From: Mark Wray <mwray@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched "style" changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called "style" changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 "style" changes objected repeatedly that the "style" changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don't know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever "costs" may be borne by those of us subject to the substantive and unintended consequences of "style" changes, those costs are "acceptable".

I respectfully disagree. Enough people, like my client, have paid the "costs", and the "costs" are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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TOM GONZALES

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES,

Plaintiff,

vs.

SHOTGUN NEVADA INVESTMENTS, LLC, a Nevada limited liability company; SHOTGUN CREEK LAS VEGAS, LLC, a Nevada limited liability company; SHOTGUN CREEK INVESTMENTS, LLC, a Washington State limited liability company; and WAYNE PERRY, an individual,

Defendants.
_____/

Case No. 2:13-cv-00931-RCJ-VPC

(Eighth Judicial District Court Case No. A-13-679826)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE JURY DEMAND

In this action removed from the District Court in and for Clark County, Nevada, Plaintiff filed a jury demand September 18, 2014, two days after this Court denied the Defendants' motion for summary judgment. With summary judgment having been denied, Plaintiff believed it was appropriate to consolidate

this action with the Desert Lands case (3:11-cv-00613-RCJ-VPC), file demands for jury in both cases, and prepare for trial. *See Wray Decl., attached.*

According to the applicable rule for jury demands in actions removed from state court, Plaintiff believes his jury demand was timely. Fed. R. Civ. P. 81(c)(3)(A) states:

(3) *Demand for a Jury Trial.*

> (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

This case was removed from a state court in Nevada. Under Nevada law, "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Thus, jury demands are not required to be filed in Nevada state court until the time of the entry of the order first setting the case for trial.

Defendants removed this action within 30 days of being served with the Summons and Complaint and before even filing their Answer to the Complaint. *ECF No. 1, 4.* Obviously, at that point in time, a jury demand was not required by Nevada law. In such a situation, the second sentence of Rule 81(c)(3)(A) states: "If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." The Court still has not ordered the parties to file a jury demand

within a specified time, and thus the Plaintiff's jury demand filed September 18, 2014 was timely under the rule.

Defendants now bring this Motion to Strike Plaintiff's Jury Demand (*ECF No. 69*), objecting that the second sentence of Fed. R. Civ. P. 81(c)(3)(A) is inapplicable because "the second sentence applies where State Law *does not require an express demand for jury trial* and Nevada law, NRCivP Rule 38, does require an express demand for a jury trial." *Motion, ECF No. 69, p. 8:5-7* (*emphasis* in original).

The Defendants' argument incorporates a subtle, yet significant, anachronism that leads to a faulty interpretation of Rule 81(c)(3)(A). The Defendants argue that Rule 81(c)(3)(A) applies when state law "**does** not require an express demand for jury trial," thus using the present tense of the verb. The second sentence of the rule actually is written in the past tense: "If the state law **did** not require an express demand for jury trial . . .". The shift from present to past tense results in a change in the meaning of the rule that is significant to deciding this motion.

Using the present tense, as the Defendants choose to do, the meaning is that if the state law does not require an express demand for jury trial; i.e., if no express demand for jury trial is required by state law *at any time*, then the Court must order the parties to file a demand. Stated alternatively, using the present tense, if *at any time* the state law requires an express demand for jury trial, then Rule 81(c)(3)(A) does not apply, and a jury demand must be filed with 14 days of filing of the last pleading directed to the issue. *See Fed. R. Civ. P. 38(b)(1).*

On the other hand, using the past tense, which is how the rule is written, of course, the meaning is that if the state law did not require an express demand for jury trial; i.e., if the Plaintiff did not have to make a jury demand under state law *before the case was removed*, then the Plaintiff need not make a jury demand until

ordered to do so. Reading Rule 81(c)(3)(A) as it is written, therefore, Plaintiff filed a timely jury demand on September 18, 2014.

The use of the present tense is an anachronism because prior to 2007, the rule was written in the present tense -- "does not" -- and starting in 2007, the rule was changed to the past tense -- "did not". The Defendants' motion disregards this distinction, but in fairness, court decisions have overlooked it as well.

