IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS MUTUAL INSURANCE COMPANY; HARTFORD UNDERWRITERS INSURANCE COMPANY; TASB RISK MANAGEMENT FUND; TRANSPORTATION INSURANCE COMPANY; TRUCK INSURANCE EXCHANGE; TWIN CITY FIRE INSURANCE COMPANY; VALLEY FORGE INSURANCE COMPANY; ZENITH INSURANCE COMPANY,
Plaintiffs,

-vs-

Case No. A-16-CA-387-SS

PHI AIR MEDICAL, LLC,
Defendant.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs' Motion to Remand [#9], Defendant PHI Air Medical, LLC's Response [#11] in opposition, Plaintiffs' Reply [#12] in support, and the Letter Briefs [## 18, 19] filed by the parties. Having considered the documents, the governing law, and the case file as a whole, the Court now enters the following opinion and orders GRANTING the motion.

Background

This case, on removal from Texas state court, seeks judicial review of a final decision of the Texas State Office of Administrative Hearings (SOAH) concerning 33 consolidated workers' compensation medical fee disputes. Plaintiffs Texas Mutual Insurance Company, Hartford Underwriters Insurance Company, TASB Risk Management Fund, Transportation Insurance

Company, Truck Insurance Exchange, Twin City Fire Insurance Company, Valley Forge Insurance Company, and Zenith Insurance Company, the respondents before the SOAH, are a group of Texas workers' compensation insurers; Defendant PHI Air Medical, LLC, the petitioner before the SOAH, is a provider of air ambulance services (colloquially known as "life flight").

Two core questions were involved in the administrative proceedings: first, whether the insurers owed PHI Air additional reimbursement for its services under the Texas Workers' Compensation Act (TWCA), TEX. LABOR CODE §§ 401.001–401.026, and its accompanying regulations; and second, whether the TWCA's reimbursement limitations applicable to air ambulance services are preempted by the federal Airline Deregulation Act (ADA), which prohibits any state from enacting or enforcing any law "related to a price, route, or service of an air carrier[.]" 49 U.S.C. § 41713(b)(1); *see* Notice Removal [#1-1] Ex. A at 13–46 (SOAH Opinion). The SOAH found the reimbursement limitations are not federally preempted because the federal McCarran-Ferguson Act "reverse-preempts" the ADA: it provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b); SOAH Opinion at 4–5.[1] On the merits of PHI Air's reimbursement claim, the SOAH determined the insurers owed PHI Air additional reimbursement. *See* SOAH Opinion at 22.

In accord with the review process set forth by the TWCA, the insurers subsequently filed a petition in Travis County district court seeking review of the SOAH's decision. *See* TEX. LABOR CODE § 413.031(k-1) ("A party . . . who is aggrieved by a final decision of . . the [SOAH] may seek

[1] Citations to the SOAH Opinion use the Opinion's internal pagination, rather than the pagination assigned by the CM/ECF electronic filing system.

judicial review of the decision."). PHI Air answered and filed a "counter-petition" requesting reversal of the SOAH's preemption decision; on the insurers' motion, however, the Travis County judge dismissed the counter-petition as untimely. *See* Notice Removal [#1-3] Ex. C (Answer & Ctr.-Pet.) at VI; App'x Notice Removal [#2-17] Ex. 17 (order dismissing counter-petition). The insurers later amended their state petition to add a claim under the Texas Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.004(a), seeking a declaratory judgment the ADA does not preempt the reimbursement limitations. *See* Notice Removal [#1-2] Ex. B (First Am. Pet.) ¶¶ 1–3.

On March 17, 2016, PHI Air removed the case to this Court, invoking the Court's federal question jurisdiction. *See* Notice Removal [#1] at ¶ 5. The instant motion to remand followed.

Analysis

I. Legal Standard

"[T]he burden of establishing federal jurisdiction is placed upon the party seeking removal." *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). Moreover, because removal jurisdiction raises significant federalism concerns, courts must strictly construe removal jurisdiction. *Id.* District courts have federal question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

II. Application

In arguing removal was proper, PHI Air hangs its hat entirely upon the insurers' later-added claim for declaratory judgment. *See* Resp. [#11] at 2 (stating this suit "only became removable on February 19, 2016, when [plaintiffs] . . . add[ed] a declaratory judgment claim to their petition for review"). Specifically, PHI Air argues the insurers' petition now raises two substantial federal questions on its face—whether the ADA preempts the relevant provisions of the TWCA and whether

the McCarran-Ferguson Act reverse-preempts the ADA—and therefore that jurisdiction lies under *Grable & Sons Metal Products, Inc. v. Darue*, 545 U.S. 308 (2005). The insurers disagree, citing to *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), for the proposition there is no federal question jurisdiction over a declaratory judgment claim concerning a federal defense. As set forth below, the Court agrees with the insurers that *Franchise Tax Board* forecloses removal jurisdiction. As such, remand is proper.

