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10
11 **UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT**
12 **OF CALIFORNIA, FRESNO DIVISION**

13 DENNIS J. NASRAWI, MICHAEL R. O'NEAL,)
14 and RHONDA BIESEMEIR,)

15 Plaintiffs,)

16 v.)

17 BUCK CONSULTANTS, LLC, HAROLD LOEB,)
18 and DOES 1-30,)

19 Defendants.)

CASE NO: 1:09-CV-02061-OWW-GSA

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO
DISMISS ACTION

Date: May 10, 2010
Time: 10:00 a.m.
Judge: The Hon. Oliver W.
Wanger
Courtroom: 3 (7th Floor)

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1 **I. INTRODUCTION**

2 This is an action for professional negligence and aiding and abetting a breach of trust.
3 The plaintiffs, Dennis J. Nasrawi, Michael R. O’Neal, and Rhonda Biesemeier (“plaintiffs”), are
4 all beneficiaries of a public pension trust administered by the Stanislaus County Employees
5 Retirement Association (StanCERA”). The defendants are Buck Consultants, LLC (“Buck”),
6 and its principal, Harold Loeb (“Loeb”), who personally performed actuarial services for
7 StanCERA.

8 The defendants have moved to dismiss the entire action on two grounds: (1) the plaintiffs
9 lack standing to sue; and (2) Loeb cannot be held individually liable for the professional actuarial
10 services he performed for StanCERA.

11 The plaintiffs have filed a motion for remand. Because jurisdictional issues should be the
12 first order of business, and the motion for remand is meritorious and should be granted, the
13 defendants’ motion to dismiss should not even be decided. See Section II, *post*.

14 If the court reaches the merits of the motion to dismiss, the motion should be denied in its
15 entirety. Under California law, the beneficiaries of a trust have standing to sue a third party
16 where, as here, the conduct of the third party has aided and abetted a breach of trust and their
17 trustee has declined to sue. See Section IV, *post*. If beneficiaries they did not have such
18 standing, as a practical matter no one would have standing to seek redress for such a wrong.

19 Under Civil Code section 2343, “one who assumes to act as an agent is responsible to
20 third persons as a principal for his acts in the course of his agency . . . (3) when his acts are
21 wrongful in their nature.” Though he was acting as an agent for Buck, Loeb is liable to the
22 plaintiffs as a principal. The plaintiffs have alleged that Buck and Loeb “have actively
23 participated with, aided, and abetted in StanCERA’s breach of trust by concealing their
24 negligence for almost two years”; they did so “for their own financial gain”; and they “concealed
25 their participation and assistance with StanCERA’s breach of trust.” Complaint for Negligence,
26 ¶¶ 16-18, pp. 3. Because professional negligence and aiding and abetting a breach of fiduciary
27 duty are both “wrongful in [their] nature,” Loeb has personal liability. See Section V, *post*.
28 Moreover, Loeb and Buck owed fiduciary duties to StanCERA and the plaintiffs as trust

1 advisors. See Section V(C), *post*.

2 **II. AS A MATTER OF PROCEDURE, THE PLAINTIFFS' MOTION**
3 **TO REMAND SHOULD BE DETERMINED BEFORE THE**
4 **DEFENDANTS' MOTION TO DISMISS IS CONSIDERED.**

5 Section 1447(c) of the Judicial Code (28 U.S.C. § 1447(c)) provides in relevant part: “If
6 at any time before final judgment it appears that the district court lacks subject matter
7 jurisdiction, the case shall be remanded.” The plaintiffs’ dispute this court’s subject matter
8 jurisdiction because there is incomplete diversity of citizenship. They have filed a pending
9 motion for remand, which is set for hearing at the same time as the defendants’ motion to
10 dismiss.

11 “[A] federal court generally may not rule on the merits of a case without first determining
12 that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the
13 parties (personal jurisdiction).” *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*
14 549 U.S. 422, 430-31, 127 S.Ct. 1184, 1191 (2007). Therefore, the court must be certain that
15 federal subject-matter jurisdiction is proper before entertaining a defendant’s motion to dismiss
16 the plaintiff’s complaint for failure to state a claim upon which relief can be granted. 14C
17 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3739 (2010), citing *In re Bear River*
18 *Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959); *Harden v. Field Memorial Community*
19 *Hosp.*, 516 F.Supp.2d 600, 605 (S.D. Miss. 2007), *aff’d*, 265 Fed. Appx. 405 (5th Cir. 2008).
20 Because “jurisdictional questions must ordinarily precede merits determinations in dispositional
21 order” (*Sinochem, supra*), the plaintiffs’ motion to remand should be determined before the court
22 determines the defendants’ motion to dismiss.

