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BUCK CONSULTANTS, LLC and HAROLD LOEB

7  
8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10 FRESNO DIVISION

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

12 Plaintiff,

13 v.

14 BUCK CONSULTANTS, LLC and HAROLD  
15 LOEB,

16 Defendants.

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

DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO DISMISS  
ACTION

[Fed. R. Civ. P. 12(b)(6)]

Date: March 22, 2010  
Time: 10:00 a.m.  
Judge: Hon. Oliver W. Wanger  
Courtroom: 3 (7<sup>th</sup> Floor)

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18  
19 **I. INTRODUCTION**

20 Plaintiffs Dennis J. Nasrawi, Michael R. O'Neal and Rhonda Biesemeier ("Plaintiffs") are  
21 former employees of the County of Stanislaus. They each receive retirement benefits from the  
22 County's retirement fund, for which the trustee is Stanislaus County Employees Retirement  
23 Association ("StanCERA"). In this action, Plaintiffs attempt to sue a company that StanCERA  
24 contracted with to provide actuarial services, Defendant Buck Consultants, LLC ("Buck"), and one  
25 of Buck's employees individually, Harold Loeb ("Loeb"), for alleged negligence in preparing an  
26 actuarial valuation for StanCERA. Plaintiffs' lawsuit is defective for two reasons: First, Plaintiffs  
27 lack standing to bring this action. As a matter of law, the action can only be brought by StanCERA  
28 in its capacity as trustee, and cannot be brought by Plaintiffs as trust beneficiaries. Second, even if

1 Plaintiffs did have standing to sue, Loeb cannot be held individually liable for Buck's alleged  
2 negligence in performing services pursuant to Buck's contract with StanCERA.<sup>1</sup>

3 In an effort to plead around the standing requirement, Plaintiffs make boilerplate allegations  
4 of special circumstances that permit trust beneficiaries to sue in a representative capacity. However,  
5 their bald assertions fail to meet the minimal threshold of federal pleading. Plaintiffs rely solely on  
6 conclusory arguments that Defendants "aided and abetted" a breach of fiduciary duty by StanCERA  
7 for their own financial gain. They allege no facts to support these arguments, however, and cannot  
8 demonstrate it is plausible that they have standing as trust beneficiaries to bring this action.

9 In addition, Plaintiffs cannot state a claim against Loeb individually. It is clear on the face of  
10 the Complaint and from judicially noticeable facts that StanCERA contracted only with Buck to  
11 provide the actuarial services at issue in this action. As Plaintiffs acknowledge, Loeb was "assigned  
12 by Buck" to perform the services at issue, and was acting in the course and scope of his employment  
13 with respect to the matters alleged in the Complaint. Under well-settled law, Buck's employee  
14 cannot be held individually liable to a third party for pecuniary losses resulting from alleged  
15 negligence in the performance of services pursuant to Buck's contract with the third party.

16 Accordingly, the action must be dismissed as a matter of law. The action against both  
17 Defendants must be dismissed because Plaintiffs lack standing. Further, the action against Loeb  
18 must be dismissed because he cannot be sued individually. The defects are fatal and cannot be  
19 cured, so Buck and Loeb each request that the Court dismiss the action against them with prejudice.

20 **II. SUMMARY OF FACTS**

21 The following recitation of facts is based on the allegations pled in the Complaint and on  
22 judicially noticeable facts. Plaintiffs' factual allegations are accepted as true solely for purposes of  
23 this motion.

24 StanCERA is a public employees retirement system created under the County Employees  
25 Retirement Law of 1937 to administer the retirement benefits for employees of County of Stanislaus,  
26 City of Ceres, the Superior Court of the State of California for County of Stanislaus, and five special

27  
28 <sup>1</sup> If this matter should proceed on the merits, the Defendants will deny all allegations of negligence.

1 districts located in County of Stanislaus. Complaint, ¶ 2. StanCERA is the trustee of the retirement  
2 system, and its assets are trust funds. Complaint, ¶ 9-10.

3 Plaintiffs are former employees of the County of Stanislaus who receive retirement benefits,  
4 and are beneficiaries of StanCERA. Complaint, ¶ 1.

5 Buck is a limited liability company that provides actuarial services. Complaint, ¶ 3. Buck  
6 contracted with StanCERA to provide actuarial services pursuant to an Agreement for Professional  
7 Services between Buck Consultants and StanCERA. Complaint, ¶¶ 3, 12; Request for Judicial  
8 Notice, Exh. A.<sup>2</sup>

9 Loeb is an individual who is employed with Buck as an actuary, and was “assigned by Buck”  
10 to provide actuarial services to StanCERA. Complaint, ¶¶ 4, 7. StanCERA’s Board minutes state  
11 that Buck assigned Loeb to be its new account manager for StanCERA as a result of staff changes in  
12 Buck’s San Francisco branch. Request for Judicial Notice, Exh. B (StanCERA Board minutes dated  
13 October 11, 2006).<sup>3</sup> Loeb is not a party to Buck’s contract with StanCERA. Request for Judicial  
14 Notice, Exh. A.<sup>4</sup>

15 Plaintiffs allege that a subsequently-retained actuary informed StanCERA on or about  
16 November 7, 2008 that Buck prepared an actuarial valuation for StanCERA using inappropriate  
17 actuarial assumptions. Complaint, ¶ 14. Plaintiffs plead they “are informed and believe” that  
18 Buck’s alleged negligence caused StanCERA to suffer harm of lower contributions to the trust fund

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19 <sup>2</sup> Under the “incorporation by reference” doctrine, Defendants are permitted to attach to their Rule  
20 12(b)(6) motion a copy of a document that is referenced in the Complaint but not physically attached  
21 to the pleading. *Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005); *Parrino v. FHP, Inc.*,  
22 146 F.3d 699, 706 (9th Cir. 1998) (extending “incorporation by reference” doctrine where the  
23 plaintiff’s claim depended on the contents of a document even though the plaintiff did not explicitly  
24 allege the contents of that document in the complaint). “Otherwise, a plaintiff with a legally  
25 deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document  
26 on which it relied.” *Pension Benefit Guar. Corp. v. White Consolidated Industries, Inc.*, 998 F.2d  
27 1192, 1196 (3rd Cir. 1993).

28 <sup>3</sup> 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](http://www.stancera.org)).

<sup>4</sup> See Footnote 2, *supra*.

1 from County of Stanislaus totaling over \$40 million, lost earnings on those contributions, and costs  
2 that StanCERA paid to other actuarial firms. Complaint, ¶ 15.

3 Plaintiffs then plead a series of factually unsupported, conclusory arguments in an attempt to  
4 establish that they have standing as trust beneficiaries to bring this action. Plaintiffs initially contend  
5 that StanCERA has a fiduciary obligation to pursue a negligence claim against Buck and its  
6 employee to recover lost County employer contributions, earnings on those contributions and costs  
7 paid to other actuarial firms. Complaint, ¶ 16. Plaintiffs argue next that StanCERA breached its  
8 fiduciary obligation by failing to bring a negligence claim against Buck and its employee, and that  
9 StanCERA has not brought and will not bring a claim because doing so would “expose” its breach of  
10 fiduciary duty (of not bringing a claim). Complaint, ¶¶ 16-17. Plaintiffs further argue that Buck and  
11 its employee “participated with, aided and abetted” in StanCERA’s breach by “concealing” their  
12 alleged negligence for their own financial gain. Complaint, ¶¶ 18-21. These conclusory assertions  
13 need not be accepted as true for purposes of this motion, and do not meet federal pleading standards.

14 On October 8, 2009, Plaintiffs brought this action for negligence against Defendants in a  
15 “representative capacity” on behalf of StanCERA, and seek general damages, special damages and  
16 costs of suit. Complaint ¶ 22, and prayer.

17 **III. ARGUMENT**

18 **A. Legal Standard**

19 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a claim.  
20 While Plaintiffs’ factual allegations are to be accepted as true in ruling on the motion, the Court need  
21 not assume the truth of legal conclusions merely because they are cast in the form of factual  
22 allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

23 The U.S. Supreme Court recently issued two opinions that set the legal standard district  
24 courts must apply in determining whether factual allegations in a complaint can survive dismissal –  
25 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d (2007); and *Ashcroft v.*  
26 *Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

27 In *Twombly*, the Supreme Court held that a plaintiff’s obligation to provide the grounds for  
28 entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the

1 elements of a cause of action will not do ....” *Twombly*, 550 U.S. at 555 (analyzing pleading  
2 requirement set forth in Fed. R. Civ. P. 8(a)). “Factual allegations must be enough to raise a right to  
3 relief above the speculative level, [citations], on the assumption that all the allegations in the  
4 complaint are true (even if doubtful in fact), [citations].” *Id.* (citations and footnote omitted). Rather,  
5 a complaint must plead “enough facts to state a claim that is plausible on its face.” *Id.* at 570.

