UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DETROIT INTERNATIONAL BRIDGE COMPANY and THE CANADIAN TRANSIT COMPANY,	)	
Plaintiffs,	)	Docket No. 10-cv-476-RMC
-vs-	)	
THE UNITED STATES COAST GUARD et al.,	)	
Defendants.	)	

INTERESTED PARTY MICHIGAN DEPARTMENT OF TRANSPORTATION'S MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF DISMISSING THE "CANADA–UNITED STATES–ONTARIO–MICHIGAN BORDER TRANSPORTATION PARTNERSHIP"

BILL SCHUETTE
Attorney General

/s/Michael J. Dittenber
Michael J. Dittenber
Assistant Attorney General
Michigan Bar No. P72238
Transportation Division
425 W. Ottawa Street
Lansing, MI 48913
(517) 373-1470
DittenberM@michigan.gov

Attorneys for Interested Party
Michigan Department of
Transportation

Appearing Pursuant to Local Civil
Rule 83.2(f)

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INTRODUCTION

The Michigan Department of Transportation, as an agency of the State of Michigan, is immune under the Eleventh Amendment from suits in federal court, including this one. This is true whether Plaintiffs DIBC and Canadian Transit Co. ("the Bridge Companies") seek relief directly, by suing MDOT, or indirectly, as they have done here by suing the so-called Canada–United States–Ontario–Michigan Border Transportation Partnership, in which MDOT is an alleged "partner." To be clear, MDOT is not appearing for or representing the "Partnership"—which is neither a legal entity nor otherwise capable of being sued.[1] Rather, MDOT appears only to protect its interests and assert its immunity insofar as the Bridge Companies seek relief against the Partnership that would bind MDOT, and through it, the State of Michigan. By filing as an interested party for this limited purpose, MDOT is not waiving its Eleventh Amendment immunity or otherwise consenting to this Court's jurisdiction—indeed, it is asserting and defending the application of this jurisdictional immunity.

Other compelling reasons exist for dismissing the Bridge Companies' claims against the Partnership: (1) the Partnership is not a legal entity that can be sued in federal court; (2) the attempted service on the Partnership was improper and should be quashed; and (3) the Bridge Companies have not pleaded viable legal claims against the Partnership (i.e., all claims are barred by the statute of

[1] The use of the term "Partnership" is for reference purposes only; it is not an admission or waiver regarding the Partnership's status.

limitations and fail to state claims upon which meaningful declaratory relief could be granted). With respect to the last point, the statutes and treaties that the Bridge Companies rely on do not grant exclusive franchise rights or provide causes of action remediable in federal court. More importantly, the Bridge Companies do not request *any* specific relief against the Partnership. Independent of immunity considerations, these claims are insufficient to survive a motion to dismiss.

But the primary thrust—as this case relates to MDOT—is what appears to be an attempt by the Bridge Companies to circumvent MDOT's, and through it, the State of Michigan's sovereign immunity. They should not be permitted to do so. "The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury. . . it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (internal citations and quotation marks omitted).

For these reasons, as fully discussed herein, all claims asserted against the Partnership should be dismissed.

STATEMENT OF FACTS

The Bridge Companies filed this case in 2010 against various federal and Canadian entities and actors, claiming an exclusive franchise right to operate an international bridge (the Ambassador Bridge) between Detroit, Michigan, and Windsor, Ontario, Canada. [D.E. #1.] In short, the Bridge Companies aim to enjoin the planning and construction of the proposed New International Trade Crossing,

an international bridge slated for construction approximately two miles south of the Ambassador Bridge.

The factual background of the NITC project, the procedural history of this case, and the exact contours of the Bridge Companies' claims are set forth in the pleadings and likely will be further developed in the parties' briefs. To avoid redundancy, MDOT will focus only on the facts relevant to the claims against the Partnership.

The Partnership was first named as a party-defendant in the Second-Amended Complaint. [D.E. #83.] In the Third-Amended Complaint, the Bridge Companies allege that the Partnership comprises representatives of Transport Canada, the Ontario Ministry of Transport, the Federal Highway Administration, and MDOT. [D.E. #105 at ¶28.] The Partnership began as a working group in December 2000 to study transportation needs. [*Id.* at ¶181.] Later, these parties entered a "framework agreement" in 2001 and a "charter" in 2005. [*Id.* at ¶184.]

As part of its studies, the Partnership identified 15 potential sites for a new international bridge, one being a twin span of the Ambassador Bridge, identified as "X12." [*Id.* at ¶¶191–192.] The Partnership was open to alternative ownership structures, stating in May 2006 that the new crossing could be either publicly or privately owned. [*Id.* at ¶¶193–194.]

By that time, however, Canada had "firmly concluded" that it would not allow the Bridge Companies to own the new crossing, whether it be an Ambassador Bridge twin span or a separate structure. [*Id.* at ¶195.] It thus resolved to "drop

site X12 as an alternative as soon as practicable[.]" [*Id.* at ¶198.] Canada then "insist[ed] that the other, United States members of the DRIC Partnership accept its rejection of the X12 location." [*Id.* at ¶205.] In 2008, "having been pressured by Canada" to reject X12, the other Partnership members ultimately decided on the NITC site (referred to as X10B). [*Id.* at ¶210.]

