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11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**
13 **FRESNO DIVISION**

14 DENNIS J. NASRAWI, MICHAEL R. O'NEAL,)
15 and RHONDA BIESEMEIER,)
16 Plaintiffs,)
17 v.)
18 BUCK CONSULTANTS, LLC, HAROLD LOEB,)
19 and DOES 1-30,)
20 Defendants.)

21 CASE NO: 1:09-cv-02061-OWW-
22 GSA
23 [Complaint Filed: October 8, 2009]
24 MEMORANDUM OF POINTS AND
25 AUTHORITIES IN SUPPORT OF
26 MOTION TO REMAND
27 Date: March 8, 2010
28 Time: 10:00 a.m.
Judge: Hon. Oliver W. Wanger
Courtroom: #3 (7th Floor)

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1 **I. INTRODUCTION**

2 This is a negligence case for actuarial malpractice against an actuarial firm and the
3 responsible actuary brought by three beneficiaries of a public employee pension fund. Even
4 though the responsible actuary, Harold Loeb (“Loeb”) is a citizen of California—as are all three
5 plaintiffs—the defendants improperly removed the case to federal court claiming complete
6 diversity of citizenship. Because well-established California law provides Loeb is liable for his
7 own negligence, complete diversity of citizenship is lacking and the case should be remanded to
8 state court.

9 **II. NATURE OF THE CASE**

10 The plaintiffs, Dennis J. Nasrawi, Michael R. O’Neal, and Rhonda Bieseemeier,¹ “are
11 former employees of the County of Stanislaus (‘the County’) who have acquired vested
12 contractual rights to receive pension and related benefits from the Stanislaus County Employees
13 Retirement Association (‘StanCERA’).” (Complaint for Negligence, attached to Document No.
14 1-2 (“Complaint”), p. 1, lines 20-22.) “Each of the plaintiffs is a member of StanCERA.” (*Id.*,
15 p. 1, lines 22-23.)

16 “StanCERA is a public employees retirement system operating under section 17 of article
17 XVI of the California Constitution and the County Employees Retirement
18 Law of 1937 (Gov. Code, § 31450 et seq.)” (*Id.*, p. 1, lines 24-26.) “StanCERA administers
19 the retirement benefits for employees of Stanislaus County, the City of Ceres, the Superior Court
20 of the State of California for Stanislaus County, and five special districts located in Stanislaus
21 County.” (*Id.*, p. 1, lines 26-28.) “StanCERA administers the plaintiffs’ defined benefit pension
22 plan and provides retirement, health insurance, disability, and death benefits to plaintiffs and
23 other members.” (*Id.*, pp. 1, line 28-p. 2, line 2.)

24 “Defendant Buck Consultants, LLC (‘Buck’), is a Delaware limited liability company.”
25 (*Id.*, p. 2, lines 3-4.) “At material times, Buck did substantial business in the County, including
26 providing actuarial services to StanCERA.” (*Id.*, p. 2, lines 4-5.)

27 “On and after January 9, 2007, StanCERA retained defendants Buck and Loeb to provide
28

¹ Ms. Bieseemeier’s name was inadvertently misspelled in the complaint.

1 actuarial services to StanCERA, in its capacity as the trustee of the plaintiffs' pension trust
2 fund." (*Id.*, p. 3, lines 6-8.) As such "Loeb owed a duty to exercise due care in performing
3 actuarial services for StanCERA." (*Id.*, p. 3, lines 9-10.) "On or about November 7, 2008,
4 StanCERA learned from a subsequently retained actuary that Buck and Loeb had breached their
5 duty of care in preparing StanCERA's January 9, 2007 actuarial valuation by using inappropriate
6 actuarial assumptions." (*Id.*, p. 3, lines 11-13.)