"[O]nly actions that originally could have been filed in federal court can be removed to federal court." *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997) (citing 28 U.S.C. § 1441). PHI Air has not raised diversity jurisdiction as a potential basis for removal. Thus, this case must fall within the Court's federal question jurisdiction to proceed. *See id.* Federal question jurisdiction exists when a federal question is present on the face of the plaintiff's well-pleaded complaint. *Id.* (citing *Caterpillar Inc. v.* Williams, 482 U.S. 386, 392 (1987); *Franchise Tax Bd.*, 463 U.S. at 8–12). Under the well-pleaded complaint rule, "a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim." *Franchise Tax Bd.*, 463 U.S. at 9–10.

In *Franchise Tax Board*, the Supreme Court held there was no removal jurisdiction over the case where the plaintiff's complaint raised both a state law cause of action and a claim seeking a state declaratory judgment that the pertinent state law was not federally preempted. *See* 463 U.S. at 4–7. Franchise Tax Board, the plaintiff, filed suit against the Construction Laborers Vacation Trust in a California court, alleging the Trust had failed to comply with a California statute requiring it to withhold delinquent taxpayers' funds held in trust and forward those funds to the Tax Board.

Id. at 5–6. The Tax Board's state complaint set forth two causes of action: first, a claim for violation of the state statute; and second, a request for declaratory judgment that ERISA did not preempt the state statute. *Id.* at 6–7.

In holding removal was improper, the Court first acknowledged that the Tax Board's state law cause of action, under a straightforward application of the well-pleaded complaint rule, clearly did not create removal jurisdiction: even though a preemption defense would make federal law relevant to the claim, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Id.* at 13–14. The Tax Board's declaratory judgment claim, however, "pose[d] a more difficult problem":

> Whereas the question of federal preemption is relevant to [the Tax Board]'s first cause of action only as a potential defense, it is a necessary element of the declaratory judgment claim. . . . [I]t is clear on the face of its well-pleaded complaint that [the Tax Board] may not obtain the relief it seeks in its second cause of action without a construction of ERISA and/or an adjudication of its preemptive effect and constitutionality—all questions of federal law.

Id. at 14.

Despite the fact the well-pleaded complaint rule, so understood, would technically permit removal, the Tax Board argued removal was nevertheless improper under *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). *See id.* at 15. As the Court explained, *Skelly Oil* stood at that time for the proposition that if, but for the federal Declaratory Judgment Act, the federal claim would arise only as a defense to a state claim, removal jurisdiction would not lie. *See id.* at 16–17. The Court held it was proper to extend *Skelly Oil* to cover state declaratory judgment actions, concluding that "federal courts do not . . . acquire jurisdiction on removal[] when a federal question is presented

by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment." *Id.* at 18–19.

This case falls squarely within the ambit of *Franchise Tax Board*'s extension of *Skelly Oil*. Here, the insurers' state complaint raises two claims: the SOAH appeal, plainly a state claim, and the claim for state declaratory relief concerning federal preemption. But for the availability of the Texas declaratory judgment procedure, the insurers' claim—that the TWCA's reimbursement limitations are not preempted by the ADA because the McCarran-Ferguson Act reverse-preempts the ADA—would arise only in the context of a state claim where an air ambulance service provider (or some other medical provider operating in the aviation space) or a workers' compensation insurer paying such a provider challenged the amount of reimbursement it received or was required to remit. As such, *Franchise Tax Board* applies, and this Court does not have removal jurisdiction.

While PHI Air does cite to *Franchise Tax Board* in its briefing, it fails to engage with the *Franchise Tax Board* holding or reasoning at any length, stating only that the well-pleaded complaint rule does not apply. *See* Resp. [#11] at 6–7. This misses the point entirely. As explained, the *Franchise Tax Board* Court acknowledged the well-pleaded complaint rule did not apply, yet still held removal was improper. *See Franchise Tax Bd.*, 463 U.S. at 15.

Grable does not change this result. *Grable* involved a state-court quiet title action, not a declaratory judgment claim, *see* 545 U.S. at 311, and "had nothing to do with using federal defenses to move litigation to federal court"; in *Grable*, the federal issue—whether the Internal Revenue Service gave proper notice as prescribed by the tax code before seizing the plaintiff's property—"was part of the plaintiff's own claim." *Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill.*,

680 F.3d 1001, 1003–04 (7th Cir. 2012). "*Grable* does not alter the rule that a potential federal defense is not enough to create federal jurisdiction under § 1331." *Id.* at 1003.

The Court concludes removal jurisdiction is lacking. Consequently, this case must be remanded to Travis County court.

Conclusion

Accordingly:

IT IS ORDERED that Plaintiffs' Motion to Remand [#9] is GRANTED;

IT IS FURTHER ORDERED that this case is REMANDED to the 53rd Judicial District Court of Travis County, Texas, where it originated as Cause No. D-1-GN-15-004040; and

IT IS FINALLY ORDERED that the Clerk of Court shall provide the Travis County District Court with a certified copy of this order.

SIGNED this the 15th day of August 2016.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE