Michael N. Westheimer, State Bar No. 178938
E-mail: Michael.Westheimer@bakernet.com
Benjamin C. Ho, State Bar No. 209377
E-mail: Benjamin.C.Ho@bakernet.com
BAKER & McKENZIE LLP
660 Hansen Way
Palo Alto, CA 94304-1044
Telephone: +1 650 856 2400
Facsimile: +1 650 856 9299

Attorneys for Defendants
BUCK CONSULTANTS, LLC and HAROLD LOEB

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

DENNIS J. NASRAWI, MICHAEL R. O'NEAL, and RHONDA BIESEMBIER,

Plaintiffs,

v.

BUCK CONSULTANTS, LLC and HAROLD LOEB,

Defendants.

Case No. 1:09-cv-02061-OWW-GSA

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

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

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. SUMMARY OF FACTS 2

A. Nature of Plaintiffs' Lawsuit 2

B. Citizenship of the Parties 3

C. Plaintiffs' Allegations Against Defendant Loeb 3

D. Procedural History 5

III. ARGUMENT 6

A. Legal Standards for Motion to Remand and Fraudulent Joinder 6

B. Defendant Loeb's Citizenship Must be Disregarded Because Plaintiffs Fraudulently Joined Him as an Individual Defendant 7

1. Plaintiffs' Failure to State a Negligence Action Against Defendant Loeb is Obvious Under Well-Settled California Law 7

2. Plaintiffs' Attempts to Distinguish California Supreme Court Precedent are Unavailing 9

3. A California Appellate Court Has Expressly Rejected Plaintiffs' Interpretation of the Supreme Court's Precedent 12

C. Once Loeb's Citizenship is Disregarded Because of Plaintiffs' Fraudulent Joinder, It is Undisputed That the Court Has Diversity Jurisdiction 14

IV. CONCLUSION 15

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

TABLE OF AUTHORITIES

Page

CASES

Burnette v. Godshall, 828 F.Supp. 1439 (N.D. Cal. 1993), *aff'd* 72 F.3d 766 (9th Cir. 1995) 6

Francis T. v. Village Green Owners Assn., 42 Cal.3d 490 (1986) 9, 10, 13

Herman Schamisso, PVBA v. Menelli, Inc., 657 F.Supp. 63 (S.D. Fla. 1986) 6

Hertz Corp. v. Friend, No. 08-1107, slip. op. at 14 (U.S. Feb. 23, 2010) 14

Holt v. Booth, 1 Cal.App.4th 1074 (1991) 8

Jenson v. Kenneth Mullen Co., 211 Cal.App.3d 653 (1989) 8

Johnson v. Colombia Properties Anchorage, LP, 438 F.3d 894 (9th Cir. 2006) 14

Lewis v. Time Inc., 83 F.R.D. 455 (E.D. Cal. 1979 ..... 6, 7

Maffei v. Allstate Cal. Ins. Co., 412 F.Supp.2d 1049 (E.D. Cal. 2006) 7

Maniar v. F.D.I.C., 979 F.2d 782 (9th Cir. 1992) 6

McCabe v. General Foods Corp., 811 F.2d 1336 (9th Cir. 1987) 6, 7

Meeker v. Belridge Water Storage Dist., 2006 U.S. Dist. Lexis 91775, *27-28 (E.D. Cal. 2006) 4

MGIC Indem. Corp. v. Weisman, 803 F.2d 500 (9th Cir. 1986) 4

Michaelis v. Benavides, 61 Cal.App.4th 681 (1998) 11, 12

Morris v. Princess Cruises, Inc., 236 F.3d 1061 (9th Cir. 2001) 6

Peck Ranch, Inc. v. Bureau of Reclamation, 823 F.Supp.715 (E.D. Cal. 1993) 4

Perkins v. Blauth, 163 Cal. 782 (1912) 8

PMC, Inc. v. Kashida, 78 Cal.App.4th 1368 (2000) 10, 11

Sanchez v. Lindsey Morden Claims Services, 72 Cal.App.4th 249 (1999) 8

Self-Insurers Security Fund v. Esis, Inc., 204 Cal.App.3d 1149 (1988) 12, 14

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) 6

United States Liability Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal.3d 586 (1970) ..... *passim*

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C. § 1447(c) 6
Fed. R. Evid. 201 4
Fed. R. Evid. 602 4
Fed. R. Evid. 901 4