7 Loeb's *personal* involvement in the negligence at issue in this case is confirmed by
8 publically-available records.² For example, on January 9, 2007, Loeb personally signed the
9 actuarial valuation at issue in this case, negligently representing³ to StanCERA that "[t]his report
10 fully and fairly discloses the actuarial position of the plan." (Notice of Lodgment, Exhibit 1
11 ("NOL, Exh. 1"), StanCERA Report on the Actuarial Valuation as of June 30, 2006, p. 2.) On
12 January 23, 2007, Loeb personally appeared at the public StanCERA board meeting and "gave a
13 presentation of StanCERA's actuarial valuation . . ." (NOL, Exh. 2, Minutes, StanCERA Board
14 Meeting dated January 23, 2007, p. 1.) "Mr. Loeb's presentation included detail of the
15 Executive Summary, such as the actuarial valuation, current assumptions, liability, contribution
16 rates and interest-crediting rate . . . [and] answered various questions." (*Id.*, pp. 1-2.)

17 At that same meeting, Loeb also presented a "Triennial Report on the Experience Study
18 for the Period July 1, 2003 through June 30, 2006." (*Id.*, p. 2 ["Mr. Loeb continued his
19 presentation . . . [and] answered board member questions"].) He also personally signed the
20 triennial experience study, "certifying" it was properly performed. (NOL, Exh. 3, StanCERA
21

22 ² Each of these public records is available on StanCERA's web site,
23 <http://stancera.org/>.

24 ³ Beyond the scope of this motion to remand is the proof that "defendants'
25 negligence caused StanCERA to suffer harm, consisting of: (1) lost County employer
26 contributions, (2) lost earnings on those contributions, and (3) costs paid to other actuarial firms
27 to discover the defendants' negligence." (Complaint, p. 3, lines 14-16.) "[T]he defendants'
28 negligence had the effect of lowering the County's required, annual employer contribution to
StanCERA by more than \$40 million." (*Id.*, p. 3, lines 16-18.) Moreover, "the 9.22 percent
employer contribution rate adopted by StanCERA, in reliance upon the actuarial valuation
negligently prepared by Buck and Loeb, was insufficient to actuarially fund the benefits
promised by the County." (*Id.*, p. 3, lines 19-21.)

1 Report on the Experience Study for the Period July 1, 2003 Through June 30, 2006, p. 2.) On
2 February 14, 2007, based on Loeb’s work product and recommendations, StanCERA approved
3 the actuarial valuation and the triennial experience study. (NOL, Exh. 4, Minutes, StanCERA
4 Board Meeting dated February 14, 2007, p. 1.) Finally, on January 15, 2007, Mr. Loeb signed an
5 actuarial certification letter stating that all “actuarial assumptions as shown in [the actuarial
6 valuation] were selected by us as being appropriate for use under the Plan.” (NOL, Exh. 5,
7 Actuarial Certification Letter dated January 15, 2007.) Loeb’s certification letter was included
8 in StanCERA’s 2008 comprehensive annual financial report to plaintiffs. (NOL, Exh. 6,
9 StanCERA’s Comprehensive Annual Financial Report for the Fiscal Years Ended June 30, 2008
10 and June 30, 2007, p. 52.)

11 Defendants concede, Loeb “is a citizen of the same state as Plaintiffs.” (Document No. 1,
12 Notice of Removal, p. 2:25-26.⁴)

13 Plaintiffs filed their complaint for negligence in Stanislaus County Superior Court on
14 October 8, 2009. On November 24, 2009, defendants removed the action to this Court.

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⁴ Loeb and all plaintiffs are citizens of the State of California.

1 **III. REMAND SHOULD BE ORDERED BECAUSE COMPLETE**
2 **DIVERSITY DOES NOT EXIST.**

3 **A. Defendants Removed the Case Solely on the Basis of Alleged**
4 **Complete Diversity of Citizenship of the Parties.**

5 Defendants' removal was based solely on an alleged complete diversity of citizenship. In
6 their Notice of Removal, defendants assert jurisdiction exists only on that ground. "This action
7 is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1332, and is
8 one which may be removed to this Court pursuant to the provisions of 28 U.S.C. § 1441(b),
9 because it is a civil action between citizens of different states and the matter in controversy
10 exclusive of interest and costs, exceeds the sum or value of \$75,000." (Document No. 1, Notice
11 of Removal, p. 1, lines 25-28.)

12 **B. Complete Diversity Is Not Present Because Defendant Loeb Is**
13 **Citizen of California.**

14 The Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction."
15 (*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), citing *Boggs v. Lewis*, 863 F.2d 662, 663
16 (9th Cir. 1988) and *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir.
17 1985).) "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in
18 the first instance." (*Gaus* at p. 566, citing *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062,
19 1064 (9th Cir. 1979).)