The remainder of the Third-Amended Complaint details decisions and acts undertaken by other defendants and non-parties. The only other direct mention of the Partnership is a generalized accusation of discrimination and concerted action in rejecting X12. [*Id.* at ¶372.] The Prayer for Relief does not request any relief specific to the Partnership. [*Id.* at pp.112–116.]

Attempted Service

On March 8, 2013, a process server appeared at MDOT's central offices in Lansing, Michigan. (Ex. A (Gleeson Aff.) at ¶3.) The Michigan Assistant Attorneys General who represent MDOT are also housed in that building. When presented with the Summons and Second-Amended Complaint, Assistant Attorney General Kathleen Gleeson informed the process server that she represents MDOT. (*Id.* at ¶5.) She did not state that she represents the Partnership or that she was authorized to accept service on behalf of that entity. (*Id.* at ¶6.) This was because she had no such authorization or appointment. (*Id.* at ¶7.) In fact, Ms. Gleeson has never had *any* contact with the Partnership. (*Id.*)

Nevertheless, the Bridge Companies have filed a return of service that indicates Ms. Gleeson was authorized to accept service on behalf of the Partnership.

[D.E. #93.] The record does not reflect any additional efforts to serve the Second-Amended Complaint, or any attempt to serve the Third-Amended Complaint.

Claims

The Third-Amended Complaint asserts nine counts. Of those, only two (Counts II and III) appear to encompass the Partnership, and only because those Counts are labeled as applying to "All Defendants." In those Counts, the Bridge Companies seek a declaration that they enjoy a perpetual and exclusive franchise to operate an international bridge between Detroit and Windsor (Count II), and that the alleged franchise gives them the exclusive right to add a twin span to the Ambassador Bridge (Count III).

The seven remaining counts do not apply to the Partnership. Counts I, IV, VI, VII, and VIII identify specific defendants without naming the Partnership. Counts V and IX are asserted against the "U.S. Defendants." By definition, those Counts exclude an entity with Michigan and Canadian participants.[2]

LEGAL STANDARD

The Partnership should be dismissed under Fed. R. Civ. P. 12(b)(1) (lack of subject-matter jurisdiction), 12(b)(5) (insufficient service of process), and 12(b)(6) (failure to state a claim).

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[2] Furthermore, Counts V and IX are brought under the Fifth Amendment, which applies only to the federal government. *See Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952) (holding the Fifth Amendment "appl[ies] to and restrict[s] only the Federal Government and not private persons"). This confirms that Counts V and IX are not—and cannot be—asserted against the Partnership.

A motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) seeks dismissal of a lawsuit because a court lacks authority to hear the dispute. Once a lack of subject matter jurisdiction is asserted, the plaintiff bears the burden of establishing the court's jurisdiction. *Shuler v. United States*, 531 F.3d 930, 932 (D.C. Cir. 2008); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007).

A Rule 12(b)(5) motion challenges the mode or method of service of the summons and complaint. "Courts may dismiss a complaint when a plaintiff fails to comply with the Federal Rules governing service." *Olson v. Fed. Election Comm'n*, 256 F.R.D. 8, 10 (D.D.C. 2009). "When a defendant moves to dismiss a complaint under Rule 12(b)(5), the plaintiff has the burden of establishing the validity of service of process[.]" *Freedom Watch, Inc. v. OPEC*, 288 F.R.D. 230, 231 (D.D.C. 2013).

"A motion to dismiss for failure to state a claim pursuant to [Fed. R. Civ. P. 12(b)(6)] challenges the adequacy of a complaint on its face." *Cottrell v. Vilsack*, 915 F. Supp. 2d 81, 89 (D.D.C. 2013). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Bell v. Twombly*, 550 U.S. 544, 555 (2007). Rather, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570)).

ARGUMENT

In Counts II and III, the Bridge Companies seek a judicial declaration against "all Defendants" that they hold an exclusive franchise to operate an international bridge in the Detroit/Windsor area and the right to build a second span of the Ambassador Bridge.

These claims should be dismissed. As an initial matter, MDOT is entitled to Eleventh Amendment immunity. Further, the Partnership cannot be sued in federal court. Even if it could, it has not been served with the Summons and Complaint. And, notwithstanding the jurisdictional and procedural issues, the Third-Amended Complaint does not state a cognizable legal claim against the Partnership. Finally, the exercise of equitable jurisdiction is discretionary, and judicial economy does not support the exercise of jurisdiction here. For any or all of these reasons, the Partnership should be dismissed from this litigation.

I. The Michigan Department of Transportation is entitled to Eleventh Amendment immunity.

Perhaps anticipating an immunity defense, the Bridge Companies did not attempt to name MDOT (or any other Michigan actor or entity) as a party-defendant or expressly seek relief against them. Nevertheless, Michigan actors, particularly MDOT, are referenced frequently throughout the Complaint. By naming the Partnership, it appears that the Bridge Companies are attempting to gain indirectly (injunctive or other relief against MDOT) what they cannot accomplish directly. Consequently, and out of abundant caution, MDOT

emphasizes that the Eleventh Amendment bars *any* relief that would potentially operate against MDOT and the State of Michigan.