OTHER AUTHORITIES

3 Witkin, Summary of Cal. Law (10th ed. 2005) § 199(3), p. 252 7

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

I. INTRODUCTION

Defendants Buck Consultants, LLC ("Buck") and Harold Loeb ("Loeb") (collectively, "Defendants") oppose the remand motion filed by Plaintiffs Dennis Nasrawi, Michael R. O'Neal and Rhonda Biesemeier (collectively, "Plaintiffs"). Defendants properly removed the action to this Court on the basis of diversity jurisdiction. In their moving papers, Plaintiffs do not contest that Buck is a diverse defendant and the amount in controversy exceeds $75,000. The sole issue in dispute is whether Plaintiffs fraudulently joined non-diverse defendant Loeb in this action – *i.e.*, whether they can state a negligence claim against Loeb individually based on work he performed in the course and scope of his employment with Buck. They cannot. Under well-settled California law, Loeb cannot be held liable individually for alleged negligence in performing duties in the course and scope of his employment that allegedly caused economic loss to a third party that contracted with his employer. There being no basis for the joinder of Loeb as a defendant, this Court must conclude that Plaintiffs have fraudulently joined him as a sham defendant. In such a case, Loeb's citizenship must be disregarded for purposes of diversity jurisdiction.

In their moving papers, Plaintiffs misconstrue the applicable legal authorities. They selectively cite to isolated portions of legal decisions out of context, and simply ignore other portions that set forth the applicable legal analysis and negate their claim against Loeb. The California Supreme Court's opinions and their progeny make it clear that Plaintiffs' negligence cause of action against Loeb fails as a matter of law. Complete diversity of citizenship otherwise exists and the amount in controversy exceeds $75,000, so the Court has diversity jurisdiction and the remand motion must be denied.

Defendants' opposition is based on their previously-filed Notice of Removal (docket # 1); this Memorandum of Points and Authorities in opposition to remand; the supporting Declarations of Harold Loeb and Karl Lohwater filed herewith; and Defendants' separately-filed Motion to Dismiss (docket # 19) set for hearing simultaneously with this remand motion and the supporting Memorandum of Points and Authorities (docket # 20), Request for Judicial Notice and exhibits (docket # 21).

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

II. SUMMARY OF FACTS

A. Nature of Plaintiffs' Lawsuit

Plaintiffs are three former employees of County of Stanislaus who receive retirement benefits from the County's retirement fund, a trust fund for which the trustee is Stanislaus County Employees Retirement Association ("StanCERA"). Complaint, ¶ 1.[1] StanCERA is a public employees retirement system created under the County Employees Retirement Law of 1937 to administer the retirement benefits for employees of County of Stanislaus, City of Ceres, the Superior Court of the State of California for the County of Stanislaus, and five special districts located in County of Stanislaus. Complaint, ¶ 2.

Defendant Buck is a limited liability company that provides actuarial services. Complaint, ¶ 3. Buck contracted with StanCERA to provide actuarial services pursuant to an Agreement for Professional Services between Buck and StanCERA. Complaint, ¶¶ 3, 12; Declaration of Loeb, ¶ 3; *see also* Defendants' Request for Judicial Notice in Support of Motion to Dismiss, Exh. A.

Loeb is an individual who is employed by Buck as an actuary, and was "assigned by Buck" to provide actuarial services to StanCERA. Complaint, ¶¶ 4, 7. Loeb is not a party to Buck's contract with StanCERA. Declaration of Loeb, ¶ 3; Defendants' Request for Judicial Notice in Support of Motion to Dismiss, Exh. A. Loeb is not an owner/member of Buck, nor an officer or director of Buck or its owner/member entity. Declaration of Loeb, ¶ 2. Loeb at all times was acting within the course and scope of his employment with Buck in performing job duties pursuant to Buck's contract with StanCERA. Complaint, ¶ 7; Declaration of Loeb, ¶¶ 2-4.

Plaintiffs bring a single cause of action for negligence against Buck and Loeb. Plaintiffs allege that a subsequently-retained actuary informed StanCERA on or about November 7, 2008 that Buck and Loeb prepared an actuarial valuation for StanCERA using inappropriate actuarial assumptions. Complaint, ¶ 14. Plaintiffs plead they are informed and believe that this alleged negligence caused economic losses to the retirement fund administered by StanCERA of: (1) lower contributions to the trust fund from County of Stanislaus totaling over $40 million; (2) lost earnings

---

[1] Plaintiffs' factual allegations are accepted as true solely for purposes of this opposition.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

on those contributions, and (3) costs that StanCERA paid to other actuarial firms. Complaint, ¶ 15.

Plaintiffs attempt to bring their negligence action against Defendants in a "representative capacity" on behalf of StanCERA, and seek to recover general damages, special damages and costs of suit. Complaint ¶ 22, and prayer.

