

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

JOHN GILDING,

Plaintiff and Appellee,

v.

NATIONAL AIR TRAFFIC  
CONTROLLERS' ASSOCIATION,  
AFL-CIO, et al.

Defendants and Appellants.

**Nos.** 09-15883  
09-15887  
09-15888

**CIV:** 08-2137-PHX-GMS  
(Dist. of Arizona)

**APPELLEE'S MOTION TO  
DISMISS APPEAL FOR LACK  
OF JURISDICTION PURSUANT  
TO FRAP 4(a)**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
HONORABLE G. MURRAY SNOW, PRESIDING

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## **INTRODUCTION**

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The District Court of Arizona remanded this case back to state court after finding that Plaintiff John Gilding’s (“Gilding”) claims are not preempted by federal labor law.

It has long been the law that an order remanding a case to state court based on lack of federal subject-matter jurisdiction is not subject to appeal. Despite the remand statute’s clear prohibition on appeals, the National Air Traffic Controllers’ Association (“the Union”) now seeks review of the District Court’s remand order.

The Union has not advanced a cogent jurisdictional theory, nor does the Union offer any legal justification for ignoring the statutory bar on appellate review of remand orders. Through legal alchemy, the Union apparently believes it can transform the District Court’s remand order into an appealable substantive ruling on the merits.

Unfortunately for the Union, both the Supreme Court and Ninth Circuit have previously rejected identical arguments raised in other cases.

## **BACKGROUND**

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This case began in Maricopa County Superior Court as CV2007-016329. Gilding filed a Third Amended Complaint on October 27, 2008. Among other things, this Complaint added the Union as a defendant. The Union removed the case to the Arizona District Court on November 19. The Union alleged that Gilding’s claims were completely preempted by federal labor law.

Gilding filed a motion to remand the case to state court shortly thereafter. This motion alleged that the District Court lacked federal subject-matter jurisdiction, as Gilding’s complaint asserted only state-law claims. Gilding further

alleged that his state-law claims were not completely preempted by federal labor law.

NATCA filed a Motion to Dismiss the following day. Both the Motion to Remand and Motion to Dismiss raised the same legal question: Whether or not Gilding's claims are completely preempted by federal labor law.

On April 8, the District Court issued its ruling granting Gilding's Motion to Remand based on lack of federal subject-matter jurisdiction. In the same order, the District Court denied the Union's Motion to Dismiss as moot.

Defendants filed Notices of Appeal with the Ninth Circuit shortly thereafter. Gilding now moves to dismiss the appeal, because the remand statute prevents review of orders remanding a case to state court for lack of federal subject-matter jurisdiction.

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## LEGAL ARGUMENT

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### **I. THE COURT OF APPEALS LACKS JURISDICTION TO HEAR APPEALS OF REMAND ORDERS.**

#### **A. An Order Remanding a Case to State Court for Lack of Federal Subject-Matter Jurisdiction is Unappealable.**

The plain language of the remand statute provides, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise..."<sup>1</sup> The Supreme Court has determined that this provision must be read *in pari materia* with the rest of the remand statute so as to prohibit appeals of any remand based on: (1) defects in the removal process, or (2) lack of federal subject-

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<sup>1</sup> 28 U.S.C. § 1447(d)

matter jurisdiction.<sup>2</sup> Appellate review of such orders is barred, even if the District Court's decision is clearly erroneous.<sup>3</sup>

In 2007, the Supreme Court revisited this issue and upheld the longstanding principle that there can be no appeal from a remand order that is based on lack of federal subject-matter jurisdiction.<sup>4</sup> The Ninth Circuit has long held that remand orders predicated on lack of subject-matter jurisdiction are immune from appeal.<sup>5</sup>

**B. A Remand Due to Lack of Complete Preemption is Treated as an Unappealable Remand for Lack of Jurisdiction.**

“When the District Court engages in a preemption analysis but determines that federal jurisdiction is absent, its order remanding the case to state court for lack of subject matter jurisdiction is unreviewable on appeal.”<sup>6</sup>

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<sup>2</sup> *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, -- S.Ct. --, 2009 WL 1174837 \*3 (2009), citing *Powerex Corp. v. Reliant Energy*, 551 U.S. 224, 229, 127 S.Ct. 2411 (2007); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-712, 116 S.Ct. 1712 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127, 116 S.Ct. 494 (1995); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-346, 96 S.Ct. 584 (1976).

<sup>3</sup> *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1116 (9th Cir. 2002), citing *Yakema Indian Nation v. State of Wash. Dept. of Revenue*, 176 F.3d 1241, 1248 (9th Cir. 1999); *Schmitt v. Ins. Co. of North America*, 845 F.2d 1546, 1549 (1988).

<sup>4</sup> *Powerex Corp. v. Reliant Energy*, 551 U.S. at 231.

<sup>5</sup> e.g. *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d at 1116.

<sup>6</sup> *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003); see also *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 643-648, 126 S.Ct. 2145, 2155-2157 (2006); *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d at 1118; *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d 1170, 1173 (9th Cir. 1999); *Whitman v. Raley's, Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1389 (9th Cir. 1989).

For example, in *Abada*, the District Court remanded the case to state court after concluding that the Securities Litigation Uniform Standards Act did not preempt the plaintiff's claims.<sup>7</sup>

“The District Court reasoned that Abada’s complaint included only state law causes of action, and therefore it only had federal question jurisdiction over the complaint if Abada’s state law claims were completely preempted by [the Act]. The District Court then determined that [the Act] did not completely preempt Abada’s state law claims and remanded Abada’s complaint to state court for lack of federal subject matter jurisdiction.”<sup>8</sup>

On appeal, the Ninth Circuit was asked to review the District Court’s resolution of the complete preemption issue. The Ninth Circuit held that it did not have jurisdiction to hear the appeal, because resolution of the complete preemption question was a jurisdictional issue, not a substantive issue.<sup>9</sup> As a result, the remand statute explicitly prohibited appellate review.

In *Kircher*, the Supreme Court held that a District Court’s remand order based on lack of complete preemption was unappealable, because the analysis of the remand question is a jurisdictional analysis that falls squarely within the remand statute’s prohibition on appellate review.<sup>10</sup>

In *Lyons* and *Hansen*, the Ninth Circuit concluded that, when a “substantive preemption analysis [is] part of the jurisdictional determination, [the Court of Appeals] lacks jurisdiction to review the remand order...”<sup>11</sup> Both of those cases

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<sup>7</sup> *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d at 1112.

<sup>8</sup> *Id.* at 1116.

<sup>9</sup> *Id.*

<sup>10</sup> *Kircher v. Putnam Funds Trust*, 547 U.S. at 643-648.

<sup>11</sup> *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d at 1174; *see also Hansen v. Blue Cross. of Calif.*, 891 F.2d at 1386.

rejected efforts to appeal the District Court's resolution of an ERISA preemption argument.<sup>12</sup>

In *Whitman*, the Ninth Circuit concluded that it did not have jurisdiction to review the District Court's resolution of a preemption argument based on the Labor Management Relations Act.<sup>13</sup> The Ninth Circuit refused to accept jurisdiction over the appeal, because the resolution of the complete preemption issue was a predicate for the order remanding the case to state court for lack of subject-matter jurisdiction.<sup>14</sup>

Here, the Union removed this case from state court based on the flawed argument that Gilding's claims are completely preempted by federal labor law.<sup>15</sup> The District Court concluded otherwise and remanded this matter to state court.<sup>16</sup> The District Court's order cites 28 U.S.C. § 1447(c), which states, "If at any time before final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded."<sup>17</sup> As a result, the District Court clearly intended to — and did — remand this case for lack of federal subject-matter jurisdiction.

Like the unsuccessful parties in *Abada*, *Kircher*, *Lyons*, *Hansen*, and *Whitman*, the Union now seeks appellate review of the District Court's resolution of the complete preemption argument, despite the fact that the complete preemption issue was addressed solely in the context of the remand order. The Union cannot distinguish this case from the litany of cases showing that rejection

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<sup>12</sup> *Id.*

<sup>13</sup> *Whitman v. Raley's, Inc.*, 886 F.2d at 1180-81.

