UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KATHRYN TEETS, et al.,

Plaintiffs,

Case No. 23-cv-11362

v.

HON. MARK A. GOLDSMITH

T-MOBILE CENTRAL LLC, et al.,

Defendants.

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OPINION & ORDER
(1) GRANTING PLAINTIFFS' MOTION TO REMAND (Dkt. 36), (2) DENYING WITHOUT PREJUDICE MOTION TO DISMISS FILED BY CITY OF WYANDOTTE AND RELATED DEFENDANTS (Dkt. 39), (3) DENYING WITHOUT PREJUDICE DEFENDANT FRANK TARNOWSKI'S MOTION FOR EXTENSION (Dkt. 42), AND (4) DENYING WITHOUT PREJUDICE DEFENDANT T-MOBILE CENTRAL LLC'S MOTION TO DISMISS (Dkt. 43)

Plaintiffs—residents of the City of Wyandotte—bring state-law claims challenging wireless telecommunications provider Defendant T-Mobile Central LLC's plan to activate a wireless communications facility that it was permitted to erect on the roof of Washington Elementary School. Plaintiffs filed this action in Wayne County Circuit Court, and T-Mobile removed it to this Court. See Notice of Removal (Dkt. 1). Plaintiffs move to remand this case to state court (Dkt. 36). For the reasons that follow, the Court grants Plaintiffs' motion.[1]

[1] Because oral argument will not aid the Court's decisional process, the motion will be decided based on the parties' briefing. See E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b). In addition to the motion, the briefing includes T-Mobile Central LLC's response (Dkt. 38) and Plaintiffs' reply (Dkt. 41). Also before the Court are (i) a motion to dismiss filed by Defendant City of Wyandotte and related Defendants (Dkt. 39), (ii) Defendant Frank Tarnowski's motion for an extension of time to file an answer (Dkt. 42), and (iii) T-Mobile's motion to dismiss (Dkt. 43). Because the Court finds that it lacks jurisdiction over this action and remands this case to state court, it denies these three motions without prejudice.

I. BACKGROUND

Plaintiffs allege that T-Mobile contracted with Wyandotte Public School District to lease space on the roof of Washington Elementary School, on which T-Mobile planned to erect and operate a wireless communications facility. Compl. ¶ 4 (Dkt. 1-2). An engineer employed by the City allegedly issued a building permit to allow T-Mobile to erect the facility. Id. ¶¶ 6–7. Plaintiffs argue that the grant of this permit violates the City's zoning ordinance, which requires that town officials follow certain procedures before permitting the placement of wireless communications facilities in residential zoning districts—like the zoning district in which the school is located—unless an exemption applies. Id. The required procedures that the City allegedly neglected to follow include (i) the provision of notice to property-owners within 300 feet of the property on which the facility is to be erected and (ii) the holding of a public hearing. Id. ¶¶ 100–104 (citing City Code §§ 190.306(B) and 190.307(II)). T-Mobile's wireless facility is now complete and ready to operate. Id. ¶ 10.

Plaintiffs sued T-Mobile, Wyandotte Public School District, the City, Wyandotte Board of Education, Wyandotte City Council, and several individuals associated with the City. Plaintiffs bring two state-law claims: (i) nuisance per se and (ii) private nuisance. Id. ¶¶ 155–200. For their nuisance per se claim, Plaintiffs rely on a Michigan statute establishing that the "use" of a "building[] or structure . . . used, erected, altered, razed, or converted in violation of a zoning ordinance . . . is a nuisance per se." Id. ¶ 160 (quoting Mich. Comp. L. § 125.3407).

The parties agree that, for Plaintiffs to establish standing to bring a nuisance per se claim under Michigan law, Plaintiffs must allege that they have suffered "special damages" distinct from those suffered by the general public. See Br. in Supp. Mot. at 16; Br. in Supp. Resp. at 10–11 (citing Saugatuck Dunes Coastal All. v. Saugatuck Twp., 983 N.W.2d 798, 816 (Mich.

2022)). To allege special damages, Plaintiffs submit that (i) they each "live[] in a house located within several hundred feet of the offensive illegal T-Mobile wireless communications facility"; (ii) the tower will "blast[] powerful wireless radiation on each plaintiff's house continuously . . ., thereby exposing plaintiff and her family members . . . to dangerous levels of wireless radiation"; (iii) Plaintiffs object to the violation of the zoning ordinance; (iv) "each plaintiff is forced to look at T-Mobile's visual monstrosity—an industrial array of wireless antennas atop the elementary school building chimney directly across from each plaintiff's house"; and (v) "the value of each plaintiff's property is significantly impaired . . . ." Compl. ¶ 176.

As to the private nuisance claim, Plaintiffs allege that "defendants are charged with the knowledge that wireless communications facilities are forbidden uses in this residential zoning district and are nuisances per se," which renders Defendants' actions "both intentional and unreasonable." Id. ¶ 190.[2]

The federal government has set safety standards for radio frequency emissions like those emitted by T-Mobile's wireless facilities. When passed in 1996, the Telecommunications Act (TCA) directed the Federal Communications Commission (FCC) to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Pub. L. No.

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[2] As demonstrated by Plaintiffs' caselaw, see Compl. ¶ 187:

> The elements of a private nuisance are satisfied if (a) the [plaintiff] has property rights and privileges in respect to the use or enjoyment [of property] interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. . . . To prove a nuisance, significant harm to the plaintiff resulting from the defendant's unreasonable interference with the use or enjoyment of property must be proven.

Pine Bluffs Ass'n v. DeWitt Landing Ass'n, 792 N.W.2d 18, 40 n.23 (Mich. Ct. App. 2010) (punctuation modified). !

104-104, § 704(b), 101 Stat. 56, 152. The FCC promulgated rules establishing limits on such emissions. See 47 C.F.R. § 1.1310. The TCA prohibits state or local laws that regulate "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC]'s regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). However, as Plaintiffs note, see Reply at 3 n.1, the TCA does not "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," including decisions implemented through local zoning ordinances, as long as such government actions are otherwise consistent with the TCA, § 332(c)(7)(A).

T-Mobile submits—and Plaintiffs do not challenge—that the radio frequency emissions due to emanate from the facility on the school roof comply with FCC regulations. See Br. in Supp. Resp. at 19. Plaintiffs' complaint, however, suggests that they challenge those regulations. Plaintiffs allege that FCC guidelines "have not been updated since 1996," cite caselaw in support of their position that updates to the guidelines are necessary, and submit that empirical evidence demonstrates that "exposure to wireless radiation from wireless communications facilities" results in "severe health consequences." Compl. ¶¶ 182–185 (citing Env't Health Trust v. FCC, 9 F.4th 893 (D.C. Cir. 2021)).

Plaintiffs filed the present action in Wayne County Circuit Court on June 1, 2023. Plaintiffs contemporaneously filed an emergency motion for a temporary restraining order, which the state court granted ex parte on June 2. See 6/2/23 Wayne County Order (Dkt. 1-5). The order enjoined Defendants from "proceeding with any further activity related to the wireless communications facility." Id. Defendants then removed the action to this Court. See Notice of

Removal. Plaintiffs filed an emergency motion to extend the temporary restraining order on June 14 (Dkt. 29). Following a hearing, this Court granted that motion and extended the existing temporary restraining order through June 30, 2023 at 11:59 p.m. (Dkt. 34) to preserve the status quo while the Court assessed its jurisdiction by way of a motion to remand that Plaintiffs would file. Now before the Court is Plaintiffs' motion to remand.

II. ANALYSIS

A removing party "bear[s] the burden of demonstrating that a basis for federal jurisdiction exists." Mays v. City of Flint, Mich., 871 F.3d 437, 449 (6th Cir. 2017) (affirming remand and finding that defendants failed to establish that state-law claims created federal jurisdiction despite plaintiffs' reliance on alleged violations of federal statute and safety regulations). "In the absence of diversity, a defendant may remove a civil action from state court to federal court only if the plaintiff's allegations establish 'original jurisdiction founded on a claim or right arising under' federal law." Mikulski v. Centerior Energy Corp., 501 F.3d 555, 560 (6th Cir. 2007) (quoting 28 U.S.C. § 1441(b)) (emphasis in original). "To determine whether the claim arises under federal law, [courts] examine the well pleaded allegations of the complaint and ignore potential defenses," including any "defense that relies on . . . the pre-emptive effect of a federal statute." Id. (punctuation modified).

There are "exceptions to the well-pleaded complaint rule" that allow for federal-question jurisdiction even in the absence of explicit federal claims. Id. T-Mobile asserts that two exceptions apply to create federal jurisdiction in this case: (i) the artful-pleading doctrine, and (ii) the substantial-federal-question doctrine. See Notice of Removal; Resp. to Mot. Plaintiffs insist that these exceptions do not apply and that this case must be remanded to state court for

lack of federal jurisdiction. The Court proceeds by considering each of the bases for federal jurisdiction asserted by T-Mobile.