B. Citizenship of the Parties

Plaintiffs confirmed in their moving papers that they all are citizens of the State of California. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Remand ("Plaintiffs' Memo. of P&A"), p. 1:4-5; *see also* Defendants' Notice of Removal, ¶ 5.

Buck was, at the time of the filing of this action, and still is, a limited liability company formed under the laws of the State of Delaware and having its principal place of business in the State of New York. Declaration of Lohwater, ¶¶ 2-4. The sole owner/member of Buck is ACS Human Resources Solutions, Inc., which was, at the time of the filing of this action, and still is, a corporation incorporated under the laws of the State of Pennsylvania and having its principal place of business in the State of New Jersey. *Id*. at ¶¶ 2, 5. ACS Human Resources Solutions, Inc. is a wholly owned subsidiary of Affiliated Computer Services, Inc., which was, at the time of the filing of this action, and still is, a corporation incorporated under the laws of the State of Delaware and having its principal place of business in the State of Texas. *Id.* at ¶¶ 2, 6.

Loeb was, at the time of the filing of this action, and still is, a citizen of the State of California. Defendants' Notice of Removal, ¶ 7; Declaration of Loeb, ¶ 1. However, Loeb's citizenship must be disregarded because he was fraudulently joined as a sham defendant. Plaintiffs do not contest that complete diversity of citizenship exists as between Plaintiffs and Buck.

C. Plaintiffs' Allegations Against Defendant Loeb

In their moving papers, Plaintiffs make a series of conclusory allegations that "StanCERA retained defendants Buck and Loeb to perform actuarial services for StanCERA," that Loeb "owed a duty to exercise due care in performing actuarial services for StanCERA," and that Loeb "breached [his] duty of care" by preparing an actuarial valuation for StanCERA using inappropriate actuarial assumptions. Plaintiffs' Memo. of P&A, p. 1:27-2:6 (citing Complaint, ¶¶ 12-14).[2] Plaintiffs do not

[2] Plaintiffs make the same allegations against Defendant Buck, which are not at issue in this motion.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

allege to whom Loeb owed a duty of care, but as explained below, their implication that Loeb breached a duty he owed to StanCERA is a legal conclusion that is erroneous as a matter of law.

To support their claim against Loeb, Plaintiffs allege that Loeb's "personal" involvement in the alleged negligence is demonstrated in records their attorney downloaded from StanCERA's website. *See* Declaration of Michael A. Conger; Plaintiffs' Notice of Lodgment, Exh. 1-6.[3] Without waiving its objections (*see* Footnote 3 herein), Defendants elaborate as follows:

It is undisputed that Loeb is not a party to Buck's contract with StanCERA, and that Loeb at all times was acting within the course and scope of his employment with Buck. *See* Complaint, ¶¶ 4, 7; Declaration of Loeb, ¶¶ 2-4; Defendants' Request for Judicial Notice in Support of Motion to Dismiss, Exh. A. According to StanCERA's Board minutes, Buck assigned Loeb to be its new account manager for StanCERA as a result of staff changes in Buck's San Francisco branch. Defendants' Request for Judicial Notice in Support of Motion to Dismiss, Exh. B (StanCERA's Board minutes dated October 11, 2006).[4]

Plaintiffs allege specifically that Loeb signed the actuarial valuation at issue, appeared at a StanCERA Board meeting to give presentations, signed a triennial experience study, and signed an actuarial certification letter. *See* Plaintiffs; Memo. of P&A, p. 2:7-3:10. In each instance, the record is clear that these actions were taken by *Buck*, that Loeb at all times was acting in the course and scope of his employment with Buck, and that Loeb was not acting in an individual capacity. The

---

The sole issue in dispute for purposes of the instant remand motion is whether Plaintiffs can state a negligence cause of action against Defendant Loeb individually.

[3] Defendants object that Mr. Conger's declaration lacks foundation and is insufficient to authenticate any of the documents because it does not establish that he has personal knowledge of their content. Fed. R. Evid. 602, 901. Defendants do not contest that the Court may take judicial notice of Exhibits 2 and 4 – StanCERA's Board minutes. *See* Footnote 4, *infra*. However, Defendants object that Plaintiffs have not established that the Court may take judicial notice of Exhibits 1, 3, 5 and 6.

[4] Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of official records and reports. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Minutes from a public agency's board meetings are public records subject to judicial notice. *Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp.715, 724-725 (E.D. Cal. 1993); *Meeker v. Belridge Water Storage Dist.*, 2006 U.S. Dist. Lexis 91775, *27-28 (E.D. Cal. 2006). StanCERA's Board minutes are publicly available on StanCERA's website (www.stancera.org).