MDOT is unquestionably entitled to Eleventh Amendment immunity from suit in federal court. *See* U.S. Const. amend. XI. State agencies are arms of the state and, as such, are entitled to the same immunities as the states themselves. *Citizens Alert Regarding Env't v. EPA*, 102 Fed. Appx. 167, 169 (D.C. Cir. 2004). Michigan's federal courts have long recognized that, as a state agency, MDOT is entitled to this jurisdictional immunity. *See, e.g., Mich. Rd. Builders Ass'n, Inc. v. Blanchard*, 761 F. Supp. 1303, 1309 (W.D. Mich. 1991).

Despite the Eleventh Amendment, a state remains open to suit in federal court in two circumstances (waiver and Congressional abrogation), neither of which applies here. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). There is no basis to conclude the State waived its immunity by MDOT's alleged participation in the Partnership. *See Farm-To-Consumer Legal Defense Fund v. Vilsack*, 636 F. Supp. 2d 116, 126 n.12 (D.D.C. 2009) ("None of the documents or actions cited by the Plaintiffs constitutes or demonstrates a waiver of Michigan's constitutional rights under the Eleventh Amendment. None of them even speaks to the issue."). The Declaratory Judgment Act, the only potential cause of action cited, does not abrogate Eleventh Amendment immunity. *See, e.g., Muirhead v. Mecham*, 427 F.3d 14, 17 n.1 (1st Cir. 2005); *Ameritech Corp. v. McCann*, 297 F.3d 582, 585 (7th Cir. 2002). The Eleventh Amendment also bars

any federal or state common-law claims. *See, e.g., Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 251 (1985).

For immunity purposes, it is inconsequential that the Bridge Companies seek only declaratory relief: "[T]he relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe of Fla.*, 517 U.S. at 58. "The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury . . . it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.]" *Id.* (internal citations and quotation marks omitted.)

Subjecting MDOT to this lawsuit under the guise of a "Partnership" would be a sterling example of the indignity that the Eleventh Amendment is designed to avoid. The Court should not allow the Bridge Companies to circumvent MDOT's immunity by artful pleading. Rather, "the crucial question is whether the relief sought is, in effect, relief against the state." Bourdeau et al., 32A Am. Jur. 2d Federal Courts § 960 (updated 2013). Because the State appears to be the real, substantial party in interest for these claims, the Eleventh Amendment bars the claims whatever the nature of the relief requested. *Pennhurst,* 465 U.S. at 101–02.

Accordingly, the Court should dismiss all claims against the Partnership insofar as any relief, equitable or otherwise, would operate against the State and/or MDOT.

II. The Partnership is not a legal entity capable of being sued in federal court.

The Bridge Companies do not identify the Partnership's capacity to be sued, save for an allegation that certain documents "reflect a commitment to form a partnership." [D.E. #105.] This unsupported assertion is a legal conclusion not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 678.

The Partnership is *not* a legal entity that can be sued in federal court. Fed. R. Civ. P. 17 provides four categories of entities that can be sued: (1) individual, (2) corporation, (3) partnership, or (4) other unincorporated association. Fed. R. Civ. P. 17(b). The Partnership is not alleged to be either an individual or a corporation. And as the analysis that follows shows, it is not a partnership, nor is it an unincorporated association capable of being sued in federal court. As such, it lacks the capacity to be sued in this case.

A. The Partnership is not a "partnership."

Unless an entity is an individual or a corporation, that entity's capacity to be sued in federal court depends on "the law of the state where the court is located[.]" Fed. R. Civ. P. 17(b)(3). In this jurisdiction, a partnership "may sue and be sued in the name of the partnership." D.C. CODE § 29–603.07. "The law of the state of the jurisdiction in which the partnership has its principal office" governs partnership liabilities. *Id.* § 29–601.06.

The Complaint does not allege where the Partnership's principal office is located, but under both Michigan and D.C. law, a partnership is an entity formed for the purpose of *operating a business for profit*. *See* D.C. CODE § 29–601.02(9) (a

"partnership" is "an association of 2 or more persons to carry on as co-owners a business for profit . . . ."); MICH. COMP. LAWS § 449.6 (a "partnership" is an "association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit").[3] *See also Varlesi v. Wayne State Univ.*, 909 F. Supp. 2d 827, 842 (E.D. Mich. 2012) (finding that the "use of the term 'partnership'" was "a colloquial equivalent for a common effort" because "a legal partnership requires an intent 'to carry on as co-owners a business for profit,' . . . and no such intent has been shown here").

In contrast, the Partnership was "formed for the purpose of improving the safe and efficient movement of people and goods across the U.S./Canadian border *at the Detroit River*, including improved connections to national, provincial and regional systems such as I-75 and Highway 401" [D.E. #105 at ¶28 (quoting Partnership's alleged charter).] Nothing in the "charter" suggests that the Partnership intended to operate a business, let alone one for profit, rather than facilitate its stated purpose of improving public transportation.