6 In *Iqbal*, the Supreme Court elaborated that a complaint does not suffice “if it tenders ‘naked  
7 assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 129 S.Ct. at 1949. “Threadbare  
8 recitals of the elements of a cause of action, supported by mere conclusory statements, will not  
9 suffice.” *Id.* A party is not permitted to plead the bare elements of his cause of action and expect his  
10 complaint to survive a motion to dismiss. *Id.* at 1954. Further, a party cannot avoid a motion to  
11 dismiss by asserting that discovery is needed, because “the question presented by a motion to  
12 dismiss a complaint does not turn on the controls placed on the discovery process.” *Id.* at 1953.  
13 When a party’s complaint is factually deficient, “he is not entitled to discovery, cabined or  
14 otherwise.” *Id.* at 1954.

15 Here, Plaintiffs cannot state a claim that meets federal pleading standards, so their action  
16 must be dismissed as a matter of law.

17 **B. Plaintiffs’ Complaint Should be Dismissed in its Entirety for Failure to State a**  
18 **Claim Upon Which Relief can be Granted**

19 **1. As Trust Beneficiaries, Plaintiffs Lack Standing to Bring This Action in a**  
20 **“Representative Capacity” on Behalf of StanCERA**

21 In California, it is well established that trust beneficiaries, such as the Plaintiffs, do not have  
22 standing to sue on behalf of the trust from which they benefit.

23 If any person other than the real party in interest brings an action, it  
24 is subject to general demurrer. [Citations.] In general, the person  
25 who has the right to file suit under the substantive law is the real  
26 party in interest. [Citations.] At common law, where a cause of  
27 action is prosecuted on behalf of an express trust, the trustee is the  
28 real party in interest because the trustee has legal title to the cause.  
[Citations.] The corollary to this rule is that the beneficiary of a  
trust generally is not the real party in interest and may not sue in  
the name of the trust. A trust beneficiary has no legal title or  
ownership interest in the trust assets; his or her right to sue is  
ordinarily limited to the enforcement of the trust, according to its  
terms. [Citations.] ... Thus, absent special circumstances, an  
action prosecuted for the benefit of trust estate by a person other

1 than the trustee is not brought in the name of the real party in  
2 interest and is demurrable. [Citations.]

3 *Pillsbury v. Karmgard*, 22 Cal.App.4th 743, 753 (1994) (citing *Saks v. Damon Raike and Co.*, 7  
4 Cal.App.4th 419, 427 (1992)).

5 As trust beneficiaries, Plaintiffs have the burden of proof on the issue of standing. *Pillsbury*,  
6 22 Cal.App.4th at 761.

7 *Saks* sets forth two special circumstances that are exceptions to the general rule against  
8 standing of trust beneficiaries. First, when the “trustee cannot or will not enforce a valid cause of  
9 action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial  
10 compulsion against the trustee. In order to prevent loss of or prejudice to a claim, the beneficiary  
11 may bring an action in equity joining the third person and the trustee.” *Saks*, 7 Cal.App.4th at 427-  
12 28; *see also Pillsbury*, Cal.App.4th at 754. To meet this exception, the trust beneficiaries must prove  
13 that the trustee’s failure to bring a suit against a third party is “negligent, wrongful or otherwise  
14 improper.” *Pillsbury*, 22 Cal.App.4th at 756.

15 Plaintiffs cannot meet this exception for several reasons. Initially, Plaintiffs make only a  
16 bare, conclusory assertion that StanCERA breached its fiduciary obligations by not filing a lawsuit  
17 against Defendants. This is a legal conclusion that need not be accepted as true for purposes of this  
18 motion. Plaintiffs have not pled any facts to support their argument that StanCERA committed a  
19 breach of its fiduciary obligations by not filing a lawsuit. Rather, they simply make a circular  
20 argument that StanCERA breached its fiduciary duty by not bringing a claim because StanCERA did  
21 not want to “expose” its breach of fiduciary duty (of not bringing a claim). Complaint, ¶¶ 16-17.  
22 This is plainly deficient. Plaintiffs have not met the federal pleading requirements, and have not met  
23 their burden of stating a plausible claim that they have standing under this exception.