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

actuarial valuation states: "This report has been prepared by Buck Consultants to present the results of the June 30, 2006 actuarial valuation of the Stanislaus County Employees' Retirement Association." Plaintiffs' Notice of Lodgment, Exh. 1 (docket # 17-4, p. 9). The report's cover letter referenced in Plaintiffs' moving papers was issued on Buck's letterhead. *Id.* (docket # 17-4, p. 5). StanCERA's Board minutes for January 23, 2007 repeatedly state that the presentations at issue were made "by Buck Consultants." *Id.* at Exh. 2 (docket # 17-4, pp. 82-84). As with the valuation report, the triennial experience study also was issued under cover of Buck's letterhead. *Id.* at Exh. 3 (docket # 17-4, p. 89). StanCERA's Comprehensive Annual Financial Report states that "Buck Consultants" conducted the triennial experience study, and that "Buck Consultants" conducted the actuarial valuation. *Id*. at Exh. 6 (docket # 17-5, p. 11). Finally, the Actuary's Certification Letter dated January 15, 2007, which also was issued on Buck's letterhead, expressly states that: "Buck Consultants, LLC is the Consulting Actuary for Stanislaus County Employees' Retirement Association." *Id*. at Exh. 5 (docket # 17-4, p. 123); Exh. 6 (docket # 17-5, p. 59).

D. Procedural History

Plaintiffs commenced this action against Buck and Loeb on October 8, 2009 in the Superior Court of California for the County of Stanislaus. Defendants' Notice of Removal, Exh. A. The first date upon which any of the Defendants received the Summons and Complaint in this action was October 26, 2009, when copies of the Summons and Complaint were personally delivered to Defendant Loeb. *Id.* at ¶ 3. On November 24, 2009, Defendants timely removed the action to this Court. *Id.* Defendants removed the action based on diversity jurisdiction, on grounds that complete diversity of citizenship exists as between Plaintiffs and Buck, it appears on the face of the Complaint that the amount in controversy exceeds $75,000, and Loeb's citizenship must be disregarded because he was fraudulently joined as a sham defendant. *Id.* at ¶¶ 4-7.

On December 15, 2009, Plaintiffs filed the instant motion to remand the action to state court.[5] Plaintiffs' sole basis for challenging the removal is their contention that Loeb is a proper defendant and the action therefore lacks complete diversity of citizenship.

[5] Plaintiffs thus are seeking to remand the action to the Superior Court for the County of Stanislaus – the state court whose employees are members of StanCERA, the entity they seek to "represent" in this action. Complaint, ¶¶ 2, 22.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

On January 19, 2010, after securing an extension of time to respond to the Complaint, Defendants filed a motion to dismiss the action on two grounds: (1) Plaintiffs' lack of standing to sue in a representative capacity on behalf of StanCERA; and (2) Plaintiffs' failure to state a claim against Defendant Loeb individually.

The instant remand motion and Defendants' separately-filed motion to dismiss the action are set for hearing simultaneously before this Court on May 10, 2010.

III. ARGUMENT

A. Legal Standards for Motion to Remand and Fraudulent Joinder

Removal is an absolute right of a defendant so long as statutory prerequisites are met. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344-45, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976); *Herman Schamisso, PVBA v. Menelli, Inc.*, 657 F.Supp. 63, 65 (S.D. Fla. 1986). Thus, while the removal statute is strictly construed and Defendants have the burden to establish that removal was proper, a District Court may remand the action only if: (i) the federal court lacks original subject matter jurisdiction; or (ii) a defect is found in the removal procedure. 28 U.S.C. § 1447(c); *Maniar v. F.D.I.C.*, 979 F.2d 782, 785 (9th Cir. 1992). "Thus, if jurisdiction exists and was properly invoked, the Court has no discretion to remand." *Burnette v. Godshall*, 828 F.Supp. 1439, 1444 (N.D. Cal. 1993), *aff'd* 72 F.3d 766 (9th Cir. 1995).

For purposes of Plaintiffs' remand motion, the sole issue in dispute is whether Defendant Loeb was fraudulently joined as a sham defendant. "'Fraudulent joinder' is a term of art, it does not reflect on the integrity of plaintiff or counsel [citation] but is merely the rubric applied when a court finds either that no cause of action is stated against the non-diverse defendant, or *in fact* no cause of action exists." *Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979). "Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, 'if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)).