The Bridge Companies have pleaded no additional facts to substantiate the existence or formation of a partnership. Because there is no factual basis to conclude that the participants intended to operate a for-profit business, the Court

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[3] The D.C. Code does not appear to address a partnership with a principal office in Canada, as its defines "state" as "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States." D.C. CODE § 29–101.02(46). Nevertheless, the Ontario Partnerships Act also requires a partnership to be a for-profit business. *See* R.S.O., 1990 Ch. P.5, § 2. ("Partnership is the relation that subsists between persons carrying on a business in common with a view to profit[.])"

should find that the Bridge Companies have failed to state a claim in a partnership capacity.

B. The Partnership is not an unincorporated association that can be sued under Fed. R. Civ. P. 17(b).

District of Columbia law does not permit unincorporated associations to sue or to be sued directly. *Sisso v. Islamic Repub. of Iran*, 448 F. Supp. 2d 76, 91 (D.D.C. 2006). Consequently, the Partnership can be sued as an unincorporated association only if it meets the requirements of Fed. R. Civ. P. 17(b)(3)(A):

> [A] partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws[.]

A temporary study group of independent governmental entities is not an "unincorporated association" within the meaning of Rule 17. Indeed, several courts have reasoned that Rule 17(b)(3)(A) was not intended to apply to units of government. *See Dean v. Barber*, 951 F.2d 1210, 1214 n.4 (11th Cir. 1992); *Mason v. Clayton County Bd. of Educ.*, 334 Fed. Appx. 191, 194 (11th Cir. 2009); *see also Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371, 376 (3d Cir. 1974) (Adams, J., concurring), *abrogated on other grounds by Washington v. Davis*, 426 U.S. 229 (1976). Rather, as Judge Arlin Adams reasoned in his *Tullio* concurrence: "It would appear from the background of Rule 17(b) that the relaxation of the requirement that an organization have 'capacity (under state law) to sue' was designed to permit *private entities* that are well-established representatives of groups of people with common social and economic concerns to sue or be sued." 493

F.2d at 376 (emphasis added). Indeed, the case that was the impetus for Rule 17(b)(3)(A), *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922), questioned whether an unincorporated labor union was amenable to suit. *See, e.g.*, Wright et al., 6A *Federal Practice & Procedure* § 1564 (3d ed.). Based on this collective reasoning, the Partnership—which has no legal status of its own but consists of sovereign governmental entities—should not be considered an "unincorporated association" subject to suit under Rule 17(b)(3)(A).

Granted, some courts have construed certain associations involving governmental actors as having Rule 17 capacity. *See, e.g.*, *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 921 n.6 (11th Cir. 2003); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 472 (D.N.J. 1998). These entities, however, are permanent, structured organizations that operate independent of their constituent members.[4] The Partnership lacks the authority, structure, and permanency of these organizations and should not be afforded the same status.

Indeed, one federal court has described the Partnership as "not a binding agreement" but a "consensus between the parties . . . to respect each other's environmental review processes and to select a Preferred Alternative that would not unduly burden one country." *Latin Ams. for Soc. & Econ. Dev. v. Fed. Highway*

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[4] For example, *see* OPEC Statute, available at http://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf (last visited August 29, 2013); 2011-12 NCAA Division I Manual (containing constitution, operating bylaws, and administrative bylaws), available at http://www.ncaapublications.com/productdownloads/D112.pdf (last visited August 29, 2013).

Admin., 858 F. Supp. 2d 839, 852 (E.D. Mich. 2012).[5] If the Partnership can be sued as an unincorporated association, so could any grouping of sovereign governmental entities that consult each other in furtherance of a common goal or purpose. Immunities cannot be so casually tossed aside, and progress should not be so easily stifled.

In sum, the Partnership is not a for-profit business with "partnership" status. Nor is it an "unincorporated association" capable of being sued in federal court under Fed. R. Civ. P. 17(b)(3)(A). For these reasons, the Partnership is not properly before the Court as a party-defendant.

III. The Partnership should be dismissed under Fed. R. Civ. P. 12(b)(5) because the attempt at service was improper.

Regardless of the Partnership's legal status, the Bridge Companies have not properly served it with the Summons and Complaint. The Bridge Companies purportedly served the Partnership by leaving the Summons and Second-Amended Complaint with Kathleen Gleeson, an Assistant Attorney General for the State of Michigan. Ms. Gleeson is not a member or official of the Partnership, nor is she an attorney for the Partnership. (Ex. A (Gleeson Aff.) at ¶8.) Rather, she is an attorney only for MDOT. (*Id.* at ¶2.)

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[5] Notably, in *Latin Americans*, the district court noted DIBC's averment that "there was no agreement in place between the countries" but rather an "unwritten, possibly illegal 'gentlemen's agreement.'" 858 F. Supp. 2d at 852. Now, the Bridge Companies (DIBC included) allege that the Partnership's documents "are not mere gentlemen's agreements" but are legally binding and significant. [D.E. #105 at ¶190.]