<sup>14</sup> *Id.*

<sup>15</sup> *Gilding v. Carr*, 2009 WL 922473 \*1 (Ariz. Dist. 2009).

<sup>16</sup> *Id.* at \*8.

<sup>17</sup> *Id.*

of a complete preemption argument in the context of a remand order constitutes an unappealable jurisdictional decision.

In *Dahl*, the Ninth Circuit succinctly stated the rule regarding appeals in these exact circumstances: “When the District Court engages in a preemption analysis but determines that federal jurisdiction is absent, its order remanding the case to state court for lack of subject matter jurisdiction is unreviewable on appeal.”<sup>18</sup> The District Court remanded this case due to lack of federal subject-matter jurisdiction. Such remands fall squarely within the plain language of 28 U.S.C. § 1447; therefore, the order “is not reviewable on appeal or otherwise.”<sup>19</sup>

## **II. THE DISTRICT COURT’S RESOLUTION OF THE UNION’S COMPLETE PREEMPTION ARGUMENT IS NOT A SUBSTANTIVE DETERMINATION.**

### **A. The *Clorox/Pelleport* Exception to Prohibitions on Appeal.**

The remand statute prohibits review of remand orders based on either defects in the removal process or lack of federal subject-matter jurisdiction. In those unique cases where remand is instead “based on a substantive determination on the merits, apart from any jurisdictional decision, the remand order may be reviewable on appeal as a collateral order.”<sup>20</sup> This is known as the *Clorox/Pelleport* exception.

#### **1. What is a Substantive Determination on the Merits?**

A remand based on a substantive determination on the merits occurs when the District Court remands a case to state court based on some reason that does not implicate jurisdictional considerations.

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<sup>18</sup> *Dahl v. Rosenfeld*, 316 F.3d at 1077.

<sup>19</sup> 28 U.S.C. § 1447(d)

<sup>20</sup> *Whitman v. Raley’s, Inc.*, 886 F.2d at 1180.

For example, in *Pelleport*, the plaintiff brought a contract breach claim in federal court due to diversity jurisdiction.<sup>21</sup> The defendant sought to remand the matter to the state court, because the contract at issue contained a forum-selection clause, stating, “any and all disputes arising out of or in connection with this Agreement shall be litigated only in the Superior Court for Los Angeles, California.”<sup>22</sup>

The District Court remanded the case to state court on the basis of the forum-selection clause, and the unsuccessful party appealed to the Ninth Circuit. The Court of Appeals reasoned that it had jurisdiction to review the remand order, because the order was based on a substantive analysis of the contract at issue and not lack of federal subject-matter jurisdiction.<sup>23</sup>

Had the District Court based its remand order on lack of diversity, or some other jurisdictional grounds, there would have been no jurisdiction for the appeal, even if the District Court’s jurisdictional decision was clearly erroneous.<sup>24</sup>

In this case, it is unclear what “substantive determinations” the Union wishes to appeal. The District Court issued only two rulings: It’s April 8 order remanding the case to state court, and a prior order rejecting Gilding’s request for a

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<sup>21</sup> *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 275 (9th Cir. 1984).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 276.

<sup>24</sup> *Id.* (“The court had before it a remand motion based on two alternative theories: (1) that diversity was defeated by the inclusion of Doe defendants, and thus the District Court lacked jurisdiction to hear the case, and (2) that the parties’ agreement to litigate all contract disputes in state court was valid and enforceable. Had the District Court based its remand order on the first theory, section 1447(d) would no doubt apply, because, even if clearly erroneous, a District Court’s decision that it lacks subject matter jurisdiction to hear a case is not reviewable. But the court did not base its remand order on lack of subject matter jurisdiction. It relied instead upon the forum selection clause.”)

stay of proceedings pending resolution of the Motion to Remand. Whatever substantive issue the Union wishes to appeal is apparently included in the District Court's remand order.