In their moving papers, Plaintiffs erroneously contend that the diversity upon which removal

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

is predicated should generally be determined from the face of the complaint. *See* Plaintiffs' Memo. of P&A, p. 5:12-14. This is incorrect. The Ninth Circuit applies a different legal standard when removal is based on fraudulent joinder: "The defendant seeking removal to the federal court is entitled to present facts showing the joinder to be fraudulent." *McCabe*, 811 F.2d at 1339 (district court properly considered declarations in affirming denial of remand on grounds that two non-diverse individuals were fraudulently joined as defendants). "When determining whether a defendant is fraudulently joined, "[t]he court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available." *Maffei v. Allstate Cal. Ins. Co.*, 412 F.Supp.2d 1049, 1053 (E.D. Cal. 2006) (quoting *Lewis*, 83 F.R.D. at 460).

B. Defendant Loeb's Citizenship Must be Disregarded Because Plaintiffs Fraudulently Joined Him as an Individual Defendant

1. Plaintiffs' Failure to State a Negligence Action Against Defendant Loeb is Obvious Under Well-Settled California Law

Plaintiffs initially cite to general agency principles for the proposition that an agent or employee is always liable for his own torts. However, they disregard well-settled California law that refines the agency analysis in the context of their lawsuit – an action against an individual who was performing job duties in the course and scope of his employment, whose alleged negligence caused the third party to suffer economic loss. As explained below, the California Supreme Court holds in this circumstance that the employee cannot be held individually liable for negligence because his duty of care is owed to his *employer*, not the third party. As a matter of law, therefore, the employee has not committed a tort against the third party because an essential element of a negligence cause of action (duty) is absent. The Supreme Court's precedent distinguishes situations where the employee's negligence causes physical injury rather than pecuniary loss, on grounds that all persons have a duty to avoid causing physical harm. In the context of this action, however, Plaintiffs are seeking to recover economic losses to a retirement fund. The alleged damages are solely pecuniary and the physical injury exception does not apply.

Plaintiffs' own authorities confirm this. Plaintiffs cite to a passage from Witkin's Summary of California Law, but omit a more specific passage in the same treatise that negates their action against Loeb. *See* 3 Witkin, Summary of Cal. Law (10th ed. 2005) § 199(3), p. 252 ("Where the

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

effect of an agent's failure to perform a duty owed by the principal is merely to cause economic loss, the law does to yet recognize liability to a third person …") (citing *Sanchez v. Lindsey Morden Claims Services*, 72 Cal.App.4th 249, 253 (1999)). The related case law that Plaintiffs cite – *Perkins v. Blauth*, 163 Cal. 782, 787 (1912), *Holt v. Booth*, 1 Cal.App.4th 1074 (1991) and *Jenson v. Kenneth Mullen Co.*, 211 Cal.App.3d 653 (1989) – all involve claims of physical damage and injury, and thus are not on point.

The Supreme Court's seminal case, *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 595 (1970), is directly on point. In *Haidinger-Hayes*, the plaintiff insurance company filed a negligence action against two defendants – a corporate insurance agent, and that company's president and principal executive officer (V. M. Haidinger) individually – for negotiating and issuing an insurance policy with insufficient premiums to cover anticipated losses. The plaintiff insurance company sought to recover monetary losses caused by the defendants' alleged negligence. The trial court found Haidinger to be individually liable based on evidence that he had personally carried on the negotiations with the insured's broker, reviewed and analyzed the underwriting information concerning the insured's risk, issued the policy setting the allegedly low premium rate, and reduced the reserves for open claims without checking to ascertain the validity of prior reserves. *Id*. at 591-93. On appeal, Haidinger contended that he personally was not a fiduciary to the plaintiff and owed it no duty of care. *Id.* at 594. The Supreme Court agreed with Haidinger, and reversed the judgment against him. *Id*. at 594-95.

The Supreme Court initially observed that Haidinger's acts "were done in the course and scope of his employment, for and on behalf of the corporation, and not as a contracting party." *Id*. at 595. The Supreme Court held that Haidinger had a duty to *his company* as its agent, but that he was "not responsible to third persons for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation alone; the act must also constitute a breach of duty owed to the third person." *Id.* The Supreme Court elaborated that:

> Liability imposed upon agents for active participation in tortious acts of the principal have been mostly restricted to cases involving physical injury, not pecuniary harm, to third persons. [Citations]. More must be shown than breach of the officer's duty to his corporation to impose personal liability to a third person upon him.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

> Neither the evidence nor the findings support the conclusion that defendant V. M. Haidinger was personally liable to plaintiff by reason of his negligent performance of his corporate duties.

Id.