Being a party's attorney does not automatically carry with it concomitant authorization to accept service on the client's behalf. *See, e.g., Schwartz v. Thomas*, 222 F.2d 305, 309 (D.C. Cir. 1955); *see also McLaughlin v. Fidelity Sec. Life Ins.*, 667 A.2d 105, 107 (D.C. 1995) (finding under D.C. law that service on counsel absent "proof of actual authority" was insufficient). At least one state's highest court has directly addressed this with respect to partnerships, finding that service on a partner's attorney does not constitute service on a partnership, unless the partnership has so authorized that attorney. *See Bush v. Winker*, 907 P.2d 79, 85 (Colo. 1995). Likewise, the Michigan Court of Appeals has held similarly regarding a labor union—an unincorporated association. *See Ekpe v. Det. Bd. of Educ.*, No. 209615, 2000 WL 33522324, at *2 (Mich. Ct. App. Mar. 7, 2000) (unpublished decision attached as Ex. B).

Service was therefore proper only if Ms. Gleeson was authorized to accept service on the Partnership's behalf. There is no factual basis to find authorization or appointment here. Indeed, Ms. Gleeson stated that she lacks any such authorization. (Ex. A (Gleeson Aff.) at ¶7.) Although Ms. Gleeson did not refuse the papers, she did not represent to the server that she was authorized to accept them for the Partnership—in fact, she stated only that she represents MDOT. (*Id.* at ¶¶5–6.) Without specific authorization, an attorney's purported acceptance of service is invalid even if an attorney accepts papers or represents that she has the requisite authorization. *See Pollard v. District of Columbia*, 285 F.R.D. 125, 128

(D.D.C. 2012) (quoting 4A Wright & Miller, *Federal Practice and Procedure* § 1097 (3d ed. 2002)).

Simply put, Ms. Gleeson lacked the authority to accept service on the Partnership's behalf. Her affidavit is the "strong and convincing evidence" necessary to rebut the *prima facie* validity of a proof of service. *Pollard*, 285 F.R.D. at 127–28. Because Ms. Gleason was not authorized to accept service, the Bridge Companies' attempted service was ineffective. *See Freedom Watch, Inc.*, 288 F.R.D. at 233 ("Absent such authorization, OPEC could not have been validly served through its counsel.")

This conclusion naturally begs the question of who is authorized to accept service on behalf of the Partnership. But "[w]hen a defendant moves to dismiss under Rule 12(b)(5), the *plaintiff* has the burden of establishing the validity of service of process." *Freedom Watch, Inc.*, 288 F.R.D. at 231 (emphasis added). Any difficulties encountered in demonstrating proper service are the "consequences of the choice" that the Bridge Companies made in naming the Partnership as a party-defendant. *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987).

The attempted service—leaving the summons and complaint with an attorney representing one alleged Partnership member—was insufficient to subject the Partnership to this Court's jurisdiction. Because the Partnership was not properly served, it should be dismissed under Fed. R. Civ. P. 12(b)(5).

IV. The statute of limitations bars the Bridge Companies' claims against the Partnership

As they relate to the Partnership, the Bridge Companies' claims are untimely. They have identified no act taken by the Partnership—as opposed to individual acts taken by its alleged members—within the statute of limitations.

"As a general rule, an action for declaratory judgment will be barred to the same extent the applicable statute of limitations bars an underlying action in law or equity." Gregor et al., 22A Am. Jur. 2d, Declaratory Judgments, § 185 (updated 2013); *see also Air Transport Ass'n of Am. v. Lenkin*, 711 F. Supp. 25, 27 (D.D.C. 1989) (declaratory judgment based on underlying contract subject to D.C. statute of limitations for breach-of-contract claim).

The Bridge Companies' claims can best be described as arising out of federal statutes (the 1921 and subsequent authorizing acts) and the 1909 Boundary Waters Treaty. None of these sources contains a statute of limitations. When a federal statute does not contain a statute of limitations, courts generally apply the most analogous state-law limitations period. *DelCostello v. Inter'l Broth. of Teamsters*, 42 U.S. 151, 158 (1983).

Here, the gravamen of the Bridge Companies' claims is that the defendants have infringed their exclusive franchise right to operate an international bridge. This injury is most analogous to a tort claim. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 716 (1999) (taking of property without compensation or adequate forum to seek compensation "sounds in tort"); *N.Y. Elec. Lines Co. v. Empire City Subway Co.*, 235 U.S. 179, 191 (1914) (a franchise right

"however named, is property"). The statute of limitations provided by the D.C. Code to recover damages for an injury to real or personal property is three years, as it is for any other non-prescribed tort action. D.C. CODE § 12-301(3), (8). Therefore, the Court should apply a three-year statute of limitations to the Bridge Companies' claims.[6]

Under this court's local rules, an amended pleading is deemed filed on the date on which the order granting the amendment is entered. *See* D.D.C. LCvR 15.1. Here, the minute order allowing the Second-Amended Complaint entered on February 11, 2013.[7] To avoid the statute of limitations, the Bridge Companies' claims must have accrued on or after February 11, 2010.

The Complaint does not identify any action taken by the Partnership within the limitations period. Any challenge to the formation of the Partnership is clearly precluded, as the Bridge Companies allege that this process began in December 2000, with memorializing documents issuing in 2001 and 2005. [D.E. #105 at ¶¶28, 181, 184.] Moreover, the general discussion pertaining to the Partnership's meetings and other activities spans from 2004 to 2007, and the Bridge Companies assert that by 2008, the Partnership had rejected the Ambassador Bridge twin span in favor of the NITC location. [*See generally id.* at ¶¶181–210.] Thus, the last

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[6] Likewise, to the extent that the franchise claims could be construed as contractual in nature, the D.C. limitations period for breach-of-contract claims is also three years. D.C. CODE § 12–301(7); *Ying Quig Lu v. Lezell*, 919 F. Supp. 2d 1, 5 (D.D.C. 2013).