A. Artful-Pleading Doctrine

Under the artful-pleading doctrine, "plaintiffs may not avoid removal jurisdiction by artfully casting their essentially federal law claims as state-law claims." Mikulski, 501 F.3d at 560 (punctuation modified). As T-Mobile correctly explains, this doctrine applies "if a plaintiff has carefully drafted the complaint so as to avoid naming a federal statute as the basis for the claim, and the claim is in fact based on a federal statute." Br. in Supp. Resp. at 6 (quoting Mikulski, 501 F.3d at 561). In other words, a district court has jurisdiction where a plaintiff brings state-law causes of action that "are truly federal-law claims in disguise." Ohio ex rel. Skaggs v. Brunner, 549 F.3d 468, 475 (6th Cir. 2008).

In T-Mobile's view, Plaintiffs "admit in their Motion that they have engaged in the kind of artful pleading these doctrines [of federal jurisdiction] are intended to provide . . . ." Br. in Supp. Resp. at 6 (emphasis in original) (citing Br. in Supp. Mot. at 5 ("Plaintiffs have carefully pleaded their complaint so that on its face no federal question is presented.")). T-Mobile concludes that Plaintiffs "cannot escape the fact their claims explicitly and inherently raise federal claims." Id.

Contrary to T-Mobile's suggestion, Plaintiffs' decision not to bring federal claims does not mean that they have engaged in artful pleading that endows this Court with jurisdiction. Plaintiffs are "the master[s] of their complaint," and they may elect to assert only state-law claims. Brunner, 549 F.3d at 475 (punctuation modified). In Brunner, for example, the United States Court of Appeals for the Sixth Circuit reversed the district court's finding that a complaint satisfied the artful-pleading doctrine by alleging that defendants had violated a federal consent

decree where the complaint did not in fact allege that defendants had violated that decree. See id.

The same result is appropriate here, where Plaintiffs have not alleged any federal causes of action. T-Mobile acknowledges that the artful-pleading doctrine applies only if Plaintiffs' "claim[s are] in fact based on a federal statute" or some other federal source of law. Mikulski, 501 F.3d at 561. But T-Mobile declines to identify which federal statute they believe is the basis for Plaintiffs' claims. As Plaintiffs correctly point out, the TCA serves no such function, nor does T-Mobile argue that Plaintiffs are asserting TCA claims in the guise of state-law claims. See Reply at 5 (citing Drago v. Garment, 691 F.Supp.2d 490, 491 (S.D.N.Y. 2010) ("[The] TCA does not support a private right of action to persons adversely affected by a local zoning board's decision to allow the construction of a wireless cell antenna.")). T-Mobile appears to be arguing that Plaintiffs should be deemed to have brought a federal claim because, in T-Mobile's view, Plaintiffs' claims challenge FCC regulations and are preempted by those federal standards. See Br. in Supp. Resp. at 9, 12–22. But this point does not transform Plaintiffs' state-law causes of action into federal claims; such claims may prompt a "defense that relies on . . . the pre-emptive effect of a federal statute," but that is not sufficient to create federal jurisdiction. Mikulski, 501 F.3d at 560 (punctuation modified).

Plaintiffs assert state-law claims for nuisance per se and private nuisance. These are not "federal-law claims in disguise." Brunner, 549 F.3d at 475. If T-Mobile is to prevail on its argument that this Court has jurisdiction, it must rely on the substantial-federal-question doctrine.

B. Substantial-Federal-Question Doctrine

"The substantial-federal-issue exception opens the federal removal door only if (1) the state-law claim necessarily raises a disputed federal issue; (2) the federal interest in the issue is substantial; and (3) the exercise of jurisdiction will not disturb any congressionally approved balance of federal and state judicial responsibilities." Id. at 476 (punctuation modified).

As to whether Plaintiffs' claims necessarily raise a disputed federal issue, T-Mobile argues that—to prevail on their nuisance per se claim—Plaintiffs must establish that they have standing to maintain such a claim under Mich. Comp. L. § 125.3407, which they can do only by alleging that they have suffered "special damages." Br. in Supp. Resp. at 10. T-Mobile notes that Plaintiffs' allegations that they suffered special damages rely, in part, on Plaintiffs' claim that radio frequency emissions are harmful to their health. Id. at 12–13 (citing Compl. ¶¶ 176, 182). T-Mobile submits that the TCA and FCC regulations "completely preempt state law claims for damages based on effects of [radio frequency] emissions that comply with the FCC's standards." Id. at 17 (citing Robbins v. New Cingular Wireless PCS, LLC, 854 F.3d 315 (6th Cir. 2017)). In T-Mobile's view, the "zoning status" of wireless facilities—i.e., whether a telecommunications facility complies with a local zoning ordinance—is irrelevant to the question of whether FCC regulations preempt state-law claims challenging the dangerousness of radio frequency emissions. Id. at 19. T-Mobile concludes that "Plaintiffs cannot establish 'special damages' based on allegations that are preempted for purposes of tort claims." Id.