A leading case on Rule 81(c) in the Ninth Circuit is *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983), which has been cited by courts in the Ninth Circuit at least 27 times for its interpretation of the rule. When *Lewis* was decided in 1983, Rule 81(c) was written in the present tense, and stated, in pertinent part: "If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so. . . ". *Id.* The court held in *Lewis* that California law does require an express demand when the trial is set. *Id.* Lewis had not requested a trial before his case was removed from California state court. *Id.* "Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand 'not later than 10 days after the service of the last pleading directed to such issue [to be tried].' Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d)." *Id.* (The 10-day deadline subsequently was extended to 14 days by other rule amendments.)

This holding from *Lewis* continues to be followed, uncritically, by district courts in the Ninth Circuit. *See, e.g., Ortega v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 2787 (E.D.Cal. 2012) (following *Lewis* as to its interpretation of Rule 81(c)(3)(A)); *Nascimento v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 111019 (D.Nev. 2011) (applying the *Lewis* holdings to an action removed from Nevada state court); *Kaldor v. Skolnik*, 2010 U.S. Dist. LEXIS 137109 (D.Nev. 2010) (finding that under *Lewis*, Rule 81(c)(3)(A) is inapplicable if state law

requires an express demand for jury trial, "regardless of when the demand is required").

With due respect for these district court decisions, it is questionable that they would follow the holding in *Lewis* today, as a matter of *stare decisis*, given the intervening changes in Rule 81(c). For *Lewis* to supply the rule of decision, it would seem that one must discount the change from the present to the past tense – from "does not" to "did not" -- as having no effect on the meaning of the second sentence of Rule 81(c)(3)(A). Disregarding differences in words runs counter to well-established rules of statutory construction. *See Boise Cascade Corp. v. United States EPA,* 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *In re Transcon Lines,* 58 F.3d 1432, 1437 (9th Cir. 1995) (the cardinal principle is that the plain meaning of a statute controls).

Furthermore, taking the view that the change from "does not " to "did not" makes no difference to the meaning of the second sentence then begs the question as to why rule-makers made the change at all.

The Notes of the Advisory Committee on 2007 Amendments state: "The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The problem with the Advisory Committee's note is that a change in "style" can also affect meaning, and therefore affect substance. A practitioner can read the amended Rule 81(c)(3)(A) to mean exactly what it says, and can reasonably believe that a jury trial demand that state law did not require to be filed before removal is not required to filed in federal court unless and until ordered by the federal judge. The problem with the note of the Advisory Committee is that in the

case of Rule 81(c)(3)(A), the effect of "style" changes is a critical change in meaning; if that meaning is not applied and the result is the loss of the right to trial by jury, the rule has become a trap for the unwary.

Many district courts in the Ninth Circuit have acknowledged that Rule 81 suffers from poor drafting and tricky wording, but have applied *Lewis* regardless. In *Rump v. Lifeline,* 2009 U.S. Dist. LEXIS 98506 (N.D.Cal. 2009), the court said:

> The Court recognizes that the federal rules governing jury demands after removal, in conjunction with California's rules permitting a plaintiff to make a jury demand up until the time of trial, creates ambiguity and a trap for the unwary. However, *Lewis* addressed the interplay between California's rules and Rules 38 and 81, and held that a jury demand must be made within 10 days of removal. Accordingly, ***because the Court is bound by Lewis***, the Court GRANTS defendants' motion and STRIKES plaintiff's jury demand.

Id., emphasis added; see also: Gilmore v. O'Daniel Motor Ctr., Inc., 2010 U.S. Dist. LEXIS 57792 (D.Neb. 2010); *Cross v. Monumental Life Ins. Co.,* 2008 U.S. Dist. LEXIS 109235 (D.Ariz. 2008) ("[T]he needless complexity of the removal rule, Rule 81(c), sometimes creates a trap for the unwary.")

Indeed, if Rule 81(c)(3)(A) cannot be relied upon to mean what it says, it is not only a trap for the unwary, it is an *unfair* trap for the unwary.

The problem with altering the "style" of any rule is that it requires changes in language, and changes in language alter meaning, which is a principle that was recognized by the people who changed the rules in 2007. The Judicial Conference Committee on Rules of Practice and Procedure keeps online records of its proceedings through the Administrative Office of the U.S. Courts in Washington, D.C. The online archives[1] contain the minutes and reports of various rules committee meetings. Attached as Exhibit 1 to this Opposition are copies of

[1] http://www.uscourts.gov/rulesandpolicies/rules/archives.aspx

excerpts from the June 2, 2006 report of the Civil Rules Advisory Committee on the subject of "style" changes, with portions highlighted for purpose of emphasis. The report refers to various contributors to the process who were highly critical of the "style" changes, including the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, whose members wrote:

> The unanimous judgment of every member of the Committee who expressed a view was that the costs and other disadvantages of the style revision project outweigh its benefits. First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found they had uncovered many more – and there was almost no overlap, suggesting that there remain a significant number of unintended consequences that neither we nor they have spotted. Second, any style revisions will bring disruptions. The sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come.