Here, Plaintiffs misconstrue *Haidinger-Hayes* as holding that Haidinger was not personally liable because he did not participate in the tortious conduct himself. *See* Plaintiffs' Memo. of P&A, p. 7:1-3. Plaintiffs simply ignore the several pages of the Supreme Court's opinion (analyzed above) that describe Haidinger's extensive personal participation in the alleged negligence. Plaintiffs also ignore *Haidinger Hayes'* actual holding, that Haidinger could not be held individually liable in a negligence action by a third party to recover economic losses, despite his active participation in the company's tortious acts, because he was not a party to his company's contract with the third party, he was at all times acting in the course and scope of his employment, and his duty was to his company and not the third party. *Haidinger-Hayes*, 1 Cal.3d at 594-95.

Haidinger-Hayes is squarely on point with Plaintiffs' claims against Defendant Loeb. Similarly here, Loeb was not a party to Buck's contract with StanCERA. Loeb acted solely as an employee of Buck, and at all times was acting within the course and scope of his employment. Plaintiffs seek to hold Loeb individually liable for negligence that allegedly caused economic losses to the retirement fund administered by StanCERA. As in *Haidinger-Hayes*, Plaintiffs cannot state a negligence action against Loeb individually as a matter of law.

2. Plaintiffs' Attempts to Distinguish California Supreme Court Precedent are Unavailing

In their moving papers, Plaintiffs make a series of bare citations to opinions that they contend interpret the Supreme Court's *Haidinger-Hayes* precedent the same way they do. They decline to provide any analysis of those opinions (and presumably are saving this for their reply brief in an effort to deprive Defendants from briefing their response). This is unavailing; the opinions Plaintiffs rely on do not support any basis for their claim against Loeb.

Plaintiffs cite to a subsequent Supreme Court decision, *Francis T. v. Village Green Owners Assn.*, 42 Cal.3d 490, 503-04 (1986), for the proposition that liability is imposed if an officer or director participates in tortious conduct. However, *Francis T.* addresses the physical injury

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

exception that is not at issue here. In *Francis T.*, the plaintiff owned a residential condominium. She sued the individual board members of her condominium owners association for negligence after they repeatedly rejected her requests to install exterior lighting near her apartment, and an unidentified individual subsequently entered her unit under cover of darkness and molested, raped and robbed her. *Id.* at 495-98. In reviewing the lower court's dismissal of her action for failure to state a claim, the Supreme Court addressed "the nature of the duty the individual defendants owed to plaintiff," and analyzed its prior *Haidinger-Hayes* opinion as restating "two traditional limitations" on personal liability for negligence. *Id.* at 505. First, the Supreme Court observed that *Haidinger-Hayes* reflected "the oft-stated disinclination to hold an agent personally liable for economic losses when, in the ordinary course of his duties to his own corporation, the agent incidentally harms the pecuniary interests of a third party." *Id.* (also noting *Haidinger-Hayes'* distinction of cases involving physical injury rather than pecuniary harm to third persons). Second, the Supreme Court found that *Haidinger-Hayes* also restated the traditional rule that corporate agents are not personally liable to third persons for breach of duties owed by the corporation alone. *Id.* at 505-06.

In accordance with this analysis, the Supreme Court held in *Francis T.* that the plaintiff could state a negligence action against the individual defendants based on "the common law duty which every person owes to others – that is, a duty to refrain from conduct that imposes an unreasonable risk of injury to third parties." *Id.* at 507. The Supreme Court held the plaintiff's claims fit within *Haidinger-Hayes*' "physical injury" exception because her allegations against the individual defendants involved "a hazardous condition threatening physical injury to residents." *Id.* at 509.

No similar facts are presented here. Plaintiffs do not and cannot allege that any physical injury resulted from Defendant Loeb's alleged negligence. Plaintiffs sue solely for economic loss, so the "physical injury" exception does not apply.

Plaintiffs also cite to *PMC, Inc. v. Kashida*, 78 Cal.App.4th 1368, 1379 (2000). However, *PMC* was not a negligence action. In *PMC*, the plaintiff company sued several of its shareholders, officers and directors individually for misappropriation of trade secrets and related intentional torts after they left the company to form a new competing business. *Id.* at 1373-74. The plaintiff did not bring a negligence action, so the court determined that *Haidinger-Hayes* was distinguishable.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

> *Haidinger-Hayes* was a negligence action. It did not involve intentional misconduct. It did not involve the Uniform Trade Secrets Act. That act imposes liability for intentional misconduct about which a person knew or had reason to know.

Id. at 1387. *PMC* is inapposite.