In T-Mobile's reading of the complaint, Plaintiffs "ultimately challenge the FCC's regulations." Id. (capitalization modified). T-Mobile submits that Plaintiffs' "ultimate theory and goal" are reflected in the following allegation:

> [T]he real problem is that thousands of peer-reviewed, published scientific and medical studies, along with renowned medical researchers, physicians, scientists,

> epidemiologists, and toxicologists, have concluded that wireless radiation exposure from wireless communications facilities at levels far below the levels considered "safe" by the FCC causes a litany of diseases and serious medical conditions, as alleged above. So, the T-Mobile wireless facility at the top of the Washington Elementary School is not "safe" . . . .

Id. at 20 (quoting Compl. ¶ 132). T-Mobile concludes that "resolution of whether Plaintiffs' allegations of special damages are valid necessarily and actually requires resolution of a federal claim—either that the FCC's rules are invalid or that [radio frequency] emissions from T-Mobile's facility are harmful despite complying with the FCC's regulations," rendering Plaintiffs' claims "preempted and invalid." Id. at 20–21.

Similarly, T-Mobile argues that Plaintiffs' private nuisance claim relies on their allegation that radio frequency emissions are "unreasonable" and "dangerous"—which, again, "is a matter dependent on and completely preempted by federal law." Id. at 22 (citing Compl. ¶ 187).

T-Mobile has failed to establish that Plaintiffs' state-law claims "necessarily raise[]" a federal issue. Brunner, 549 F.3d at 476 (punctuation modified). A reference to federal law as part of a statement of a state-law claim "is not a necessary element of the claim" if it is not the "only" route by which a plaintiff can prevail on that claim. Fried v. Sanders, 783 F. App'x 532, 536 (6th Cir. 2019). In Fried, for example, the complaint's reliance on a federal issue was far more direct than the challenge to FCC regulations in this case; plaintiffs explicitly pleaded in Fried that defendants violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO) to support their state-law claim for intentional infliction of emotional distress (IIED). Id. at 535–536. Affirming the remand to state court based on the absence of federal jurisdiction, the Sixth Circuit explained:

> According to the complaint, violations of federal law are proof of certain elements of plaintiffs' IIED claim. But they are not the only proof—the complaint details

> numerous actions by defendants having nothing to do with federal law, but which are alleged as a basis for their IIED claim. The federal issue is therefore not a necessary element of the claim. After all, plaintiffs may win or lose regardless of whether defendants violated federal law; such a connection is more tenuous than what has previously made a federal issue necessarily raised.

Id. (citing Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 807 (1986) (affirming finding that removal was improper due to lack of federal jurisdiction and reciting Sixth Circuit's explanation: "Because the jury could find negligence on the part of Merrell Dow without finding a violation of the [Federal Food, Drug, and Cosmetic Act], the plaintiffs' causes of action did not depend necessarily upon a question of federal law.") (punctuation modified)); see also Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006) (affirming finding of no substantial-federal-question jurisdiction, stating: "[I]t takes more than a federal element to open the 'arising under' door.") (punctuation modified).

T-Mobile has not shown that Plaintiffs' claims necessarily raise a federal issue because the dangerousness of radio frequency emissions is not Plaintiffs' only basis for alleging special damages. Plaintiffs allege special damages on grounds other than "the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv), including the aesthetic harm they suffer from viewing the telecommunications facility and the deflated values of their properties, see Compl. ¶ 176. If these bases are sufficient to establish special damages under Michigan law, then the issue of standing can be resolved without reference to the TCA's preemptive effect. Because "plaintiffs may win or lose [on standing] regardless of whether" the TCA preempts an argument that radio frequency emissions are dangerous, Plaintiffs' negligence per se claim does not "necessarily" raise a federal issue. Fried, 783 F. App'x at 536.