The District Court did not make any substantive rulings apart from the overall jurisdictional analysis. As such, there is simply nothing to appeal in this case. Supreme Court and Ninth Circuit precedent clearly foreclose attempts, such as this one, to appeal a District Court's rejection of the complete preemption doctrine in the context of a remand order.

## **2. The Ninth Circuit Rarely Utilizes the *Clorox/Pelleport* Exception to Allow Review.**

Since its inception, the *Clorox/Pelleport* rule has rarely been successful in allowing review of a District Court's remand order.<sup>25</sup> In the last thirteen years, only two cases in the Ninth Circuit have applied the *Clorox/Pelleport* rule to determine whether a remand order is reviewable as a "substantive determination on the merits."<sup>26</sup>

In the first of those two cases (*Lyons*), the Ninth Circuit analyzed whether a remand based on lack of complete preemption should be considered an unappealable jurisdictional remand, or an appealable remand based on a

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<sup>25</sup> e.g. *Clorox Co. v. U.S. Dist. Court*, 779 F.2d 517 (9th Cir. 1988) (holding that a review of the District Court's remand order was proper, because the remand order was based on contract and waiver principles, not on jurisdictional grounds); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d at 273 (holding that a review of the District Court's remand order was proper, because the remand order was based on contract principles, not on jurisdictional grounds).

<sup>26</sup> *Calif. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d 1087, 1095 n. 7 (9th Cir. 2008) ("We have found only two published decisions in this circuit that have applied the jurisdictional/substantive test since *Quackenbush* was decided...*Niehaus v. Greyhound Lines, Inc.* [and] *Lyons v. Alaska Teamsters Employer Service Corp.*")

substantive determination on the merits.<sup>27</sup> The *Lyons* court ultimately concluded that remands based on lack of complete preemption are not appealable collateral orders.<sup>28</sup>

In the second of those two cases (*Niehaus*), the Ninth Circuit mentioned the collateral order doctrine but ultimately decided that it had jurisdiction over an appeal of the remand for a different reason: The remand in that case was a discretionary remand, not a remand for lack of federal subject-matter jurisdiction.<sup>29</sup> As such, the *Niehaus* court's jurisdictional ruling was not based on the collateral order doctrine.<sup>30</sup>

### **3. The *Clorox/Pelleport* Exception Has Been Treated Negatively by the Supreme Court in Recent Dicta.**

The vitality of the *Clorox/Pelleport* exception is in serious doubt because of the Supreme Court's recent dicta in *Powerex*.

There, the Ninth Circuit held that it had jurisdiction to review a district court's remand order under the *Clorox/Pelleport* exception.<sup>31</sup> The Supreme Court vacated the Ninth Circuit's ruling and forcefully asserted in dicta that the

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<sup>27</sup> *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d at 1172.

<sup>28</sup> *Id.* at 1174 (“Because the District Court’s ultimate decision was that it lacked jurisdiction, and any substantive preemption analysis was part of the jurisdictional determination, this court lacks jurisdiction to review the remand order...”).

<sup>29</sup> It has long been the law that, when a District Court dismisses the plaintiff’s federal claims, it has the discretion to either remand any remaining state-law claims to the state court, or maintain jurisdiction over those state-law claims. When the court exercises its discretion to remand the remaining state-law claims, an appeal is not barred by 28 U.S.C. § 1447. *Calif. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d at 1091.

<sup>30</sup> *Niehaus v. Greyhound Lines, Inc.*, 173 F.3d 1207 (9th Cir. 1999).

<sup>31</sup> *California v. NRG Energy, Inc.*, 391 F.3d 1011, 1023 (9th Cir. 2004), *vacated by Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 127 S.Ct. 2411, 2421 (2007).

*Clorox/Pelleport* exception upon which the Ninth Circuit relied is fundamentally flawed:

“Part of the reason why the Ninth Circuit concluded it had appellate jurisdiction is a legal theory quite different from those discussed and rejected above. Petitioner, along with the other appellants, convinced the court [of appeals] to apply Circuit precedent [*Pelleport*] holding that § 1447(d) does not preclude review of a district court’s merits determinations that precede the remand...

The line of Ninth Circuit jurisprudence upon which petitioner relied appears to be invoking our decision in *Waco v. United States Fidelity*. There, the District Court, in a single decree, had entered one order dismissing a cross-complaint against one party, and another order remanding because there was no diversity of citizenship in light of the dismissal. We held that appellate jurisdiction existed to review the order of dismissal, although we repeatedly cautioned that the remand order itself could not be set aside. The Ninth Circuit’s application of *Waco* to petitioner’s appeal was mistaken.”<sup>32</sup>

To the extent the *Clorox/Pelleport* exception can be read as authorizing appeals of remand orders based on lack of federal subject-matter jurisdiction, it is no longer good law. The Supreme Court has cautioned that the *Clorox/Pelleport* cannot be interpreted so as to permit appeals in circumstances such as the one presently before the Court of Appeals.

**B. To the Extent the *Clorox/Pelleport* Exception is Still Good Law, the Union Cannot Establish Any of its Elements.**

In order to obtain appellate review of a substantive determination by the District Court, the party seeking review must establish several elements. First, the substantive issue cannot be part of the District Court’s jurisdictional analysis.

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<sup>32</sup> *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S.Ct. at 2419.

Second, the substantive determination must precede the remand and be issued in a separate order. Third, the substantive determination must meet all the criteria for being a “final order” under either 28 U.S.C. § 1291, or the collateral order doctrine.

Each of these elements is addressed separately below.

**1. To be Reviewable, a Substantive Determination Must be Segregable From the Jurisdictional Analysis.**

When determining whether federal subject-matter jurisdiction exists, a District Court will often be called on to resolve legal issues concerning the supposed federal question. Such issues are part of the jurisdictional decision, and are not separate, substantive questions. As a result, substantive determinations that relate in any way to the Court’s jurisdiction are not reviewable.<sup>33</sup> Where “resolution of the substantive legal question [is] a necessary predicate to deciding the existence of subject matter jurisdiction,” the remand statute prevents any appeal.<sup>34</sup>

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<sup>33</sup> e.g. *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d at 1172 (1999) (“[T]here is a narrow exception to the general bar on appellate review where a remand order is based on a substantive determination on the merits apart from any jurisdictional decision.”); *Lee v. City of Beaumont*, 12 F.3d 933, 936 (1993) (“[W]here a remand order is based on a substantive determination on the merits apart from any jurisdiction decision, the order is reviewable on appeal...”); *Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1388 (9th Cir. 1989) (reasoning that the resolution of a complete preemption claim was not a substantive issue subject to appeal, because “Blue Cross fails to demonstrate how the District Court’s legal decision [regarding complete preemption] was apart from the question of subject matter jurisdiction...”); *Schmitt v. Ins. Co. of North America*, 845 F.2d at 1549 (1988) (“We have held that a remand order may be reviewed on appeal as a final collateral order...if the order resolves the merits of substantive law apart from any jurisdictional decision.”)

<sup>34</sup> *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960, 967 (9th Cir. 2004).

When the decision of whether to remand a case to state court depends on the applicability of the complete preemption doctrine, resolution of the complete preemption issue is inherently jurisdictional in nature. As a result, an order remanding a case to state court due to lack of complete preemption is not subject to appeal.<sup>35</sup>

“In deciding whether subject-matter jurisdiction exists [in the face of a complete preemption challenge], the District Court is required to reach certain substantive legal conclusions, but because these conclusions are not apart from the question of subject matter jurisdiction, but rather related to it, the *Clorox/Pelleport* exception does not apply.”<sup>36</sup>

Here, the Union erroneously believes that it can appeal the District Court’s rejection of the Union’s complete preemption argument simply by mischaracterizing the complete preemption issue as a “substantive determination on the merits.” No amount of linguistic gymnastics can transform the District Court’s rejection of the Union’s flawed preemption defense from a jurisdictional ruling to a substantive one.

