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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES A. MILLER,

CASE NO. 1:10-CV-1428 AWI-SMS (PC)

Plaintiff,

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND REMANDING
CASE TO STATE COURT

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
et al.,

(Doc. No. 8)

Defendants.

_____ /

This case was removed from Fresno County Superior Court on August 6, 2010. On August 27, 2010, Plaintiff filed a motion to remand. Plaintiff identified several procedural problems with the removal, including a violation of the unanimity rule. On November 30, 2010, the Magistrate Judge issued a Findings and Recommendation that recommended granting Plaintiff's motion and remanding the matter to state court. On December 29, 2010, Defendants filed objections to the Findings and Recommendation.

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the undersigned has conducted the appropriate *de novo* review consistent with Defendants' objections.

The Court is in general agreement with the Findings and Recommendation. However, Defendants submitted new evidence (a declaration from the Litigation Coordinator who received

1 the summonses in this case) in their objections that was not submitted to the Magistrate Judge.
2 The evidence indicates that, despite the Fresno County Superior Court notation, Defendant
3 Medina has not been served. Why Defendants did not submit this declaration to the Magistrate
4 Judge is a mystery. This new evidence should have been presented to the Magistrate Judge
5 because it is evidence that would have affected the Findings and Recommendation. While the
6 Court is not obligated to consider this new evidence, it will do so for this motion. The new
7 evidence creates a genuine question concerning whether service has been accomplished against
8 Defendant Medina. As such, the Court cannot adopt the Findings and Recommendation with
9 respect to the analysis of Defendant Medina.

10 Nevertheless, the Court is satisfied that the unanimity rule has been violated. See Atlantic
11 Nat'l Trust, LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 938 (9th Cir. 2010). Defendants removed
12 this case without consultation with, or consent from, Defendant Anderson and Defendant Chuddy,
13 and did so at a time when Chudy and Anderson were not represented by the same attorney. They
14 were not represented by the same attorney as the removing Defendants because the Office of
15 Attorney General had not yet received signed requests for representation. See September 13,
16 2010, Ramsey Dec. ¶¶ 4, 6, 7. Defendants' counsel knew that Chudy and Anderson had been
17 served on July 22, 2010, but did nothing to contact them regarding the August 6, 2010, removal.
18 Defendants' counsel did not receive the signed request for representation from Chudy until
19 August 10, 2006, and from Anderson until September 7, 2010. Chudy's and Anderson's consent
20 to removal was filed on September 13, 2010. This is beyond the time to correct the removal
21 deficiency. See Prize Frize, Inc. v. Matrix (U.S.), Inc., 167 F.3d 1261, 1266 (9th Cir. 1999). The
22 removal statute is strictly construed. See Luther v. Countrywide Home Loans Servicing LP, 533
23 F.3d 1031, 1034 (9th Cir. 2008). The Court agrees with the Findings and Recommendation that
24 there is an insufficient explanation for not pro-actively seeking consent from Chudy and Anderson
25 prior to removal. Remand for violation of the unanimity rule is appropriate.¹ See 28 U.S.C. §
26 1446; 28 U.S.C. § 1447(c); Altantic, 621 F.3d at 940; Prize Frize, 167 F.3d at 1266 & n.4.

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¹The Court does not find *Lewis v. City of Fresno*, 627 F.Supp.2d 1179 (E.D. Cal. 2008) because, unlike this case, there was significant evidence in *Lewis* of the City's intent to join the removal. See id. at 1186.

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The Findings and Recommendations, filed November 30, 2010, are ADOPTED to the
3 extent consistent with the above analysis;

4 2. Plaintiff's motion to remand is GRANTED pursuant to 28 U.S.C. § 1447(c);

5 3. The Clerk shall forthwith REMAND this case to the Fresno County Superior Court and
6 CLOSE this case.

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8 IT IS SO ORDERED.

9 Dated: March 10, 2011



CHIEF UNITED STATES DISTRICT JUDGE

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