T-Mobile suggests that Plaintiffs cannot establish standing on these alternate grounds under Michigan law because "generalized concerns about traffic congestion, economic harms,

aesthetic harms, environmental harms, and the like are not sufficient" to establish special damages. Br. in Supp. Resp. at 11 (quoting Saugatuck, 983 N.W.2d at 816 (emphasis in Saugatuck)). But T-Mobile's citation to Saugatuck does not establish that Plaintiffs in this case are precluded from showing special damages. In the same paragraph quoted by T-Mobile, the Saugatuck court stated that a "specific" zoning decision "might burden certain properties or individuals' rights more heavily than others," and the court concluded: "A party who can present some evidence of such disproportionate burdens likely will have standing . . . ." 983 N.W.2d at 816–817. Plaintiffs in this case have alleged that they are uniquely positioned because they live within "several hundred feet" of the challenged facility. Compl. ¶ 176. These allegations may suffice to demonstrate that Plaintiffs suffered disproportionate harms that meet the "special damages" standard—though resolution of that question properly lies with the Michigan courts.

Similarly, as to Plaintiffs' private nuisance claim, establishing that the radio frequency emissions are dangerous is not the "only" way for Plaintiffs to demonstrate that the wireless facility is unreasonable. Fried, 783 F. App'x at 536. Plaintiffs insist that they can show that the alleged intrusion was unreasonable if they can demonstrate that the erection of the facility violated Michigan's zoning ordinance. Compl. ¶ 190; Reply at 1. "[P]laintiffs may win or lose" on this basis alone. Fried, 783 F. App'x at 536.

T-Mobile points to language in Plaintiffs' complaint indicating that Plaintiffs take issue with the dangerousness of the facility's radio frequency emissions, which T-Mobile sees as a challenge to FCC's regulatory regime. Br. in Supp. Resp. at 19–21. But the suggestion in Plaintiffs' complaint that the FCC's guidelines should be updated does not "necessarily" raise a federal issue any more than the Fried plaintiffs' explicit reliance on a federal statute does; merely "touch[ing] on federal law"—that is, merely referring to federal law as one of several

independent grounds for supporting a state-law claim—is insufficient to meet the first prong of the substantial-federal-question test. Fried, 783 F. App'x at 535. "At heart," Plaintiffs' case "is an action to enforce [state law], not [federal law], and it "will likely turn on a question of state law." Miller v. Bruenger, 949 F.3d 986, 989, 992 (6th Cir. 2020) (finding that party asserting federal jurisdiction to enforce property settlement agreement and challenging life insurance proceeds distributed "in accordance with the statutorily directed federal distribution scheme" had not asserted a claim that "necessarily raise[d] a federal issue"). "[F]ederal jurisdiction is not established simply because a state court may have to entertain a federal issue." Id. at 992.

The out-of-circuit cases cited by T-Mobile that found substantial-federal-question jurisdiction are distinguishable. See Br. in Supp. Resp. at 8, 21. Plaintiffs' claims in those cases necessarily relied on alleged violations of federal regulations or directly challenged the legality of federal agency decisions governing trading in securities. See Turbeville v. Fin. Indus. Regul. Auth., 874 F.3d 1268, 1274–1275 (11th Cir. 2017) (finding federal jurisdiction where plaintiff's only grounds for substantiating three of his four state-law claims "rest[ed] expressly on allegations that FINRA violated its own rules and exceeded its jurisdictional grant" and so relied on an interpretation of federal law); Pet Quarters, Inc. v. Depository Tr. & Clearing Corp., 559 F.3d 772, 779 (8th Cir. 2009) (finding that complaint's allegation that stock program created with Securities and Exchange Commission's approval was anticompetitive "by its mere existence" "directly implicate[d] actions taken by the Commission in approving the creation of the Stock Borrow Program and the rules governing it") (punctuation modified).

As discussed, this case does not necessarily raise any federal issue, thus requiring a remand to state court. See Fried, 783 F. App'x at 536; Mays, 871 F.3d at 449–450; see also Hudak v. Elmcroft of Sagamore Hills, 58 F.4th 845, 857–858 (6th Cir. 2023) (affirming remand

to state court because claims "grounded in state common law" did not "necessarily raise[] a federal issue or require[] a court to address or resolve one" despite likely availability of "federal-preemption defense").

T-Mobile has not carried its burden of demonstrating that Plaintiffs' claims necessarily raise a federal issue, and so they have not shown that this action can "be squeezed into the slim category" of substantial-federal-question cases. Empire, 547 U.S. at 701. T-Mobile has failed to establish that this Court has jurisdiction.

III. CONCLUSION

For the reasons explained above, the Court grants Plaintiffs' motion to remand (Dkt. 36). It denies without prejudice the motion to dismiss filed by the City of Wyandotte and related Defendants (Dkt. 39), Tarnowski's motion for an extension of time to file an answer (Dkt. 42), and T-Mobile's motion to dismiss (Dkt. 43).

SO ORDERED.

Dated: June 28, 2023
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge