the inverse condemnation by the City of their property.

POINT III

THE PLAINTIFFS' INVERSE CONDEMNATION CLAIMS ARE NOT RIPE FOR FEDERAL REVIEW

The City has removed this case to federal court, pursuant to 28 U.S.C. §1441(a) on the basis that this Court has original jurisdiction of all civil actions arising under the Constitution,

¹ The City's pending motion to dismiss is based almost exclusively on the statute of limitations and the Plaintiffs' alleged failure to exhaust state administrative remedies, issues which are more properly evaluated by Michigan state courts. The Michigan Supreme Court has considered and addressed the appropriate statute of limitations in inverse condemnation actions. If the motion to remand is granted, the Court need not reach these substantive issues.

laws or treaties of the United States, as set forth in 28 U.S.C. §1331. Because the Plaintiffs have included claims under both the Fifth Amendment to the United States Constitution and 42 U.S.C. §1983, the City argues that removal is proper and that the Court can exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367(a). While original jurisdiction under 28 U.S.C. §1331 may be necessary for removal, the City's arguments fail to take account of additional requirements that the courts have superimposed on this bare statutory predicate in order to limit federal court jurisdiction.

One of those limitations is the requirement for ripeness, which is raised squarely by the City's attempt to remove from state court claims like those advanced by the Plaintiffs in their complaint. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the United States Supreme Court held that, so long as a state court provides an adequate procedure for seeking just compensation for a taking, the case is not ripe for federal review. 473 U.S. at 195. In *Williamson*, the plaintiff, Hamilton Bank of Johnson City, sued the defendant planning commission and its staff in the United States District Court for the Middle District of Tennessee, alleging that the application of various zoning laws and regulations to its property amounted to a "taking" of that property without just compensation. Following a trial, the jury awarded the plaintiff \$350,000 as compensation and, following a grant of judgment notwithstanding the verdict in favor of the defendants, the United States Court of Appeals for the Sixth Circuit reversed and reinstated the verdict. The Sixth Circuit concluded that the application of the zoning ordinance and associated regulations constituted a taking under the facts of that case. *Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, et al.*, 729 F. 2d 402, 406 (6th Cir. 1984). The Supreme Court reversed and remanded, ruling that, even if the application of the disputed regulations effected a taking, the case was brought in federal court prematurely. As the Court stated: "if a State provides an adequate procedure for seeking just compensation, the property

owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation.” 473 U.S. at 195.

The teachings of *Williamson* govern this case and require that the action be remanded to Michigan Circuit Court for adjudication. The Plaintiffs in this action recognized that, even though the federal courts have original jurisdiction over claims involving a federal question, including their Fifth Amendment and 42 U.S.C. §1983 claims, they nevertheless were obligated to commence this action in Michigan State Court because their federal claims were not yet ripe. In the case at bar, the City appears aware of the ripeness doctrine but unaware of its particular application to cases of inverse condemnation, including the Plaintiffs’ case.²

There is no question but that the State of Michigan provides an adequate just compensation procedure. “In Michigan, the doctrine of inverse condemnation is long recognized and constitutionally established.” *Macene v. County of Wayne*, 951 F. 2d 700, 704 (6th Cir. 1991). “The Michigan Constitution provides an inverse condemnation remedy for property owners whose property is taken for public use.” *Eaton v. Charter Twp. of Emmett*, No. 06-1542, 2008 U.S. App. LEXIS 6603 (6th Cir., March 21, 2008), *citing Mich. Const. Article 10, §2*. By filing an action for inverse condemnation, property owners may seek compensation for a taking. *Merkur Steel Supply, Inc. v. City of Detroit*, 261 Mich. App. 116 (Mich. Ct. App. 2004) “[a]n inverse condemnation suit is one instituted by a private property owner whose property, while not formally taken for public use has been damaged by a public improvement undertaking or other public activity.” For purposes of determining whether or not a case is ripe for federal review, it matters not whether the alleged taking is styled as “physical” or “regulatory.” *River City Capital, L.P. v. Bd. of County Comm’ers, Clermont County, Ohio*, 491 F. 3d 301, 307 (6th Cir. 2007).

² Indeed, the City cites *Williamson* in its memorandum supporting its Motion to Dismiss (Docket No. 2 at p.10). In essence, the City is asking the District Court to assert subject matter jurisdiction where it has none, make a determination on the merits and then dismiss the case, rather than remand it. Paradoxically, the City has removed the case from the only court it acknowledges has subject matter jurisdiction over the dispute.