24 Moreover, even if Plaintiffs could plead specific facts regarding StanCERA’s alleged breach,  
25 this exception would only give them standing to pursue an action in equity seeking judicial  
26 compulsion against *StanCERA*. *Saks*, 7 Cal.App.4th at 427-28; *Pillsbury*, Cal.App.4th at 754. The  
27 exception does not permit Plaintiffs to bring a damages action against Defendants as they have done  
28 here. As a matter of law, Plaintiffs lack standing to bring the instant action under this exception.

1 A second exception arises when a third party directly participates with the trustee in a breach  
2 of trust. *See Saks*, 7 Cal.App.4<sup>th</sup> at 428; *Wolf v. Mitchell, Silberberg & Knupp*, 76 Cal.App.4th 1030,  
3 1038 (1999). Specifically, trust beneficiaries have standing to bring suit on their direct claims  
4 against third persons who have “actively participated with a trustee in a breach of trust for their own  
5 financial advantage, whether by inducing, aiding or abetting the trustee’s breach of duty, or by  
6 receiving trust property from the trustee in knowing breach of trust.” *Wolf*, 76 Cal.App.4th at 1039.

7 Here, Plaintiffs attempt to establish standing under this exception by pleading the bare  
8 elements without any factual details. Plaintiffs make conclusory assertions that Defendants  
9 “participated in, aided and abetted” StanCERA’s breach of fiduciary duty (of not bringing a claim)  
10 by “concealing” their alleged negligence, and that they did so “for their own financial gain.”  
11 Complaint, ¶¶ 18-21. Plaintiffs cannot plead any facts to support these assertions, especially since  
12 Plaintiffs’ own allegations contradict them. Initially, StanCERA necessarily was aware of Buck’s  
13 actuarial valuation with allegedly inappropriate assumptions (*i.e.*, Defendants could not have  
14 “concealed” it); because Plaintiffs expressly allege that StanCERA breached its fiduciary duty by not  
15 bringing a claim against Defendants based on its content. Further, Plaintiffs’ own allegations belie  
16 their contention that Defendants took some type of action (which Plaintiffs fail to identify in their  
17 Complaint) “for their own financial gain.” The damages Plaintiffs seek to recover in this action are  
18 lost contributions from *County of Stanislaus*, and costs paid to *other actuarial firms*. Complaint, ¶¶  
19 15-16, and prayer. Plaintiffs’ sparse factual allegations do not support their conclusory assertion that  
20 *Defendants* financially gained. Plaintiffs’ attempt to plead around the standing requirement by  
21 making conclusory allegations is unavailing. Plaintiffs cannot state a plausible claim that they have  
22 standing under this exception.

23 Plaintiffs’ inability to plead facts to demonstrate they have standing is a fatal defect that  
24 cannot be cured. Defendants request that the Court dismiss the action in its entirety with prejudice.

25 **2. Plaintiffs Cannot State a Claim For Negligence Against Loeb in His**  
26 **Individual Capacity**

27 Even if Plaintiffs could establish they have standing to bring this action, their action against  
28 Loeb individually must be dismissed. It is well-settled that a company’s officers and employees are

1 not liable to third party for negligence amounting to nonfeasance or a breach of duty owing to their  
 2 corporate employer alone. *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586,  
 3 595 (1970); *Self-Insurance Sec. Fund v. ESIS, Inc.*, 204 Cal.App.3d 1148, 1162 (1988) (dismissing  
 4 the plaintiff's claim based on the "oft-stated disinclination to hold an agent personally liable for  
 5 economic losses when, in the ordinary course of his duties to his own corporation, the agent  
 6 incidentally harms the pecuniary interests of a third party"). While an action might lie against the  
 7 corporate employer, the action cannot also be brought against its employee who was acting within  
 8 the course and scope of the employment.