See Exhibit 1, attached. The words of the committee from the Eastern District of New York are amazingly prescient in anticipating the current situation with the Plaintiff.

In its "Overall Evaluation", the rules committee asked Profession Stephen B. Burbank and Gregory P. Joseph, Esq. (the "Burbank-Joseph" group) to comment on their working group's view of the wisdom of the style project. Burbank-Joseph reported that 14 members participated in the final conference call. "Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed." *See Exhibit 1, attached.*

The rules committee spoke of "costs that will be entailed", which in this case, is the cost of losing the right to a jury trial. Forfeiting that Constitutional

right because of a tricky rule, which cannot be relied upon to mean what it says, is not a cost that can or should be borne by the Plaintiff or any other litigant.

Nor is the situation in the Plaintiff's case in any way unique. Dozens of cases are reported from U.S. District Courts across the country where a party was deprived of a right to a jury trial in a case removed from state court based on an interpretation of Rule 81(c)(3)(A). This means attorneys across the land are losing the right to jury trials for their clients in cases that are removed from state court to federal court because the rule is not being interpreted the way it reads.

To Plaintiff's knowledge, only one of the many reported decisions on this issue explicitly discusses the change from the present to past tense, and is the only case that squarely addresses the issue raised by this Opposition. In *Kay Beer Distrib. v. Energy Brands, Inc.*, 2009 U.S. Dist. LEXIS 49792 (E.D. Wisc. 2009), the district judge analyzed and decided the issue as follows:

> The language of the current Rule 81 is ambiguous. At least one court has observed that the Rule is "poorly crafted." Cross v. Monumental Life Ins. Co., 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense -- "If state law did not require an express demand" -- without any qualification, makes it unclear whether the exception is intended to apply to cases in which a demand for a jury under state law was not yet due when the case was removed, or to cases in which a demand is not required at all. Kay's interpretation of Rule 81(c)(3)(A) thus has some merit. But ultimately, I conclude that Energy's interpretation is correct. Rule 81(c)(3)(A) only applies when the applicable state law does not require a jury demand at all. It has no application when, as in this case, the applicable state law requires an express demand, but the time for making the demand has not yet expired when the case is removed.
>
> This is apparent from the language of the Rule prior to its amendment in 2007. Prior to the 2007 amendment to Rule 81, it read:
>
> If state law applicable in the court from which the case is removed *does not* require the parties to make express demands after removal in

order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Fed. Rule Civ. P. 81(c) (2006) (amended 2007) (italics added).

The Advisory Committee Notes for the 2007 Amendments to Rule 81 state that the language of the Rule was amended "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The note states that the changes were intended to be "stylistic only."

The earlier version of Rule 81(c) was the result of the 1963 amendment to the Rules which added the exception in the first place. The Advisory Committee Notes relating to the 1963 Amendment state that the change was meant to avoid unintended waivers of a party's right to a jury trial in cases that are removed to federal court from state courts in which no demand is required. To achieve this purpose, "the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal." Fed. R. Civ. P. 81 Advisory Committee Note, 1963 Amendment. See also 9 Wright & Miller, Federal Practice and Procedure (hereafter Wright & Miller) § 2319 at 228-29 (3d ed. 2008). It therefore follows that the exception in Rule 81(c)(3)(A), which relieves a party in a removed case from the obligation to demand a jury trial, applies only where the applicable state law does not require an express demand for a jury trial. Since Wisconsin law does require a jury demand, Rule 81(c)(3)(A)'s exception does not apply.