[7] The date of the Second-Amended Complaint is used because it was the first pleading to name and seek relief against the Partnership as a party-defendant.

attribution of Partnership action involves conduct occurring at least two years outside of the statute of limitations.

Finally, this would be an improper situation to relate the amendment back to the original pleading. A claim against a new party relates back only where, within the time provided for serving the summons and complaint, the new party: (1) received notice of the action and would not be prejudiced by defending; and (2) knew or should have known that the action would have been brought against that party but for a mistake concerning the party's identity. Fed. R. Civ. P. 15(c)(1)(C)(i)–(ii).

Neither requirement is met here. Nothing suggests that the Partnership received notice of this lawsuit within the original 120-day period for service. More importantly, there was no mistake regarding the Partnership's identity; the Bridge Companies referenced the Partnership by name in their original complaint. [D.E. #1 at ¶82.] For whatever reason, they elected not to sue the Partnership at that time (or, for that matter, in their First-Amended Complaint). *See Philogene v. Dist. of Columbia*, 864 F. Supp. 2d 127, 134 (D.D.C. 2012) ("Although the first amended complaint includes Sergeant Mack in its factual allegations, Sergeant Mack was not named as a party"); *Ferguson v. Local 689, Amalgamated Transit Union*, 626 F. Supp. 2d 55, 60 (D.D.C. 2009) (denying relation back and noting "Ferguson's original complaint contains multiple references to WMATA, yet it did not name WMATA as a party").

"[T]he plaintiff is responsible for determining who is liable for her injury and for doing so before the statute of limitations runs out; if she later discovers another

possible defendant, she may not, merely by invoking Rule 15(c), avoid the consequences of her earlier oversight." *Rendall-Speranza v. Nassim*, 107 F.3d 913, 919 (D.C. Cir. 1997). The Bridge Companies' delay in naming the Partnership was not "a simple case of mistaken identity or a 'slip of the pen.'" *Philogene*, 864 F. Supp. 2d at 134. Rather, it was an informed, conscious decision, and one for which Rule 15(c) provides no relief: "When the original complaint and the plaintiff's conduct compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity, the requirements of Rule 15(c)(1)(C)(ii) are not met." *Krupski v. Costa Crociere S.p.A.*, __ U.S. ___, 130 S. Ct. 2485, 2496 (2010).

Because the Bridge Companies have not alleged any Partnership action within the limitations period, and because their claims do not relate back, the Court should dismiss the claims against the Partnership as untimely.

V. The Bridge Companies lack standing to seek relief against the Partnership.

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). The Declaratory Judgment Act—the only alleged source of relief that the Bridge Companies cite—likewise notes that a court may resort to the Act only "[i]n a case of actual controversy within its jurisdiction[.]" 28 U.S.C. § 2201(a). "The requirement of a case or controversy is no less strict when a party is seeking a

declaratory judgment than for any other relief." *Fed. Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 963 (D.C. Cir. 1995).

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To meet the "irreducible constitutional minimum of standing[,]" a plaintiff must demonstrate: (1) a concrete and particularized injury in fact; (2) a causal connection between that injury and the conduct complained of that is fairly traceable to the defendant's actions; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* at 560–61. Because the Bridge Companies are invoking federal jurisdiction, it is their burden to establish standing. *Gordon v. Haas*, 828 F. Supp. 2d 13, 17 (D.D.C. 2011).

The Complaint does not attribute an injury-in-fact to the Partnership. It appears that the Bridge Companies' main qualm with the Partnership is its mere existence. [*See* D.E. #105 at ¶185 (averring that the Partnership violates U.S. CONST. art. I, § 10).] Alleging that the respective agencies improperly convened a governmental "thinktank" is a "generalized grievance[] about the conduct of Government" for which the Bridge Companies lack standing to sue. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (citation and quotation marks omitted).

Furthermore, the few allegations attributed to the Partnership involve instances of past conduct. Where declaratory and injunctive relief are sought, "past injuries alone are insufficient to establish standing[.]" *Dearth v. Holder*, 641 F.3d

499, 502 (D.C. Cir. 2011). The Bridge Companies give no indication of what actions they believe the Partnership, as an entity, will take to cause future harm.

In reality, the Bridge Companies' alleged injuries are the result of independent actions of other actors. They do not allege that the Partnership approved or took other formal action to facilitate the NITC project. Nor do they allege that the Partnership is responsible for any approvals, denials, or other action with respect to proposed second Ambassador Bridge span. Accordingly, any injuries that the Bridge Companies have allegedly suffered—or, more importantly, will suffer in the future—are not traceable to the Partnership. The Bridge Companies' Prayer for Relief confirms this; of the *twenty* separate requests for relief, not one asks for relief specific to the Partnership. [D.E. #105, pp.112–116.]