9 In *Haidinger-Hayes*, the plaintiff insurance company filed a negligence action against two  
 10 defendants – a corporate insurance agent, and that company's president (Haidinger) individually –  
 11 for issuing an insurance policy with insufficient premiums to cover anticipated losses. The trial  
 12 court found that Haidinger was individually liable for negligence because he had personally  
 13 reviewed and analyzed the underwriting information and approved the policy. 1 Cal.3d at 593-94.  
 14 On appeal, Haidinger contended he personally was not a fiduciary to plaintiff and owed it no duty of  
 15 care. *Id.* at 594. The California Supreme Court agreed, and reversed. *Id.* at 594-95. The Court  
 16 initially observed that Haidinger's acts "were done in the course and scope of his employment, for  
 17 and on behalf of the corporation, and not as a contracting party." *Id.* at 595. Haidinger had a duty to  
 18 *his company* as its agent, but was "not responsible to third persons for negligence amounting merely  
 19 to nonfeasance, to a breach of duty owing to the corporation alone; the act must also constitute a  
 20 breach of duty owed to the third person." *Id.* The Court elaborated that:

21 Liability imposed upon agents for active participation in tortious  
 22 acts of the principal have been mostly restricted to cases involving  
 23 physical injury, not pecuniary harm, to third persons. [Citations].  
 24 More must be shown than breach of the officer's duty to his  
 25 corporation to impose personal liability to a third person upon him.  
 26 Neither the evidence nor the findings support the conclusion that  
 27 defendant V. M. Haidinger was personally liable to plaintiff by  
 28 reason of his negligent performance of his corporate duties.

29 *Id.*<sup>5</sup>

30 \_\_\_\_\_  
 31 <sup>5</sup> In their pending remand motion (set for hearing simultaneously with this motion), Plaintiffs  
 32 selectively quote portions of the *Haidinger-Hayes* opinion out of context and omit other portions  
 33 which reveal their analysis is flawed. Defendants will provide a more detailed response to Plaintiffs'  
 34 arguments in their opposition to the remand motion.



1 In their Complaint, Plaintiffs make conclusory assertions that “StanCERA retained  
2 defendants Buck and Loeb to perform actuarial services for StanCERA,” that Loeb “owed a duty to  
3 exercise due care in performing actuarial services for StanCERA” and that Loeb “breached [his]  
4 duty of care.” Complaint ¶¶ 12-14. The Court need not accept these conclusory allegations as true  
5 for purposes of this motion. Since the Complaint specifically refers to StanCERA’s retention of  
6 Defendants to perform actuarial services, and Plaintiffs’ claims against Loeb depend upon the  
7 specific facts of the retention agreement, Defendants are entitled to attach the relevant document to  
8 their motion and the Court may properly consider it in ruling on this motion.<sup>6</sup> The contracting  
9 parties were Buck and StanCERA, not Loeb. See Request for Judicial Notice, Exh. A. This is  
10 further established by Plaintiffs’ own allegations and judicially noticeable facts. Plaintiffs plead that  
11 Loeb was “assigned by Buck to provide actuarial services to StanCERA” and at all times was acting  
12 in the course and scope of his employment. Complaint, ¶¶ 4, 7. StanCERA’s Board minutes also  
13 confirm that Buck assigned Loeb to be its new account manager for StanCERA as a result of staff  
14 changes in Buck’s San Francisco branch.<sup>7</sup> Request for Judicial Notice, Exh. B.

15 These circumstances are closely similar to those described in *Haidinger-Hayes, supra*. Loeb  
16 was not a contracting party, but instead was merely performing services in the course and scope of  
17 his employment pursuant to his employer Buck’s contract with StanCERA. Plaintiffs are seeking  
18 pecuniary damages based on allegations that the services were negligently performed. The Supreme  
19 Court has unequivocally held these circumstances are insufficient to impose personal liability on an  
20 individual acting within the scope of his employment. *Haidinger-Hayes*, 1 Cal.3d at 595.

21 Plaintiffs cannot sue Loeb individually as a matter of law, so he is entitled to be dismissed  
22 from this action with prejudice.

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27 <sup>6</sup> See Footnote 2, *supra*.

28 <sup>7</sup> See Footnote 3, *supra*.


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**IV. CONCLUSION**

For the foregoing reasons, Defendants each respectfully request that this Court grant their motion, dismiss the action against them with prejudice, enter judgment in their favor, award them their costs of suit, and grant such other and further relief as the Court deems proper.

Dated: January 19, 2010

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By: 

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