Kay cites Williams v. J.F.K. Int'l Carting Co., 164 F.R.D. 340 (S.D.N.Y. 1996) and Marvel Entm't Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86 (S.D.N.Y. 1987), in support of its interpretation of Rule 81, but both dealt with actions removed from New York courts. Cases removed from New York court provide little guidance because "the practice in New York falls within a gray area not covered by Rule 81(c)." Cascone v. Ortho Pharm. Corp., 702 F.2d 389, 391 (2d Cir. 1983); see also 9 Wright & Miller § 2319 at 231 ("Many cases

> removed from New York state courts pose a unique situation."). Wisconsin law unequivocally requires a demand in order to preserve one's right to a jury trial. I therefore conclude that Rule 81(c)(3)(A) is inapplicable and Kay's demand for a jury trial was untimely under Rule 38(b).

Plaintiff respectfully urges that this Court *not* adopt the reasoning of *Kay Beer*. The court in *Kay Beer* did not apply the language of the rule as it reads today, and instead reverted to the former version of the rule. The court stated: "Rule 81(c)(3)(A) only applies when the applicable state law **does not** require a jury demand at all." (Emphasis added). The only rationale offered by the court in *Kay Beer* for applying the former version of the rule instead of the current rule is that the Notes of the Advisory Committee state that the 2007 changes to the rules were intended to be "stylistic only". Respectfully, changes that may have been intended to be "stylistic only" can in fact be substantive. The people that adopted the rules openly debated the effect that the "stylistic" changes would have on the substantive law, and ultimately, the rules committee adopted the rules knowing that certain "costs" would be borne by litigants and the court system, including "costs" in the form of substantive rule changes that may not have been intended. The rules committee nonetheless deemed these costs to be acceptable in adopting the new rules. *See Exhibit 1, attached.* When a "stylistic" change alters the meaning of a rule, this is deemed an acceptable cost, and the Court should apply the rule as it is written. Practitioners also should be able to rely on the rules as written.

As an additional consideration, the court in *Kay Beer* only followed the rationale that the general purpose of the 2007 changes was to effect changes in style and not substance. The court in *Kay Beer* had no apparent knowledge as to the specific reasons why the change was made from "does not" to "did not". One would have to access the minutes and reports of the style subcommittee of the Civil Rules Advisory Committee to obtain that knowledge. The minutes and reports of the style subcommittee do not appear to be available online or in any

readily available alternative source, however, and Plaintiff is unable to provide them to the Court. *See Wray Decl., attached.*

In the absence of the subcommittee minutes and reports, the proper approach is to apply ordinary rules of statutory construction and construe the rule as it is written. By applying the plain language of the rule, one must reasonably conclude that in cases removed from state to federal court, when the applicable state law requires an express jury demand, but the time for making the demand has not yet expired when the case is removed, the time for making a jury demand is to be set by the court.

Accordingly, the jury demand filed September 18, 2014 in this action is timely. It respectfully requested that the Defendants' Motion to Strike Plaintiff's Jury Demand be denied.

DATED: October 16, 2014 LAW OFFICES OF MARK WRAY

By __/s/ Mark Wray_____
MARK WRAY
Attorneys for Plaintiff TOM GONZALES

DECLARATION OF MARK WRAY IN SUPPORT OF OPPOSITION TO STRIKE JURY DEMAND

I, Mark Wray, declare:

1. My name is Mark Wray. I substituted in as attorney for Plaintiff Tom Gonzales in this action on June 11, 2014. I know the following facts of my personal knowledge and could, if asked, competently testify to the truth of the same under oath.

2. On September 16, 2014, the Court denied the Defendants' motion for summary judgment. *ECF No. 65.*

3. Upon receiving the order, I reviewed Fed. R. Civ. P. 81(c)(3)(A) and prepared a jury demand which I filed with the Court on September 18, 2014. I also called Defendants' counsel, Mr. Schwartzer, and asked if he would inquire about obtaining his clients' permission to consolidate the trial of the two related actions.

4. On September 26, 2014, Mr. Schwartzer advised me that his clients would not agree to consolidation and that he would be filing a motion to strike the jury demand.

5. After receiving the Defendants' motion and re-reading Rule 81(c)(3)(A), I reviewed minutes and reports of the Judicial Conference Committee on Rules of Practice and Procedure for the years 2003 through 2007. I also contacted the support staff of the committee in Washington, D.C. I learned there are six members of the support staff, headed by their chief, Jonathan Rose, and they are busy with six different committees. Over a period of days and follow-up phone calls, I attempted to find out whether anyone on the support staff has access to any minutes and reports of the style subcommittee of the Advisory Committee on Civil Rules during the years leading up to the 2007 rule changes. I spoke to Mr. Rose specifically about this subject, explaining my interest in knowing the genesis of the change from "does not" to "did not". Although I followed up several times

seeking to obtain this information from Mr. Rose or his staff, I did not receive a response from them before having to prepare and file this Opposition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 16, 2014 at Reno, Nevada.

/s/ Mark Wray
MARK WRAY

CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray hereby certifies that a true copy of the foregoing document was sealed in an envelope with first-class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on October 16, 2014 addressed as follows:

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm
2850 S. Jones Blvd., Suite 1
Las Vegas, NV 89146

_____/s/ Theresa Moore_____

EXHIBIT INDEX

Exhibit 1 Excerpts of Minutes of the Civil Rules Advisory Committee

EXHIBIT 1

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **June 2, 2006**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

(b) **Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	(b) **Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) **Removed Actions.** These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	(c) **Removed Actions.** (1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	(2) ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: (A) 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; (B) 20 days after being served with the summons for an initial pleading on file at the time of service; or (C) 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	(3) ***Demand for a Jury Trial.*** (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. (B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: (i) it files a notice of removal; or (ii) it is served with a notice of removal filed by another party.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES, Plaintiff, vs. SHOTGUN NEVADA INVESTMENTS, LLC et al., Defendants.	)	2:13-cv-00931-RCJ-VPC **ORDER**

This case arises out of the alleged breach of a settlement agreement that was part of a confirmation plan in a Chapter 11 bankruptcy action. Pending before the Court are a Motion to Reconsider (ECF No. 68) and a Motion to Strike Jury Demand (ECF No. 69). For the reasons given herein, the Court denies the motion to reconsider and grants the motion to strike jury demand.

I. FACTS AND PROCEDURAL HISTORY

This is the second action in this Court by Plaintiff Tom Gonzales concerning his entitlement to a fee under a Confirmation Order the undersigned entered over ten years ago while sitting as a bankruptcy judge.

A. The Previous Case

On December 7, 2000, Plaintiff loaned $41.5 million to Desert Land, LLC and Desert

Oasis Apartments, LLC to finance their acquisition and/or development of land ("Parcel A") in Las Vegas, Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land and Desert Oasis Apartments, as well as Desert Ranch, LLC (collectively, the "Desert Entities"), each filed for bankruptcy, and the undersigned jointly administered those three bankruptcies while sitting as a bankruptcy judge. The court confirmed the second amended plan, and the Confirmation Order included a finding that a settlement had been reached under which Gonzales would extinguish his note and reconvey his deed of trust, Gonzales and another party would convey their fractional interests in Parcel A to Desert Land so that Desert Land would own 100% of Parcel A, Gonzales would receive Desert Ranch's 65% in interest in another property, and Gonzales would receive $10 million if Parcel A were sold or transferred after 90 days (the "Parcel Transfer Fee"). Gonzales appealed the Confirmation Order, and the Bankruptcy Appellate Panel affirmed, except as to a provision subordinating Gonzales's interest in the Parcel Transfer Fee to up to $45 million in financing obtained by the Desert Entities.

In 2011, Gonzales sued Desert Land, Desert Oasis Apartments, Desert Oasis Investments, LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co., and Wells Fargo (as trustee for a mortgage-backed security) in state court for: (1) declaratory judgment that a transfer of Parcel A had occurred entitling him to the Parcel Transfer Fee; (2) declaratory judgment that the lender defendants in that action knew of the bankruptcy proceedings and the requirement of the Parcel Transfer Fee; (3) breach of contract (for breach of the Confirmation Order); (4) breach of the implied covenant of good faith and fair dealing (same); (5) judicial foreclosure against Parcel A under Nevada law; and (6) injunctive relief. Defendants removed that case to the Bankruptcy Court. The Bankruptcy Court recommended moving to withdraw the reference, because the undersigned issued the underlying Confirmation Order while sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion. The Court dismissed the second and fifth causes of action and later granted certain defendants' counter-

motion for summary judgment as against the remaining claims. Plaintiff asked the Court to reconsider and to clarify which, if any, of its claims remained, and defendants asked the Court to certify its summary judgment order under Rule 54(b) and to enter judgment in their favor on all claims. The Court denied the motion to reconsider, clarified that it had intended to rule on all claims, and certified the summary judgment order for immediate appeal. The Court of Appeals affirmed, ruling that the Parcel Transfer Fee had not been triggered based on the allegations in that case, and that Plaintiff had no lien against Parcel A.

B. The Present Case

In the present case, also removed from state court, Plaintiff recounts the Confirmation Order and the Parcel Transfer Fee. (*See* Compl. ¶¶ 10–14, Apr. 10, 2013, ECF No. 1, at 11). Plaintiff also recounts the history of the '613 Case. (*See id.* ¶¶ 17–21). Plaintiff alleges that Defendant Shotgun Nevada Investments, LLC ("Shotgun") began making loans to Desert Entities for the development of Parcel A between 2012 and January 2013 despite its awareness of the Confirmation Order and Parcel A transfer fee provision therein. (*See id.* ¶¶ 22–23). Plaintiff sued Shotgun, Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M. Perry for intentional interference with contract, intentional interference with prospective economic advantage, and unjust enrichment based upon their having provided financing to the Desert Entities to develop Parcel A. Defendants removed and moved for summary judgment, arguing that the preclusion of certain issues decided in the '613 Case necessarily prevented Plaintiffs from prevailing in the present case. The Court granted that motion as a motion to dismiss, with leave to amend.

Plaintiff filed the Amended Complaint ("AC"). (*See* Am. Compl., Aug. 20, 2013, ECF No. 28). Plaintiff alleges that the Confirmation Order permitted Parcel A to be used as collateral for up to $25,000,000 in mortgages of Parcel A itself or as collateral for a mortgage securing the purchase of real property subject to the FLT Option if the proceeds were used only for the

purchase of that real property, but that any encumbrance of Parcel A outside of these parameters would trigger the Parcel Transfer Fee. (*See id.* ¶¶ 15–16). Various Shotgun entities made additional loans to the Desert Entities in 2012 and 2013 "related to the development of Parcel A." (*Id.* ¶¶ 25–26). Multiple Shotgun entities have also invested in SkyVue Las Vegas, LLC ("SkyVue"), the company that owns the entities that own Parcel A. (*Id.* ¶ 27). Plaintiff alleges that the reason Perry, the principal of the Shotgun entities, did not document his $10 million investment was to "avoid evidence of a transfer," and thus the triggering of the Parcel Transfer Fee. (*See id.* ¶ 29).

Defendants moved for summary judgment, and Plaintiff moved to compel discovery under Rule 56(d). The Court struck the conspiracy and declaratory judgment claims from the AC, because Plaintiff had no leave to add them. The Court otherwise denied the motion for summary judgment and granted the motion to compel discovery, although the Court noted that the intentional interference with prospective economic advantage claim (but not the intentional interference with contractual relations claim) was legally insufficient. Defendants again moved for summary judgment after further discovery and filed a motion in limine asking the Court to exclude any testimony of witnesses or documents not disclosed in discovery. The Court denied the motion for summary judgment because the allegations in the AC concerned events subsequent to the events alleged in the '613 Case, and Plaintiff had submitted evidence sufficient to create a genuine issue of material fact for trial as to the sole remaining claim for intentional interference with contractual relations. The Court denied the motion in limine because it identified no particular evidence to exclude but simply asked the Court to enforce the evidence rules at trial as a general matter.

Defendants have asked the Court to reconsider their latest motion for summary judgment and to strike Plaintiff's recently filed jury demand.

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II. DISCUSSION

A. Motion to Reconsider

Defendants argue that the Court noted no timely reply had been filed, but that they in fact filed a reply that was timely under a stipulation to extend time. The Court has examined the reply, and it does not negate the genuine issue of material fact Plaintiff showed in his response.

B. Motion to Strike Jury Demand

Plaintiff did not demand a jury trial in the Complaint, (*see* Compl., ECF No. 1, at 11), or in the AC, (*see* Am. Compl., ECF No. 28). Defendants did not demand a jury trial in the Answer to the Complaint, (*see* Answer, ECF No. 4), or in the Answer to the AC, (*see* Answer, ECF No. 30). A jury must be demanded by serving the other parties with a written demand no later than fourteen days after service of the last pleading directed to the issue for which a jury trial is demanded. Fed. R. Civ. P. 38(b)(1). The last such pleading in this case was the Answer to the AC, which was served upon Plaintiff via ECF on September 3, 2013. (*See* Cert. Service, ECF No. 30, at 8). The deadline for any party to demand a jury trial was therefore Tuesday, September 17, 2013. The Jury Demand at ECF No. 67 was served upon Defendants via ECF on September 18, 2014, over a year after the deadline. (*See* Cert. Service, ECF No. 67, at 3). Defendants are therefore correct that the demand is untimely and should be stricken.