**2. To be Reviewable, a Substantive Determination Must be Addressed in a Separate Order.**

The Supreme Court recently had cause to reiterate its longstanding policy that a party may not appeal substantive determinations made by the District Court, unless: (1) the issue being appealed precedes the remand order in time or logic, and

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<sup>35</sup> *Kircher v. Putnam Funds Trust*, 547 U.S. at 643-648; *Dahl v. Rosenfeld*, 316 F.3d at 1077; *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d at 1118; *Lyons v. Alaska Teamsters Employer Service Corp.*, 188 F.3d at 1173; *Whitman v. Raley’s, Inc.*, 886 F.2d at 1181; *Hansen v. Blue Cross of Calif.*, 891 F.2d at 1389.

<sup>36</sup> *Lyons*, 188 F.3d at 1173.

(2) the issue being appealed was addressed in an order separate from the remand order.<sup>37</sup>

In *Waco*, the District Court issued one order denying a cross-claim against a third party and a second order remanding the matter to state court for lack of diversity jurisdiction.<sup>38</sup> The Supreme Court held that the remand itself was unappealable but that the prior order dismissing the petitioner's cross-claim was subject to appellate scrutiny.<sup>39</sup>

In *Kircher*, the Supreme Court revisited *Waco* and explained that *Waco* involved two separate orders: one dismissing a cross-claim, and other remanding the matter to state court.<sup>40</sup> Thus, *Waco* does not permit appeals of the remand order itself. Instead, it merely allows appeals of unrelated substantive determinations that both: (1) logically precede the remand and, (2) are issued in a separate order.<sup>41</sup>

In *Powerex*, the Supreme Court upheld and reinforced the principles set forth in *Waco* and *Kircher*:

As we reiterated in *Kircher*, *Waco* does not permit an appeal when there is no order separate from the unreviewable remand order. Here, petitioner can point to no District Court order, separate from the remand, to which it objects...thus, petitioner's invocation of *Waco* amounts to...a reversal of the remand order. *Waco* did not, and could not, authorize [such a] form of judicial relief."<sup>42</sup>

Like the unsuccessful party in *Powerex*, the Union can point to no District Court order, other than the remand order, to which it objects. The District Court's

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<sup>37</sup> *Powerex v. Reliant Energy Services*, 127 S.Ct. at 2420.

<sup>38</sup> *City of Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140, 142, 55 S.Ct. 6 (1934).

<sup>39</sup> *Id.*

<sup>40</sup> *Kircher v. Putnam Funds Trust*, 547 U.S. at 644 n. 13.

<sup>41</sup> *Id.*

<sup>42</sup> *Powerex v. Reliant Energy Services*, 127 S.Ct. at 2420 (2007).

resolution of the Union's complete preemption defense neither preceded the remand nor was issued as part of a separate order. Instead, the complete preemption issue was an integral component of the District Court's jurisdictional analysis and was addressed in the remand order itself.

**3. To be Reviewable, a Substantive Determination Must Be a Final Order Under the Collateral Order Rule.**

To be reviewable on appeal, a District Court's substantive determination must qualify as a "final order" under the collateral order doctrine.<sup>43</sup> A "collateral order" is one that: (1) conclusively determines the disputed question; (2) resolves important issues completely separate from action's merits; and (3) is effectively unreviewable on appeal from final judgment.<sup>44</sup>

The Union fails to establish any of the elements of the collateral order doctrine.

- a. The Union Claims it May Re-Raise its Complete Preemption Argument in State Court; Therefore, the District Court's Rejection of the Union's Complete Preemption Claim is Not "Conclusive."

For an order to be "final" under the collateral order rule, it must conclusively determine the question at issue.<sup>45</sup>

Here, the Union has previously asserted that the District Court's rejection of its complete preemption defense is not conclusive and that the state court has jurisdiction to revisit this issue.<sup>46</sup> The Union argues, "[i]f the appellate court

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<sup>43</sup> *Stevens v. Brink's Home Security, Inc.*, 378 F.3d 944, 946-47 (9th Cir. 2004).