Finally, Plaintiffs make a passing reference in a footnote to *Michaelis v. Benavides*, 61 Cal.App.4th 681, 686 (1998). There, the appellants hired a general contractor to construct their residence. The general contractor subcontracted the cement work on the home's patio and driveway to a concrete company (A & J). The appellants filed a lawsuit alleging the patio developed severe cracks and separations, portions of the patio were not thick enough and slid down the surrounding hill, the driveway was four feet narrower than specified by the architect's plans which made it difficult and dangerous for cars to turn around, the driveway drains were incorrectly placed and too shallow and narrow which caused flooding, and the work created a hazard to the home's structural integrity and caused a safety hazard to persons entering and leaving the property. *Id.* at 683-84. The appellants sued the concrete company's president and majority owner (respondent Anthony Benavides) individually for negligence, alleging he personally bid the cement job and made the construction decisions for the patio and driveway. *Id.* at 683. Benavides filed a motion for nonsuit. Importantly, "At the hearing on respondent's motion for nonsuit, respondent *stipulated*, without agreeing to appellants' specific factual contentions, that he was negligent in constructing their patio and driveway." *Id.* (emphasis added). Nonetheless, the trial court granted his motion for nonsuit.

In reversing the trial court's grant of nonsuit, the appellate court in *Michaelis* distinguished the Supreme Court's *Haidinger-Hayes* opinion on grounds that *Benavides had stipulated to his individual negligence.*

> That situation [in *Haidinger-Hayes*] contrasts with the parties' stipulation here for purposes of respondents' nonsuit motion. They agreed therein that respondent was individually negligent in building appellants a patio and driveway. This acknowledges that a breach of duty owed to appellants as third parties was violated, rather than merely a breach of duty owed to A & J.

Id. at 686.

The *Michaelis* court further distinguished *Haidinger-Hayes* on the basis that the plaintiff

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

there did not experience any personal injury, but only pecuniary harm in the form of monetary loss. *Id.* The court found, in contrast, that: "Respondent's negligence here allegedly caused serious physical damage to appellants' home." *Id.* "It is not unlikely that personal injury could have resulted from the unsafe conditions caused by the structurally defective patio and driveway." *Id.* at 687. Thus, the court determined in *Michaelis* that the appellants stated a negligence action against Benavides because their situation fit within the physical injury exception. *Id.* at 686-87.[6]

Again, no similar facts are presented here. Defendant Loeb has not stipulated to individual negligence. *See* Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, p. 2:28, n. 1 ("If this matter should proceed on the merits, the Defendants will deny all allegations of negligence."). Further, as stated above, Plaintiffs are suing solely for economic loss to a retirement fund so the physical injury exception does not apply. As with Plaintiffs' other cited authorities, *Michaelis* is inapposite.

3. A California Appellate Court Has Expressly Rejected Plaintiffs' Interpretation of the Supreme Court's Precedent

In *Self-Insurers Security Fund v. Esis, Inc.*, 204 Cal.App.3d 1149 (1988), a California appellate court expressly rejected the plaintiff's attempt to interpret *Haidinger-Hayes* in the manner that Plaintiffs do here. In *Esis*, the plaintiff workers' compensation security fund sought to hold a company's vice president (William Gruber) personally liable for alleged negligence. Gruber's company (CCG) was self-insured for workers' compensation benefits. Gruber signed an annual report that CCG filed with the California labor department, and he attested to its accuracy under penalty of perjury, that underestimated CCG's workers' compensation liabilities by over $1 million. *Id*. at 1153. In its lawsuit, the plaintiff security fund alleged that Gruber was individually liable for negligence because he: "(1) falsely estimated CCG's workers' compensation liabilities with no

[6] Plaintiffs correctly observe in their footnote that the *Michaelis* court also attempted to distinguish *Haidinger-Hayes* by asserting there was no evidence in *Haidinger-Hayes* that the individual defendant actively participated in the tortious corporate conduct. *Michaelis*, 61 Cal.App.4th at 686. That passing reference in *Michaelis* is inaccurate, because the Supreme Court discussed extensive evidence of the individual defendant's active participation. *Haidinger-Hayes*, 1 Cal.3d at 591-93. In any event, the appellate court's misstatement is irrelevant for two reasons. First, for purposes of ruling on the negligence issues presented in the instant remand motion, the Supreme Court's precedent is controlling. Second, this inaccuracy is harmless in light of *Michaelis*' other articulated grounds for distinguishing *Haidinger-Hayes* – Benavides' stipulation of individual negligence, and the finding of physical injury. *Michaelis*, 61 Cal.App.4th at 686-87.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

reasonable basis for such estimates; (2) knew that CCG, its employees and the department would rely on the estimates in determining the amount of the bond; (3) actively ordered, participated in and authorized the tort; and (4) 'knew or reasonably should have known that if CCG became insolvent CCG's employees would be injured by the submission of annual [reports] which underestimated CCG's liabilities and failed to take or order appropriate action to avoid the harm.'" *Id.* at 1161. Gruber demurred to the plaintiff's complaint, the trial court sustained his demurrer without leave to amend, and the plaintiff appealed. *Id.* at 1153. The appellate court affirmed dismissal of the action on demurrer, holding that no action for negligence could lie against Gruber in his individual capacity. *Id.* at 1163.