23 **III. THE STANDARDS FOR DECIDING A MOTION TO DISMISS**

24 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *Novarro*
25 *v. Black*, 250 F.3d 729, 732 (9th Cir.2001); *Bassett v. Ruggles*, 2010 WL 1525554, *5 (E.D. Cal.
26 2010). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal
27 theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts
28 under that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). In
reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual

1 allegations and must construe all inferences from them in the light most favorable to the
 2 nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). However, legal
 3 conclusions need not be taken as true merely because they are cast in the form of factual
 4 allegations. *Iieto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir.2003). “A district court should
 5 grant a motion to dismiss if plaintiffs have not pled ‘enough facts to state a claim to relief that is
 6 plausible on its face.’” *Williams ex rel. Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9th
 7 Cir.2008), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). “‘Factual allegations
 8 must be enough to raise a right to relief above the speculative level.’” *Id.* “While a complaint
 9 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a
 10 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than
 11 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
 12 do.” *Bell Atlantic, id.* at 555. A claim has facial plausibility when the plaintiff pleads factual
 13 content that allows the court to draw the reasonable inference that the defendant is liable for the
 14 misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a “probability
 15 requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.
 16 *Id.*

17 In *Ashcroft v. Iqbal*,, 129 S.Ct. 1937, 1949-1950 (2009), the Supreme Court explained:

18 Two working principles underlie our decision in [*Bell Atlantic*]. First, the tenet
 19 that a court must accept as true all of the allegations contained in a complaint is
 20 inapplicable to legal conclusions. Threadbare recitations of the elements of a
 21 cause of action, supported by mere conclusory statements, do not suffice
 22 Rule 8 marks a notable and generous departure from the hyper-technical, code-
 23 pleading regime of a prior era, but it does not unlock the doors of discovery for a
 24 plaintiff armed with nothing more than conclusions. Second, only a complaint
 25 that states a plausible claim for relief survives a motion to dismiss
 26 Determining whether a complaint states a plausible claim for relief will . . . be a
 27 context-specific task that requires the reviewing court to draw on its judicial
 28 experience and common sense But where the well-pleaded facts do not
 permit the court to infer more than the mere possibility of misconduct, the
 complaint has alleged—but it has not ‘show [n]’—‘that the pleader is entitled to
 relief.’

In keeping with these principles, a court considering a motion to dismiss can
 choose to begin by identifying pleadings that, because they are no more than
 conclusions, are not entitled to the assumption of truth. While legal conclusions
 can provide the framework of a complaint, they must be supported by factual
 allegations. When there are well-pleaded factual allegations, a court should
 assume their veracity and then determine whether they plausibly give rise to an

1 entitlement to relief.

2

3 **IV. UNDER CALIFORNIA LAW, THE BENEFICIARIES OF A TRUST**
4 **HAVE STANDING TO SUE A THIRD PARTY WHERE, AS HERE,**
5 **THE CONDUCT OF THE THIRD PARTY HAS AIDED AND**
6 **ABETTED A BREACH OF TRUST AND THEIR TRUSTEE HAS**
7 **DECLINED TO SUE.**

8 The defendants first argue that the plaintiffs' lack standing to bring this lawsuit in a
9 representative capacity on behalf of StanCERA (Defendants' Mem., pp. 5-7), even though the
10 plaintiffs have alleged that StanCERA breached its fiduciary duty by failing to pursue a
11 negligence claim against the defendants (Complaint, ¶ 15, p. 3) and the defendants have aided
12 and abetted that breach of trust (*id.*, ¶¶ 16-18.)

13 "A person or entity may sue *on behalf* of the real parties in interest 'where justified by
14 considerations of *necessity, convenience, and justice.*'" WEIL & BROWN, CAL. PRACTICE GUIDE:
15 CIVIL PROCEDURE BEFORE TRIAL (THE RUTTER GROUP 2009) ¶ 14:200, quoting *Salton City etc.*
16 *Owners Assn. v. M. Penn Phillips Co.*, 75 Cal.App.3d 184, 191 (1977), italics original.