In response, Plaintiff notes that in removal cases such as the present one, an express jury demand made before removal that is sufficient under state law need not be renewed after removal, and that where state law requires no express jury demand, a party need not make such a demand after removal unless specially ordered to do so by the court within a specified time. *See* Fed. R. Civ. P. 81(c)(3)(A). Plaintiff argues that Nevada law requires a jury demand "not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Plaintiff argues that because a jury demand was not yet due under state law at the time the case was removed, he need not make such a demand after removal unless ordered to do so by the

court within a specified time, and the Court has not issued such an order in this case.

Rule 81 waives the requirements of Rule 38 where an express jury demand has been made under state law before removal. Plaintiff does not claim to have made any express jury demand before removal, however. It is also true that where state law does not require an express jury demand, none need be made after removal. The questions here are whether and when a party must make a jury demand in federal court after removal in cases where state law does in fact require a jury demand, but where it was not yet due under state law at the time of removal. In such cases, is the jury demand requirement under Rule 38 negated, as is the case where state law requires no demand at all?

Plaintiff candidly admits that the Court of Appeals has ruled that in such cases a jury demand must be made in accordance with Rule 38, and that district courts typically follow that rule. *See Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983). However, Plaintiff also notes that the rule at the time of *Lewis* read, "If state law applicable in the court from which the case is removed *does* not require the parties to make express demands in order to claim trial by jury . . . ." *See id.* (quoting Fed. R. Civ. P. 81(c) (1983)) (emphasis added). Plaintiff argues that the result should be different today, because the rule was amended in relevant part in 2007 to read, "If the state law *did* not require an express demand for a jury trial . . . ." Fed. R. Civ. P. 81(c)(3)(A) (emphasis added). Plaintiff argues that because the current rule uses the past tense as to the requirement to make a jury demand under state law when viewed from the point of removal, that there is no requirement to make a jury demand in federal court if none was yet due under state law at the time of removal. Plaintiff admits that the 2007 amendments to the rules were "intended to be stylistic only," *see* Fed. R. Civ. P. 81 advisory committee's note, but argues that the stylistic change is an "unfair trap for the unwary."

The Court agrees with the district courts that continue to enforce the *Lewis* rule. Rule 81 is not a trap for the unwary. Even if that had been a fair argument when Rule 81 was newly

amended, as Plaintiff notes, district courts, including those in this district, have consistently enforced the *Lewis* rule under Rule 81 as amended. *See Nascimento v. Wells Fargo Bank*, No. 2:11-cv-1049, 2011 WL 4500410, at *2 (D. Nev. Sept. 27, 2011) (Mahan, J.); *Kaldor v. Skolnik*, No. 3:10-cv-529, 2010 WL 5441999, at *2 (D. Nev. Dec. 28, 2010) (Hicks, J.). And the new language of the rule is not particularly confusing. The Rule 38 demand is required unless the state law "did not require an express demand," not only if the state law "did not *yet* require an express demand *to have been served at the time of removal*." The latter reading of the rule is improbable. The committee's notes make clear that such a meaning was not intended, as the amendment was only for style. The authors of the rule surely knew how to distinguish the concepts of whether and when, and they did not add any language reasonably invoking the concept of timing into the amendment of Rule 81(c)(3)(A).

Moreover, Plaintiff's own Case Management Report of July 30, 2013 notes that "A jury trial has not been requested" under paragraph VIII, entitled "JURY TRIAL." (*See* Case Mgmt. Report 6, July 30, 2013, ECF No. 25). If Plaintiff had truly been under the impression that the right to a jury trial had been preserved under Rule 81(c)(3)(A) because no jury demand was yet due at the time of removal, he surely would have noted his expectation of a jury trial and/or explained his position that no jury demand was necessary; he would not have simply noted that no jury trial had been requested and left it at that. Plaintiff's "unfair trap for the unwary" argument in this case is therefore not made in good faith, even if the argument could avail a litigant in an appropriate case.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 68) is DENIED.

IT IS FURTHER ORDERED that the Motion to Strike Jury Demand (ECF No. 69) is GRANTED.

IT IS SO ORDERED.

Dated this 23rd day of October, 2014.

ROBERT C. JONES
United States District Judge