The *Esis* court reiterated the "two traditional limits" on an agent's liability for negligence: (1) the oft-stated disinclination to hold an agent personally liable for economic losses when, in the ordinary course of his duties to his own corporation, the agent incidentally harms the pecuniary interests of a third party; and (2) the traditional rule that agents are not personally liable to third persons for negligence amounting to a breach of duty owed to the corporation alone. *Id.* at 1162 (citing *Haidinger-Hayes* and *Francis T.*). The court ruled that the action against Gruber "fits squarely within both of these limits" because Gruber "was acting solely in the scope and course of his employment" and his conduct allegedly resulted in pecuniary harm rather than physical injury. *Id.* at 1162-63.

Similar to Plaintiffs' argument here, the plaintiff in *Esis* argued that Gruber had "personally" committed negligence by actively participating in various acts. *Id.* at 1161-62. The plaintiff further argued it had pled that Gruber knew or should have known that employees could be injured as a result, and the action against him therefore could proceed in accordance with the Supreme Court's opinion in *Francis T.* *Id.* The *Esis* court rejected the plaintiff's arguments:

> We agree that the complaint recited the magic words of *Francis T.* However, that does not solve the legal problem of whether Gruber owed a duty of care to CCG employees under the circumstances. We conclude he did not.

Id. at 1162 (affirming dismissal of action against Gruber on demurrer).

As demonstrated in *Esis* and the other cited authorities, California law is clear that an agent

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

cannot be held liable for negligence when he is performing duties in the course and scope of his employment that allegedly cause economic loss to a third party. As in *Esis*, Plaintiffs' action against Loeb fails as a matter of law. Plaintiffs fraudulently joined Loeb in this action as a sham defendant, so his citizenship must be disregarded in ruling on Plaintiffs' remand motion.

C. Once Loeb's Citizenship is Disregarded Because of Plaintiffs' Fraudulent Joinder, It is Undisputed That the Court Has Diversity Jurisdiction

The Court has diversity jurisdiction of this action. It is undisputed that Buck is a diverse defendant. As the U.S. Supreme Court recently held, a corporate entity's principal place of business "is best read as referring to the place where the corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.' And in practice it should normally be the place where the corporation maintains its headquarters." *Hertz Corp. v. Friend,* No. 08-1107, slip. op. at 14 (U.S. Feb. 23, 2010).

Buck was, at the time of the filing of this action, and still is, a limited liability company formed under the laws of the State of Delaware and having its principal place of business in the State of New York. A limited liability company's citizenship for purposes of diversity jurisdiction is based on the citizenship of its owner/members. *Johnson v. Colombia Properties Anchorage, LP*, 438 F.3d 894, 899 (9th Cir. 2006). The sole owner/member of Buck is ACS Human Resources Solutions, Inc., which was, at the time of the filing of this action, and still is, a corporation incorporated under the laws of the State of Pennsylvania and having its principal place of business in the State of New Jersey. ACS Human Resources Solutions, Inc. is a wholly owned subsidiary of Affiliated Computer Services, Inc., which was, at the time of the filing of this action, and still is, a corporation incorporated under the laws of the State of Delaware and having its principal place of business in the State of Texas. Declaration of Lohwater, ¶¶ 2-6. Buck unquestionably is a diverse defendant for purposes of diversity jurisdiction.

Since Loeb's citizenship must be disregarded because Plaintiffs fraudulently joined him as a sham defendant, complete diversity of citizenship exists in this action. In addition, Plaintiffs allege on the face of their complaint, and do not dispute in their remand motion, that the amount in controversy exceeds $75,000. Complaint, ¶ 15 (alleging that Defendants' negligence had the effect

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400

of lowering contributions to StanCERA by more than $40 million). Defendants therefore have met their burden of establishing that the Court has diversity jurisdiction of this action, and that the action has properly been removed to this Court.

IV. CONCLUSION

For each of the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' motion to remand the action to state court, and further the request that the Court issue such other and further relief as the Court deems appropriate.

Dated: March 8, 2010

BAKER & McKENZIE LLP

By: /s/ Michael N. Westheimer
Michael N. Westheimer
Attorneys for Defendants
BUCK CONSULTANTS, LLC and
HAROLD LOEB

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856 2400