Furthermore, a declaration against the Partnership would redress nothing. It would not invalidate or otherwise affect the Crossing Agreement, the FHWA and Canadian decisions and reports, or any other action taken under the name and authority of a specific agency. *See Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) (finding injury not capable of redress in part because "declaratory and injunctive relief against the defendants actually named would not prevent the claimed injury"). Relief against the Partnership would be illusory, and "Article III simply does not permit this Court to offer advisory opinions as to the constitutionality of actions for which no redress can be granted." *Newdow v. Bush*, 391 F. Supp. 2d 95, 108 (D.D.C. 2005).

The Bridge Companies have not identified an injury-in-fact traceable to the Partnership, nor have they explained how a judgment against the Partnership would redress their alleged injuries. As such, they have failed to establish Article III standing, and the claims against the Partnership should be dismissed.

VI. The Bridge Companies fail to state a viable claim for declaratory relief against the Partnership.

Even if the Bridge Companies can establish standing, they cannot demonstrate their entitlement to declaratory or other equitable relief. The 1921 and subsequent authorizing acts do not contain language granting exclusive franchise rights or providing a private cause of action. And the 1909 Boundary Waters Treaty does not provide the Bridge Companies a remedy to enforce an alleged violation of the treaty. The Bridge Companies have not identified any other right privately enforceable in this Court.

Alternatively, considering the uncertainties surrounding the Partnership, and the Bridge Companies' ability to seek meaningful relief against other defendants, the Court has compelling reasons to decline equitable jurisdiction over the Partnership.

A. The Bridge Companies have not identified a private cause of action enforceable through the Declaratory Judgment Act.

The Declaratory Judgment Act, 28 U.S.C. § 2201, is procedural only. *See Morgantown Glassware Guild, Inc. v. Humphrey*, 236 F.2d 670, 672 (D.C. Cir. 1956). Without an underlying "cognizable cause of action[,]" there is "no basis upon

which to seek declaratory relief." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011).

"It is axiomatic that a plaintiff must proffer a proper basis for both a federal court's exercise of jurisdiction and an independent cause of action under which to proceed." *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 212 (D.D.C. 2009). The statute providing for federal-question jurisdiction, 28 U.S.C. § 1331, "does not create any causes of action." *Marciano v. Shulman*, 795 F. Supp. 2d 35, 38 (D.D.C. 2011). The Declaratory Judgment Act likewise does not provide a cause of action. *Ali*, 649 F.3d at 778. Rather, "the availability of such relief presupposes the existence of a judicially remediable right." *Shilling v. Rogers*, 363 U.S. 666, 677 (1960).

A judicially recognizable right enforceable against the Partnership must necessarily stem from one of the underlying sources of law that the Bridge Companies have identified. Moreover, if the Court concludes that the Partnership is being sued under Fed. R. Civ. P. 17(b)(3)(A), the Bridge Companies can seek to enforce only "a substantive right existing under the United States Constitution or laws." For the reasons discussed below, the identified sources of law do not establish privately enforceable or substantive franchise rights.

1. The 1921 and subsequent authorizing acts do not contain a private cause of action.

The most obvious (and appropriate) source of a privately enforceable right would be the statutes upon which the Bridge Companies rely. "And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). The statute must "display[] an intent to create not just a private right *but also a private remedy*." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis added). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002).

As relevant here, the applicable authorizing act states: "[T]he consent of Congress is hereby granted to American Transit Company, its successors and assigns, to construct, maintain, and operate a bridge and approaches thereto across Detroit River." Act of Mar. 4, 1921, 66th Cong., ch. 167, 41 Stat. 1439. The statute merely grants consent to build and maintain an international bridge, which the Bridge Companies have done and continue to do. There is no language remotely suggestive of Congress's intent to create a privately enforceable right or remedy in this statute. The other statutes that the Bridge Companies rely on simply extended the time in which the bridge was to be built; they add nothing to the franchise argument. *See* Act of April 17, 1924, 68th Cong. ch. 125, 43 Stat. 103; Act of Mar. 3,

1925, 68th Cong. ch. 448, 43 Stat. 1128; Act of May 13, 1926, 69th Cong. ch. 292, 44 Stat. 535.

Even if the Bridge Companies can glean from these acts an enforceable right to "construct, maintain, and operate" an international bridge, that right is not what they seek to enforce here; instead, they want a declaration that they have a perpetual exclusive franchise to operate *any* bridge linking Detroit and Windsor.

The statute, however, does not mention a "franchise," let alone an "exclusive" or "perpetual" one. "[G]rants of franchise and special privilege are always to be construed most strongly against the donee, and in favor of the public." *St. Clair County Turnpike Co. v. Illinois*, 96 U.S. 63, 68–69 (1877); *see also Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892) ("Nothing passes by mere implication.").

The Supreme Court has considered, and rejected, the "franchise" argument with respect to a similar bridge-authorizing statute. In *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917), the plaintiff bridge owner sought to enjoin an order from the Secretary of War requiring substantial modifications to its bridge, citing a "irrevocable franchise" granted by the establishing statute. *Id.* at 416. The Court disagreed with this assessment, noting that there were "no words of perpetuity" in the statute and concluding that "the case is peculiarly one for the application of the universal rule that grants of special franchise and privileges are

to be strictly construed in favor of the public right[.]" *Id.* at 417, 419.[8] That universal rule applies with equal force here.