17 "[I]t is well established that where a trustee has committed a breach of trust, the trust
18 beneficiaries may prosecute an action against third persons who, for their own financial gain or
19 advantage, induced the trustee to commit the breach of trust; actively participated with, aided or
20 abetted the trustee in that breach; or received and retained trust property from the trustee in
21 knowing breach of trust." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*
22 (*"City of Atascadero"*), 68 Cal.App.4th 445, 462 (1998); accord, *Harnedy v. Whitty* (*"Harnedy"*),
23 110 Cal.App.4th 1333, 1340-1341 (2003); *Pillsbury v. Karmgard*, 22 Cal.App.4th 743, 754
24 (1994); *Saks v. Damon Raike & Co.*, 7 Cal.App.4th 419, 427-28 (1992) ["The beneficiary may
25 also sue third persons who directly participated with the trustee in breaches of trust"].

26 In *City of Atascadero*, the beneficiaries alleged in their complaint that a third party
27 brokerage firm made direct misrepresentations to the beneficiaries, actively participated with the
28 trustee in breaches of trust, and acted for their own financial gain. 68 Cal.App.4th at 457-58,
462. The Court of Appeal reversed the trial court's sustaining of a demurrer without leave to
amend, finding that such allegations satisfied the exception to the general rule that only the

1 trustees have standing to sue a third party. *Id.* at 462-63. The court explained:

2 The rights of trust beneficiaries vis-à-vis third parties who participate in a breach
3 of trust ultimately derive from the obligations of the trustee himself. The
4 violation by the trustee of any duty owed to the beneficiaries of the trust
5 constitutes a breach of trust. . . . The beneficiaries of a trust may sue a trustee to
6 recover profits or recoup losses resulting from a trustee’s breach of any of any of
7 these duties. [¶] At common law, the beneficiaries of a trust could also sue third
8 parties who participated with a trustee in such breach of the trustee’s duties.

6 *Ibid.*

7 The court further explained the circumstances under which a beneficiary could maintain a
8 suit against third parties *even when* the “trustee is ready and willing to undertake the necessary
9 proceedings.”¹

10 [W]here the third person does not act adversely to the trustee but participates with
11 the trustee in the breach of trust[,] . . . *the third person commits a wrong directly*
12 *to the beneficiaries; he is interfering with the trust relationship.* If he induces
13 [the] trustee to commit a breach of trust, he incurs liability to the beneficiaries,
14 much as a person who induces a breach of contract incurs liability. In such a case,
15 it is true, the trustee is also permitted to sue the third person, *but primarily it is the*
16 *beneficiaries who are wronged and who are entitled to sue.*

14 *Id.* at 465, italics modified, citing 4 Scott on Trusts (4th ed. 1989) § 282, p. 28.

15 In *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1105-06 (1991), the beneficiaries alleged in their
16 complaint that third party investment advisors and attorneys who represented the trustees
17 concealed the trustees’ breaches of trust, made misrepresentations to the court, and acted for their
18 own personal gain in the form of fees and investment opportunities. The appellate court reversed
19 the trial court’s sustaining of a demurrer without leave to amend, concluding that the allegations
20 demonstrated that the investment advisors and attorneys were accused of active participation in
21 breaches of trust by the former trustees. *Id.* at 1106. The court held that the beneficiary may sue
22 third persons who directly participated with the trustee in breaches of trust. *Id.* at 1110.

23 In *Wolf v. Mitchell, Silberberg & Knupp* (“*Wolf*”), 76 Cal.App.4th 1030 (1999), the trust
24 beneficiary alleged in his complaint, inter alia, that the third party attorneys performed legal
25 services intended to prevent the beneficiary from discovering dissipation of trust assets and the
26 trustee’s inappropriate investments. *Id.* at 1040. The appellate court held that these allegations

27
28 ¹ That is not the case here; “StanCERA has been unwilling to prosecute this action to
recover assets belonging to the trust.” Complaint, ¶ 19, p. 3.