<sup>44</sup> *Calif. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d at 1094.

<sup>45</sup> *Id.*

<sup>46</sup> Dkt. 133 at n. 2, attached hereto as Exhibit A for the Court's convenience.

[declines jurisdiction of the Union’s appeal], the merits of NATCA’s CSRA preemption defenses will be a matter for the state court to resolve.”<sup>47</sup>

Since the Union itself asserts that the District Court’s resolution of its complete preemption defense is not conclusive, it cannot possibly establish this element of the collateral order doctrine.

b. The District Court Did Not Resolve Any Important Issues Separate From the Merits of the Case.

For an order to be “final” under the collateral order rule, it must resolve an important issue that is completely separate from the merits of the case.<sup>48</sup> An “important issue” is one that implicates a “weighty public objective.”<sup>49</sup>

Here, public policy is directly contrary to the Union’s position. The remand statute’s prohibition on appealing a remand order is specifically designed to reduce protracted litigation of jurisdictional claims and to allow for speedy adjudication of the merits of the State Court claims.<sup>50</sup>

The remand statute “reflects Congress’s longstanding ‘policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the District Court to which the case is removed.’ Appellate courts must take that jurisdictional prescription seriously, however pressing the merits of the appeal might seem.”<sup>51</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Calif. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d at 1094.

<sup>49</sup> *Id.* at 1096.

<sup>50</sup> See *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307 (2nd Cir. 2005); *Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664 (5th Cir. 1993); *State of Ohio v. Wright*, 992 F.2d 616 (6th Cir. 1993); *Chandler v. O’Bryan*, 445 F.2d 1045 (10th Cir. 1971); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970); *In re MacNeil Bros. Co.*, 259 F.2d 386 (1st Cir. 1958).

<sup>51</sup> *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S.Ct. at 2421, quoting *United States v. Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 844 (1946).

The Union fails to indicate what “weighty public objective” can be achieved by overturning longstanding precedent and granting an appeal in this case. Public policy clearly weighs in favor of swift resolution of state-law claims on the merits, rather than the kind of protracted jurisdictional feud like the one sought by the Union here.

- c. The Union Claims it May Re-Raise its Complete Preemption Argument in State Court; Therefore, the District Court’s Rejection of the Preemption Claims is Reviewable on Direct Appeal From the State Court.

An order is “final” under the collateral order doctrine if it is effectively unreviewable on final appeal.<sup>52</sup> As discussed more fully above, the Union asserts that it can re-raise its preemption argument in state court. If the Union is correct, then the ruling of the state court on this issue will be subject to review on final appeal.

Thus, the Union fails to prove the third element of the collateral order doctrine by its own prior statements to the District Court.

### III. CONCLUSION

The remand statute prevents appellate review of remand orders. Many litigants have attempted to chisel away at this sweeping prohibition to little avail.

The Ninth Circuit has repeatedly rejected requests to review remand orders based on a rejection of the unsuccessful party’s complete preemption defense. The Union has presented no legitimate reason this Court should reject its own precedent — or precedent of the Supreme Court, for that matter — and find jurisdiction to review the District Court’s denial of the Union’s complete preemption claims.

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<sup>52</sup> *Calif. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d at 1094.

For those reasons, Gilding respectfully requests that the Union's appeal be dismissed. Gilding further requests that this Court specify in its order that it will retain jurisdiction over the request for sanctions that Gilding intends to file, pursuant to FRAP 38.

**RESPECTFULLY SUBMITTED** this 14th day of May, 2009.

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**CERTIFICATE OF MAILING**

U.S. Court of Appeals Docket Numbers: 09-15883; 09-15887; and 09-15888.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 14, 2009. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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**CERTIFICATE OF COMPLIANCE**

I certify that, pursuant to Fed. R. App. P. 27(d)(2), this Motion By Plaintiff-Appellee To Dismiss Appeal For Lack Of Jurisdiction is proportionately spaced, has a typeface of 14 points or more, and consists of 17 pages.

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