And it is not as if Congress lacks the means or ability to make clear its intent to grant an exclusive franchise. For example, in 1956, it granted the D.C. Transit Company an exclusive franchise to operate a mass transportation system in Washington D.C. *See D.C. Transit Sys., Inc. v. Wash. Metro. Area Transit Comm'n*, 359 F.2d 420, 421 (4th Cir. 1966). To do so, Congress included statutory language barring competition in the Company's area of operation (except upon a finding of public necessity). *See* Act of July 24, 1956, 84th Cong., P.L. 757, 70 Stat. 598 (granting 20-year exclusive franchise). No equivalent language is contained in the 1921 or subsequent acts.

Therefore, the authorizing acts do not grant the Bridge Company a privately enforceable cause of action to remedy the alleged violation of their exclusive franchise rights.

2. The Boundary Waters Treaty does not contain an enforceable private remedy.

The Bridge Companies also claim rights under the 1909 Boundary Waters Treaty, 36 Stat. 2448. But an international treaty does not afford them privately

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[8] The plaintiff also argued that the great financial burden to construct the bridge evinced an intent to grant an irrevocable franchise. The Court found this a "very grave consideration" but concluded "the investors were satisfied with the prospect of the profit to be gained from the use of the bridge in the meantime." *Id.* at 420. This reasoning applies equally to the Bridge Companies' contention that they would never have built the Ambassador Bridge if they did not have an exclusive franchise for its operation. [D.E. #105 at ¶69.]

enforceable rights: "[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose on the States through lawmaking of their own." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006). *See also Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941) ("[T]he courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters."). This is because "inferring a treaty-based cause of action embroils the judiciary in matters outside its competence and authority." *McKesson Corp. v. Islamic Rep. of Iran*, 539 F.3d 485, 490 (D.C. Cir. 2008).

No article of the Boundary Waters Treaty institutes a private judicial remedy for non-compliance. *See Miller v. United States*, 583 F.2d 857, 861 (6th Cir. 1978) ("[T]here is no indication that the [the Boundary Waters Treaty] also expresses an intent on the part of either government to accept new obligations vis-a-vis its own citizens."). The only remedy discussed in the Treaty is referral of a dispute to the International Joint Commission (established in the Treaty) by the United States or Canada. *See* 1909 Boundary Waters Treaty, Art. IX; X. It does not contemplate or authorize a private lawsuit against either the United States or Canada, or any other entity.

For these reasons, the Bridge Companies cannot challenge whether the International Bridges Act, or the Crossing Agreement approved thereunder, violates the Boundary Waters Treaty. This also prevents the Bridge Companies from using

the Treaty as a means of enforcing any purported franchise rights under Canadian law.[9]

B. The Court should decline to exercise its equitable jurisdiction over the Partnership.

Alternatively, if the Court finds jurisdiction under the Declaratory Judgment Act, its exercise of that jurisdiction is discretionary. *See, e.g.*, *Sigma-Tau Industrie Farmaceutiche Riunite, S.p.A. v. Lonza, Ltd.*, 36 F. Supp. 2d 26, 30 (D.D.C. 1999); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207–08 (D.C. Cir. 1985) ("[A]ll the bases for nonmonetary relief—including injunction, mandamus, and declaratory judgment—are discretionary.").

Considering that a judicial declaration against the Partnership will not resolve *any* issue at hand, judicial economy would be best served by declining to exercise equitable jurisdiction over the Partnership and instead addressing the alleged actions of the independently named defendants. A declaration of rights vis-à-vis the Partnership will not invalidate the Presidential Permit, the approval of the Crossing Agreement or any other decision made regarding the NITC project. *See, e.g.*, *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1020 (D.C. Cir. 1991) ("Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers.").

[9] In addition, any rights under Canadian law would not exist under "the United States Constitution and laws" as required to maintain a lawsuit against a Rule 17(b)(3)(A) party.

In addition, dismissing the Partnership will preserve both the parties' and the Court's resources. Just as one example, the Bridge Companies have indicated that they will attempt to seek jurisdictional discovery relating to the Partnership. [*See* D.E. #113.] Declining equitable jurisdiction will avoid the unnecessary and duplicative use of judicial resources, especially since the Bridge Companies' rights can be fully adjudicated based on their other claims.

CONCLUSION AND RELIEF REQUESTED

For all of these reasons, Interested Party MDOT supports the dismissal of the Partnership from this case.

Respectfully submitted,

BILL SCHUETTE
Attorney General

/s/Michael J. Dittenber
Michael J. Dittenber
Assistant Attorney General
Michigan Bar No. P72238
Transportation Division
425 W. Ottawa Street
Lansing, MI 48913
(517) 373-1470
DittenberM@michigan.gov

Attorneys for the Michigan
Department of Transportation

Appearing Pursuant to Local Civil
Rule 83.2(f)

CERTIFICATE OF SERVICE (e-file)

I, Michael J. Dittenber, hereby certify that, on August 30, 2013, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 30, 2013

/s/ Michael J. Dittenber
Michael J. Dittenber