1 met the requirements for a claim by a beneficiary directly against a third party who participated
2 in a trustee's breach of trust. (*Ibid.*)

3 The court explained that the beneficiaries of a trust are afforded an appropriate common
4 law remedy “in section 326 of the Restatement Second of Trusts. Section 326 of the Restatement
5 provides that ‘[a] third person who, although not a transferee of trust property, has notice that the
6 trustee is committing a breach of trust and participates therein is liable to the beneficiary for any
7 loss caused by the breach of trust.’ (See also Bogert, Law of Trusts and Trustees (rev. 2d ed.
8 1995) § 868, pp. 104-109 [person who knowingly aids trustee in committing a breach of his
9 duties is liable to the beneficiary]; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Trusts, § 164,
10 p. 1017 [beneficiary may sue third persons who participated in breaches of trust].)” 76
11 Cal.App.4th at p. 1039.

12 In *Harnedy, supra*, 110 Cal.App.4th 1333, the beneficiary sued a trustee of his father’s
13 trust for fraud, constructive fraud, and financial abuse. *Id.* at 1337. The court held that the
14 beneficiary had standing to sue because, inter alia, the complaint was brought against a current
15 trustee “for what was effectively an alleged breach of trust.” *Id.* at 1342. The court explained
16 that the several holdings in *Saks, Pillsbury, Pierce v. Lyman, City of Atascadero, and Wolf* could

17 be rationalized relatively easily: when the claim being asserted rests in whole or in
18 part on alleged breaches of trust by the trustee, a beneficiary has standing to
19 pursue such a claim against either (1) the trustee directly, (2) the trustee and third
20 parties participating in or benefitting from his, her or its breach of trust, or (3)
21 *such third parties alone. Only* in circumstances such as those present in *Saks* and
Pillsbury, where no misfeasance or breach of trust by the trustee is asserted and
the beneficiary is effectively seeking to step into the shoes of the trustee and
enforce the trust agreement directly, does the beneficiary lack standing.

22 *Harnedy, supra*, 110 Cal.App.4th at 1341-42, italics modified. Therefore, the defendants heavy
23 reliance n *Saks* and *Pillsbury* (Defendants’ Mem., pp. 5-7) is misplaced.

24 Here, the plaintiffs have adequately pleaded facts demonstrating their standing to bring
25 this representative suit. *First*, they have alleged they are beneficiaries of a trust fund
26 administered by the members of the Board of Administration of StanCERA, who are trustees and
27 owe fiduciary duties to the members of StanCERA, including the plaintiffs. Complaint, ¶¶ 1, 2,
28 10-12, pp. 1-3. *Second*, the plaintiffs have alleged that the defendants “have actively participated

1 with, aided, and abetted in StanCERA's breach of fiduciary duty by concealing their negligence
 2 for almost two years" (*id.*, ¶ 16); they did so "for their own financial gain" (*id.*, ¶ 17); and they
 3 "concealed their participation and assistance with StanCERA's breach of trust" (*id.*, ¶ 18).
 4 *Finally*, the plaintiffs have alleged that "SDCERS has been unwilling to prosecute this action to
 5 recover assets belonging to the trust." *Id.*, ¶ 19. Without any citation of legal authority, the
 6 defendants assert that these factual allegations are insufficient. Defendants' Mem., p. 7:7-22.

7 Under the alleged circumstances, the beneficiary-plaintiffs have standing to pursue their
 8 representative negligence claim against Buck and Loeb. Because StanCERA is understandably
 9 unwilling to assert its *own* breach of trust, if third parties could not assert such a claim, the
 10 defendants' wrongs would go unremedied. No one would have standing to sue.

11 **V. LOEB HAS PERSONAL TORT LIABILITY FOR HIS OWN**
 12 **PROFESSIONAL NEGLIGENCE AND FOR PERSONALLY**
 13 **AIDING AND ABETTING A BREACH OF TRUST.**

14 **A. Under Civil Code Section 2343, an Agent Is Responsible to a**
 15 **Third Person "When His Acts Are Wrongful in Their Nature."**

16 In California, "[a]n agent or employee is always liable for that person's own torts." 5
 17 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 30, p. 92. "This is so whether the principal
 18 or employer is liable or not." *Ibid.*, citing *Perkins v. Blauth*, 163 Cal. 782, 787 (1912) [agent who
 19 commits tort acting under principal's authority is liable, even though principal thus also becomes
 20 liable]; *Holt v. Booth*, 1 Cal.App.4th 1074, 1080, n. 5 (1991). "Thus, an agent is always liable
 21 for his or her own torts, whether his or her employer is liable or not . . ." 2B Cal.Jur.3d (2007)
 Agency, § 126, p. 348.

22 Civil Code section 2343 provides in relevant part: "One who assumes to act as an agent is
 23 responsible to third persons as a principal for his acts in the course of his agency . . . (3) [w]hen
 24 his acts are wrongful in their nature." Negligence is such a wrongful act. *Jenson v. Kenneth*
 25 *Mullen Co.*, 211 Cal.App.3d 653, 659 (1989).

26 An individual attorney cannot avoid personal liability for his own negligence by
 27 becoming a principal in a limited liability corporation. Neither can a professional actuary, Loeb,
 28 avoid personal liability for his own professional negligence by becoming a principal of a limited

1 liability corporation, Buck. He is responsible to third persons, StanCERA (directly) and the
2 plaintiffs (indirectly) for the services he negligently performed.

3
4 **B. Because Loeb Personally Breached Professional Duties He Owed**
5 **to the Trust and Its Beneficiaries, Not Just Duties He Owed to His**
6 **Employer (Buck), *United States Liability Ins. Co. v. Haidinger-***
7 ***Hayes, Inc. Is Distinguishable.***

8 Relying on *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (“*Haidinger-*
9 *Hayes*”), 1 Cal.3d 586 (1970), the defendants next argue that Loeb has no personal liability for
10 the harm his negligence caused to the pension trust—not even personal liability to StanCERA
11 (on whose behalf the plaintiffs are bringing this representative suit). Defendants’ Mem., pp. 7-9.
12 However, *Haidinger-Hayes* does not support that conclusion. If it did, it would be contrary to
13 Civil Code section 2343, subdivision (3).

14 In *Haidinger-Hayes*, the “defendant corporation was hired by plaintiff insurance company
15 under a general agency contract to underwrite insurance policies and determine premium rates.
16 The defendant corporation negligently computed a premium rate for an insured which resulted in
17 pecuniary losses to plaintiff. The California Supreme Court held defendant corporation’s
18 president Haidinger was not personally liable to plaintiff for his corporation’s negligence.
19 (*Haidinger-Hayes, supra*, 1 Cal.3d at pp. 591-592.)” *Michaelis v. Benavides* (“*Michaelis*”), 61
20 Cal.App.4th 681, 684 (1998).

21 “The court in *Haidinger-Hayes* stated: ‘As president and principal officer of defendant
22 corporation, [Haidinger] was a fiduciary to and an agent of that corporation. He had a duty to the
23 corporation to exercise his corporate powers in good faith and with a view to its interests (Corp.
24 Code, § 820). Directors and officers are not personally liable on contracts signed by them for and
25 on behalf of the corporation unless they purport to bind themselves individually. . . . [¶]
26 Directors or officers of a corporation do not incur personal liability for torts of the corporation
27 merely by reason of their official position, *unless they participate in the wrong* or authorize or
28 direct that it be done. They may be liable, under the rules of tort and agency, for tortious acts
committed on behalf of the corporation. [Citations.] They are not responsible to third persons
for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation

1 alone; the act must also constitute a breach of duty owed to the third person. (19 Am.Jur.2d,
 2 1382.) . . . More must be shown than breach of the officer’s duty *to his corporation* to impose
 3 personal liability *to a third person* upon him.’ (1 Cal.3d at pp. 594-595.)” *Michaelis, supra*, 61
 4 Cal.App.4th at pp. 684-85, italics added.

5 “The Supreme Court in *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490,
 6 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] (*Frances T.*) reviewed a corporate officer’s
 7 duty of care. In that case, plaintiff condominium owner was raped and robbed in her
 8 condominium after the owners association had refused to allow her to utilize exterior lighting at
 9 her unit to protect herself against crimes occurring in the area of her condominium. Plaintiff
 10 sued the individual directors on the association’s board, claiming they breached a duty of care
 11 owed to her by ordering her to remove the external lighting she had installed.” *Michaelis, supra*,
 12 61 Cal.App.4th at p. 685.

13 “*Frances T.* interpreted *Haidinger-Hayes* as prohibiting a corporate officer’s *vicarious*
 14 liability, based on his official status in the corporation, for torts committed by his corporation in
 15 which he does not personally participate or direct. *Frances T.* further interpreted *Haidinger-*
 16 *Hayes* to *allow* an officer’s liability for his own tortious conduct. (42 Cal.3d at pp. 503-504.)
 17 ‘Unlike ordinary employees or other subordinate agents under their control, a corporate officer is
 18 under no compulsion to take action unreasonably injurious to third parties. But like any other
 19 employee, [officers] individually owe a duty of care, independent of the corporate entity’s own
 20 duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to
 21 third parties. The reason for this rule is that otherwise, a[n officer] could inflict injuries upon
 22 others and then escape liability behind the shield of his or her representative character, even
 23 though the corporation might be insolvent or irresponsible.’ (*Id.*, at p. 505.)”² *Michaelis, supra*,

24
 25 ² Similarly, in *Self-Insurers’ Security Fund, supra*, 204 Cal.App.3d 1148, the court held
 26 that an officer of an insolvent self-insured employer need not reimburse worker’s compensation
 27 benefits paid by a state-created insurance fund. While the court’s holding was based primarily
 28 on lack of any statutory or regulatory violation in this heavily-regulated arena (*id.* at pp. 1155-
 1161), the court declined to hold the officer personally liable for negligent misrepresentation.
 (*Id.* at pp. 1161-1163.) In reaching this result, the court relied primarily on *Haidinger-Hayes*
 (*ibid.*) which, as discussed above, actually confirms Loeb’s individual liability for negligence that

1 61 Cal.App.4th at p. 685.

2 The facts of this case are distinguishable from those of *Haidinger-Hayes* for the same
 3 reason the facts of *Michaelis, supra*, 61 Cal.App.4th at pp. 684-85, were distinguishable from
 4 those of *Haidinger-Hayes*: the plaintiffs are not contending that Loeb has *vicarious* liability for
 5 Buck's breach of contract or negligence. They are contending that he *personally* failed to
 6 exercise due care as a professional actuary by using inappropriate actuarial assumptions and
 7 thereby underestimating the County's required employer contribution by more than \$40 million
 8 (Complaint, ¶ 14, p. 3), and later aiding and abetting breaches of fiduciary duty by StanCERA
 9 (*id.*, ¶¶ 16-18). He did these things *personally*, in his capacity as StanCERA's "Managing
 10 Principal and Consulting Actuary." Defendants' Request for Judicial Notice [etc.], Exh. B.

11 Loeb's alleged conduct caused substantial economic injury to the pension trust. He
 12 cannot use the corporate veil of Buck as a shield for liability resulting from his personal,
 13 professional negligence³ (any more than an individual attorney may do so in similar
 14 circumstances). "The legal fiction of the corporation as an independent entity is partly intended
 15 to insulate corporate officers from personal liability for corporate *contracts*. (*Frances T., supra*,
 16 42 Cal.3d at pp. 507-508.) The corporate fiction was never intended to insulate officers from
 17 liability for their *own tortious conduct*. (*Id.*, at p. 508.) This is sound and settled public policy."
 18 *Michaelis, supra*, 61 Cal.App.4th at p. 688, italics added; *PMC, Inc. v. Kadisha*, 78 Cal.App.4th
 19 1368, 1380 (2000).

20 The plaintiffs are seeking to impose *tort* liability on Loeb for his *personal* negligence, not
 21 *vicarious* contractual or tort liability⁴ on Loeb for his employer's (Buck's) conduct. A corporate

22 _____
 23 he personally committed.

24 ³ The agreement between Buck and StanCERA, of which the defendants have requested
 25 this court to take judicial notice, was plainly one for "professional" actuarial services. Defendants'
 26 Request for Judicial Notice [etc.], Exh. A.

27 ⁴ "Contract law exists to enforce the intentions of the parties to an agreement while
 28 tort law is designed to vindicate social policy. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d
 654, 683 [254 Cal.Rptr. 211, 765 P.2d 373].) . . . [T]he same wrongful act may constitute both a
 breach of contract and an invasion of an interest protected by the law of torts. (3 Witkin, Cal.

1 officer or director is liable for torts in which he personally participates. *Frances T.*, *supra*, 42
2 Cal.3d at p. 503; *PMC, Inc. v. Kadisha*, *supra*, 78 Cal.App.4th at p. 1380. “Corporate director or
3 officer status neither immunizes a person from personal liability for tortious conduct nor subjects
4 him or her to vicarious liability for such acts.” *PMC, Inc. v. Kadisha*, *supra*, 78 Cal.App.4th at p.
5 1379.⁵

6 **C. As an Advisor of the Plaintiffs’ Trustee (StanCERA),**
7 **Loeb Breached Fiduciary Duties That He Owed to**
8 **the Trust and Its Beneficiaries.**

8 “The rules pertaining to the rights and duties of trustees generally [are] broadly applicable
9 to trust advisors” *Crocker-Citizens National Bank v. Younger*, 4 Cal.3d 202, 211 (1971).
10 “Trust advisers with powers of direction must be considered fiduciaries The few courts
11 that have dealt with advisers have generally recognized their fiduciary nature by comparing them
12 with cotrustees.” *Ibid.*, citing Note, *Trust Advisers* (1965) 78 Harv.L.Rev. 1230, 1231. For that
13 reason also, Loeb personally owed fiduciary duties to StanCERA and the beneficiaries of the
14 trust. Because he breached his duties as a trust advisor, he has personal liability.

15 **D. Loeb Has Personal Liability for Aiding and Abetting a Breach**
16 **of Trust by StanCERA.**

17 Under California law, liability for aiding and abetting “may . . . be imposed on one who
18 aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct
19 constitutes a breach of duty and gives substantial assistance or encouragement to the other to so
20 act or (b) gives substantial assistance to the other in accomplishing a tortious result and the

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22 Procedure (4th ed. 1996) Actions, §§ 139, pp. 203-204.) [¶¶] . . . A contract to perform services
23 gives rise to a duty of care which requires that such services be performed in a competent and
24 reasonable manner. A negligent failure to do so may be both a breach of contract and a tort. (*Perry*
25 *v. Robertson* (1988) 201 Cal.App.3d 333, 340 [247 Cal.Rptr. 74].) . . . [¶¶] . . . In general, it has
26 been held that an action based on the negligent performance of contractual duties, although involving
27 elements of both contract and tort, is regarded as a delictual action, since negligence is considered
28 the gravamen of the action. (*Eads v. Marks* [(1952)] 39 Cal.2d [807,] 811-812 [249 P.2d 257]; see
also *Distefano v. Hall* (1963) 218 Cal.App.2d 657, 678 [32 Cal.Rptr. 770].)’ (*Id.*, at pp. 774-775.)”
Michaelis, *supra*, 61 Cal.App.4th at pp. 687-688.

⁵ Of course, as Loeb’s employer, *Buck* has *vicarious* liability for Loeb’s tortious
conduct under the doctrine of respondeat superior.

1 person's own conduct, separately considered, constitutes a breach of duty to the third person.”
2 *Fiol v. Doellstedt*, 50 Cal.App.4th 1318, 1325-1326 (1996); *Saunders v. Superior Court*, 27
3 Cal.App.4th 832, 846 (1994); Rest.2d Torts, § 846, subs. (b), (c); see *Richard B. LeVine, Inc. v.*
4 *Higashi*, 131 Cal.App.4th 566, 579 (2005).

5 There can be no doubt that StanCERA has a fiduciary duty to maintain an actuarially
6 sound pension system. Cal. Const., art. XVI, § 17, subs. (a)-(b), (e); *Board of Administration v.*
7 *Wilson*, 52 Cal.App.4th 1109, 1131-1137 (1997). Subdivision (a) of section 17 of article XVI of
8 the California Constitution prescribes the fiduciary duties of public pension boards, such as
9 StanCERA: “The retirement board of a public pension or retirement system shall have the sole
10 and exclusive fiduciary responsibility over the assets of the public pension or retirement system.
11 The retirement board shall also have sole and exclusive responsibility to administer the system in
12 a manner that will assure prompt delivery of benefits and related services to the participants and
13 their beneficiaries. The assets of a public pension or retirement system are trust funds and shall
14 be held for the exclusive purposes of providing benefits to participants in the pension or
15 retirement system and their beneficiaries and defraying reasonable expenses of administering the
16 system.” Under subdivision (b) of section 17, StanCERA’s “duty to its participants and their
17 beneficiaries shall take precedence over any other duty,” such as minimizing the contributions of
18 a public employer. Subdivision (e) of section 17 provides that StanCERA, “consistent with the
19 exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to
20 provide for actuarial services in order to assure the competency of the assets of the public
21 pension or retirement system.” Loeb was the professional actuary who advised StanCERA
22 regarding the exercise of its constitutional, actuarial powers (Cal. Const., art. XVI, § 17, subd.
23 (e)).

24 The plaintiffs have alleged that Loeb aided and abetted a breach of trust by StanCERA.
25 He “performed the January 9, 2007 actuarial valuation negligently by using inappropriate
26 actuarial assumptions [which] lowered the County’s required employer contribution to
27 StanCERA by more than \$40 million. *This negligence rendered StanCERA actuarially unsound,*
28 because the employer contribution rate adopted by StanCERA (9.22%) was not enough to

1 actuarially fund benefits.” Complaint, ¶ 14, p. 3, italics added. For this reason also, Loeb has
2 individual liability.

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4 **VI. IF THE COURT PERCEIVES ANY MERIT TO THE MOTION TO
DISMISS, LEAVE TO AMEND SHOULD BE GRANTED.**

5 Finally, if the court perceives any defect in the plaintiffs’ original complaint, it should
6 grant the plaintiffs leave to amend. Although the complaint contains allegations of negligence
7 (duty, breach, causation, and damages to the trust) that are sufficient to inform the defendants of
8 the charges they are expected to meet, the plaintiffs could and would, if given the opportunity,
9 allege in greater detail:

10 (1) the nature of the defendants’ actuarial negligence and the harm it caused to the
11 pension trust;

12 (2) why StanCERA was and is unwilling

13 (a) to allege that its breached its own constitutional, fiduciary duties (Cal.
14 Const., art. XVI, § 17, subds. (a)-(c), (e)) by relying on the defendants’ negligent actuarial
15 valuations and

16 (b) to collect and control a trust asset, i.e., enforce a chose in action for
17 negligence against the defendants, and

18 (3) facts showing that the defendants aided and abetted breaches of StanCERA’s
19 fiduciary duties and later concealed their negligence from StanCERA and its beneficiaries.

20 **VII. CONCLUSION**

21 Before considering this motion to dismiss, the court should determine the plaintiffs’
22 motion for remand, which includes an objection to this court’s subject matter jurisdiction.
23 Section II, *ante*. If that motion is granted, the court need not and should not decide the
24 defendants’ motion to dismiss.

25 If the court denies the plaintiffs’ motion for remand and considers the defendants’ motion
26 to dismiss, it should deny that motion because (1) the beneficiaries of StanCERA have standing
27 to bring a representative suit against third parties where, as here, the conduct of the third party
28 has aided and abetted a breach of trust and their trustee has declined to sue (Section IV, *ante*) and

1 (2) Loeb has individual tort liability for professional negligence that he personally committed
2 (Section V, *ante*).

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Dated: April 26, 2010

LAW OFFICE OF MICHAEL A. CONGER

/s/ Michael A. Conger
Attorney for Plaintiffs
E-mail: congermike@aol.com

PROOF OF SERVICE

Nasrawi v. Buck Consultants, LLC, et al.

United States District Court Case No. 1:09-cv-02061-OWW-GSA

I declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 16236 San Dieguito Road, Suite 4-14, P.O. Box 9374, Rancho Santa Fe, California 92067.

On April 26, 2010, I served the foregoing document(s) described as:

1. PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS ACTION;

on the interested parties in this action as follows:

Michael N. Westheimer, Esquire

Benjamin C. Ho, Esquire

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Attorneys for Defendants

Buck Consultants, LLC and


Harold Loeb

(X) BY ELECTRONIC MAIL - by filing the foregoing with the Clerk of the United States District Court, Eastern District of California using its CM/ ECF system, which electronically served them.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 26, 2010, at Rancho Santa Fe, California.


Patricia B. Messer