20 "The 'strong presumption' against removal jurisdiction means that the defendant always
21 has the burden of establishing that removal is proper." (*Gaus, supra*, 980 F.2d at p. 566, citing
22 *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712, n.3 (9th Cir. 1990).) "The
23 party asserting jurisdiction has the burden of proving all jurisdictional facts." (*Industrial*
24 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092, (9th Cir.1990), citing *McNutt v. General*
25 *Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).) "Plaintiffs' motion for remand effectively
26 forces the defendant—the party who invoked the federal court's removal jurisdiction—to prove
27 by a preponderance of evidence whatever is necessary to support the petition: e.g. the existence
28 of diversity [etc.]." (Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before
Trial (The Rutter Group 2009) ("Schwarzer"), pp. 2D-216-217, ¶ 2:1093, citing *Gaus, supra*,

1 980 F.2d 564 at p. 566 and *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199
2 F.Supp. 993, 1000 (C.D. Cal. 2002).)

3 Except in civil rights cases, “[a]n order remanding a case to the State court from which it
4 was removed is not reviewable on appeal or otherwise” (28 U.S.C. § 1447, subd. (d).)
5 Moreover, “[n]o statement of reasons need be given in ruling on a motion to remand.”
6 (Schwarzer, *supra*, p. 2D-221, ¶ 2:1105.) “If a trial purports to remand a case on the ground that
7 it was removed ‘improvidently and without jurisdiction,’ his order is not subject to challenge in
8 the courts of appeal, by mandamus, or otherwise.” (*Thermtron Products, Inc. v. Hermansdorfer*,
9 423 U.S. 336, 343 (1976).)

10 “Subject matter jurisdiction based upon diversity of citizenship requires that no
11 defendants have the same citizenship as any plaintiff.” (*Tosco Corp. v. Communities for a Better*
12 *Environment*, 236 F. 3d 495, 499 (9th Cir. 2001).) “The diversity upon which removal is
13 predicated must be complete (citation), and should generally be determined from the face of the
14 complaint.” (*Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985).)

15 In their complaint, plaintiffs allege: “Defendant Harold Loeb . . . is an individual actuary
16 who, based on information and belief, resides in California” (Complaint, p. 2, lines 6-7.)
17 Defendants concede Loeb is a citizen of California, the same state of citizenship as the plaintiffs.
18 “The Complaint also names defendant Loeb as an individual defendant, who is a citizen of the
19 same state as Plaintiffs.” (Document No. 1, Notice of Removal, p. 2, lines 25-26.⁵)

20
21 **C. Because Loeb Was Personally Negligent, He Is Not a Sham Defendant.**

22 Defendants assert “[t]he citizenship of Loeb should be disregarded for purposes of
23 determining jurisdiction under 28 U.S.C. §§ 1332 and 1441(b) on the ground that he is a sham or
24 fraudulent defendant.” (Document No. 1, Notice of Removal, p. 2, lines 26-28.) According to
25 defendants, “[plaintiffs] cannot establish liability against Loeb for the following reasons: (i) the
26 only cause of action alleged against Loeb is a claim for negligence; and (ii) Plaintiffs cannot, as a
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28 ⁵ Defendants concede, Loeb “is a citizen of the same state as Plaintiffs.”
(Document No. 1, Notice of Removal, p. 2:25-26.)

1 matter of law, state a claim for negligence against an employee, like Loeb, who at all times
2 relevant was acting in the course and scope of his employment for Buck.” (*Id.*, p. 3, lines 1-4.)

3 “Joinder is fraudulent ‘[i]f the plaintiff fails to state a cause of action against a resident
4 defendant, and the failure is obvious according to the settled rules of the state.’” (*Hunter v.*
5 *Phillip Morris USA*, 582 F.2d 1039, 1043 (9th Cir. 2009), quoting *Morris v. Princess Cruises,*
6 *Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).) “[I]f there is any possibility that the state law might
7 impose liability on a resident defendant under the circumstances alleged in the complaint, the
8 federal court cannot find that joinder of the resident was fraudulent, and remand is necessary.”
9 (*Hunter*, at p. 1044, quoting *Florence v. Crescent Res., LLC*, 484 F.3d 1293, 1299 (11th Cir.
10 2007).)