Remand is warranted, regardless of whether the case was commenced in federal court by the Plaintiffs or removed there by the Defendant. In *Oakland 40, LLC v. City of South Lyon*, No. 10-14456(JCO), 2011 U.S. Dist. LEXIS 53158 (E.D. Mich., May 18, 2011), a case procedurally similar to the case at bar, the plaintiff filed suit in Oakland County Circuit Court asserting both state and federal claims for inverse condemnation. The defendant, City of South Lyon, removed the case to the United States District Court for the Eastern District of Michigan and then filed a motion to dismiss. Like the City in this case, the City of South Lyon also removed the case based on federal question jurisdiction under 28 U.S.C. §1331. While both parties agreed that the plaintiff's federal takings and due process claims were not ripe for federal court review, the City in that case, as here, also sought dismissal of claims, rather than remand. Rejecting this argument, the District Court denied the motion to dismiss and, instead, remanded all of the claims to state court for adjudication:

Defendant takes issue with the Court's denial of its motion to dismiss. However, the granting of the Plaintiff's motion to remand precludes the relief that Defendant sought in this Court. The Court clarifies, however, that it denied Defendant's motion to dismiss because the appropriate remedy was remand, not dismissal. As should be clear by the above discussion, the Court's disposition of this case is not intended to affect the state court's adjudication of the federal or state claims. *See Smith v. Wisconsin Dept. of Agriculture*, 23 F. 3d at 1142 (“[State] doctrines of standing and ripeness are the business of the [state] courts, and it is not for us to venture how the case would there be resolved.”).

2011 U.S. Dist. LEXIS 53158 at *8. Notwithstanding the arguments made by the City of South Lyon that it would be futile to remand the matter to state court because the state court would dismiss the claims against the defendants for lack of standing,³ the District Court held that it was required to remand under 28 U.S.C. §1447(c): “[a]lthough it appears counterintuitive to remand *federal* claims to state court, Plaintiff is correct. Under 28 U.S.C. §1447(c), this Court ‘shall’

³ This is the same argument the City has advanced in support of its motion to dismiss, in addition to its statute of limitations argument. Again, if the Court hears the Plaintiffs' motion to remand first and orders the action remanded to state court, this issue need not be reached.

remand the case if the Court lacks subject matter jurisdiction; and ripeness is a jurisdictional requirement.” *Id.* at *5.

The removal of this case from Washtenaw County Circuit Court to district court was improvident. The City was well aware of the ripeness doctrine and knew or should have known that, under *Williamson*, the case did not belong in federal court for review until the Plaintiffs had pursued Michigan’s “adequate procedure for seeking just compensation.”

POINT IV COSTS AND EXPENSES

This totally unnecessary removal to federal court by the City has required the Plaintiffs to incur additional costs and expenses, mainly in the form of attorneys’ fees, which would otherwise not have been required, had the matter proceeded on an orderly basis in Michigan State Court. 28 U.S.C. §1447(c) provides in pertinent part that: “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorneys’ fees, occurred as a result of the removal.” The Plaintiffs respectfully request that this Court award to the Plaintiffs the attorneys’ fees incurred in connection with the City’s removal of this action prematurely to federal court, including the costs incurred in connection with the preparation and processing of this motion to remand, the review of the City’s motion to dismiss and any other efforts associated with the removal. “An award of attorneys’ fees and costs pursuant to 28 U.S.C. §1447(c) falls “squarely within the discretion of the district court...” *Warthman v. Genoa Twp. Bd. of Trs.*, 549 F. 3d 1055, 1059 (6th Cir. 2008). “Absent unusual circumstances, courts may award attorneys’ under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 547, (2005). It is respectfully submitted that, given the obvious impediments to federal court review posed by the ripeness doctrine under *Williamson* and its progeny, a doctrine with which the City was obviously familiar--the removal was not objectively reasonable.

A showing of bad faith is not required as a predicate to an award of attorneys' fees under the removal statute. *See, Miranti v. Lee*, 3 F. 3d 925, 928 (5th Cir. 1993); *Digital 1 Media, Inc. v. Van Almen*, No. 8:09-cv-1097-33(TBM), 2010 U.S. Dist. LEXIS 83536 at *11 (M.D. Fl., July 27, 2010). "It is not necessary to show that the removing party's position was frivolous, unreasonable or without foundation." *Allstate Ins. Co. v. Pfizer, Inc.*, 861 F. Supp. 2d 866, 873 (W.D. Mich. 2012) *quoting Martin*, 546 U.S. at 138. "Ripeness is a "threshold jurisdictional question." *Southern Pacific Trans. Co. v. City of Los Angeles*, 922 F. 2d 498, 508 (9th Cir. 1990). Thus, in determining the removability of this action, the City was bound not just to consider federal question jurisdiction under 28 U.S.C. §1331, but also the barriers posed to removal of well-pleaded inverse condemnation actions based upon the ripeness doctrine. The City cannot both cite the ripeness doctrine in support of its motion to dismiss, and also be heard to argue that it was objectively reasonable for the City to ignore this doctrine as it applies to removability of inverse condemnation actions.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that an order of remand of the Circuit Court for Washtenaw County be granted, together with the costs and attorneys' fees associated with the City's improvident removal.

DATED: April 3, 2014
Plymouth, Michigan

Respectfully submitted,

/s/M. Michael Koroj
M. MICHAEL KOROJ (P44470)
150 N. Main St.
Plymouth, MI 48170
734-459-4040
mmkoroj@sbcglobal.net

WOODS OVIATT GILMAN LLP
Donald W. O'Brien, Jr., Esq.
Attorneys for Plaintiff
700 Crossroads Building

2 State Street
Rochester, New York 14614
585.987.2800
dobrien@woodsviatt.com

IRVIN A. MERMELSTEIN, ESQ.
2099 Ascot Street
Ann Arbor, Michigan 48103
734-717-0383
nrglaw@gmail.com