11 In California, “[a]n agent or employee is always liable for that person’s own torts.” (5
12 Witkin, Summary of Cal. Law (10th ed. 2005) § 30, p. 92.) “This is so whether the principal or
13 employer is liable or not.” (*Ibid.*, citing *Perkins v. Blauth*, 163 Cal. 782, 787 (1912) [agent who
14 commits tort acting under principal’s authority is liable, even though principal thus also becomes
15 liable]; *Holt v. Booth*, 1 Cal.App.4th 1074, 1080, n. 5 (1991).) “Thus, an agent is always liable
16 for his or her own torts, whether his or her employer is liable or not” (2B Cal.Jur. 3d,
17 Agency, § 126, p. 348.) Further, since 1872, California Civil Code section 2343(3) has provided
18 “[o]ne who assumes to act as an agent is responsible to third persons as a principal for his acts in
19 the course of his agency . . . [w]hen his acts are wrongful in their nature.” Negligence is such a
20 wrongful act. (*Jenson v. Kenneth Mullen Co.*, 211 Cal.App.3d 653, 659 (1989).)

21 In support of removal, defendants cited two cases: *United States Liability Ins. Co. v.*
22 *Haidinger-Hayes, Inc.*, 1 Cal.3d 586 (1970), and *Self-Insurers’ Security Fund v. ESIS*, 204
23 Cal.App.3d 1148 (1988). (Document No. 1, Notice of Removal, p. 3, lines 4-6.⁶) However,
24 upon scrutiny, both cases actually support plaintiffs’ motion to remand.

25 In *Haidinger-Hayes*, an out-of-state insurer brought an action against its in-state
26 corporate general agent and the corporation’s president for negligence in undercharging an
27

28 ⁶ Defendants do not provide pinpoint citations for either case.

1 insurance premium and recommending a poor insurance risk. (1 Cal.3d at pp. 590-591.) The
2 court held that the president should not be held liable, but only because he did not participate in
3 the tortious conduct himself.⁷ “Directors and officers of a corporation do not incur personal
4 liability for torts of the corporation merely by reason of their official position, *unless they*
5 *participate in the wrong or authorize or direct that it be done.*” (*Id.* at p. 595, italics added.)
6 “They may be liable, under the rules of tort and agency, for tortious acts committed on behalf of
7 the corporation [citations].” (*Ibid.*; see *PMC, Inc. v. Kadisha*, 78 Cal.App.4th 1368, 1379 (2000)
8 [distinguishing *Haidinger-Hayes*]; *Frances T. v. Village Green Owners Assn.*, 42 Cal.3d 490,
9 503-504 (1986) [liability imposed if officer or director participates in tortious conduct].)

10 Similarly, in *Self-Insurers’ Security Fund, supra*, 204 Cal.App.3d 1148, the court held
11 that an officer of an insolvent self-insured employer need not reimburse worker’s compensation
12 benefits paid by a state-created insurance fund. While the court’s holding was based primarily
13 on lack of any statutory or regulatory violation in this heavily-regulated arena (*id.* at pp. 1155-
14 1161), the court declined to hold the officer personally liable for negligent misrepresentation.
15 (*Id.* at pp. 1161-1163.) In reaching this result, the court relied primarily on *Haidinger-Hayes*
16 (*ibid.*) which, as discussed above, actually supports remand in light of Loeb’s *personal*
17 involvement in the negligence alleged by the complaint. (See in Section II, *ante*, NOL, Exhs. 1-
18 6.)

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27 ⁷ This key distinction was noted by the court in *Michaelis v. Benavides*, 61
28 Cal.App.4th 681, 686 (1998): “[T]here was no evidence in *Haidinger-Hayes* that the corporate
president actively participated in the tortious corporate conduct. (1 Cal. 3d at p. 594.)”

1 **IV. CONCLUSION**

2 This case should never have been removed and it should be promptly remanded. Because
3 well-established California law provides Loeb is liable for his own negligence, complete
4 diversity of citizenship is lacking and the case should be remanded to state court.

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6 Dated: December 15, 2009

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