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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**OWNER-OPERATED INDEPENDENT
DRIVERS ASSOCIATION, *et al.***)
Plaintiffs,)
vs.)
PACIFIC FINANCIAL ASSOCIATION,)
Inc., et al.)
Defendants.)

**2:13-cv-00373 JWS
ORDER AND OPINION
[Re: Motion at Docket 8]**

I. MOTION PRESENTED

At docket 8 plaintiffs Owner-Operator Independent Drivers Association (“OOIDA”), Thomas and Karen Moore d/b/a Tom Moore Transportation, Jasmine, LLC, and K&S Trucking LLC (collectively “plaintiffs”) move to remand this case to the Arizona Superior Court, Maricopa County pursuant to 28 U.S.C. § 1447(c), arguing that there is no federal jurisdiction to support removal, and request attorneys’ fees associated with the removal. Defendants Pacific Financial Association, Inc. (“Pacific”) and its agent, Federal Service Corporation (“FSC”; collectively, “defendants”) respond at docket 18. Plaintiffs reply at docket 19. Oral argument was requested, but the motion has been thoroughly briefed, and oral argument would not be of further assistance to the court.

1 **II. BACKGROUND**

2 The plaintiffs are motor carriers or shippers who hauled freight pursuant to
3 contractual agreements they had with a transportation broker, Alliance Transportation,
4 Inc. (“Alliance”), which is not a party to this action. All such brokers must be registered
5 with the Department of Transportation pursuant to 49 U.S.C. § 13901. In order to be
6 registered as a broker for transportation, under 49 U.S.C. § 13906, the person must file
7 “a bond, insurance policy, or other type of security approved by the Secretary [of
8 Transportation] to ensure that the transportation for which a broker arranges is
9 provided.”¹ Alliance elected to provide the federally required security by way of a trust
10 agreement with Pacific. In compliance with the regulations implementing the statute,
11 the trust agreement provided for a \$10,000 fund (“Trust”) provided by Alliance to Pacific
12 as the trustee and was filed on a prescribed form, Form BMC-85 (“Trust Agreement”).²
13 The Trust is intended to “ensure the financial responsibility of the broker by providing
14 for payments to shippers or motor carriers if the broker fails to carry out its contracts,
15 agreements, or arrangements for the supplying of transportation by authorized motor
16 carriers.”³

17 The plaintiffs filed a class action complaint in Arizona Superior Court in
18 Maricopa County against Pacific under state law for breach of fiduciary duty generally,
19 for breach of fiduciary duty for failure to inform, for breach of the duty of good faith and
20 fair dealing, for negligence, and for breach of fiduciary duty for the misallocation of trust
21 assets. They raised state claims against Pacific’s agent, FSC, for breach of fiduciary
22 duty related to the misallocation of trust assets, for negligence, and for aiding and
23 abetting tortious conduct. They brought a declaratory judgment claim as well, asking
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25 ¹49 U.S.C. § 13906(b).

26 ²49 C.F.R. § 387.307(b), (d) (requiring that the evidence of a trust fund be filed using
27 Form BMC-85).

28 ³49 C.F.R. § 387.307(b).

1 the state court to determine that Pacific was engaged in the “trust business” as defined
2 by state law.

3 The complaint alleges that starting in the fall of 2011, Alliance ceased paying
4 motor carriers for their transportation services, and that these motor carriers began
5 filing claims against the Trust. It alleges that by October 19, 2011, the aggregate of
6 unpaid claims against the Trust premised upon deliveries before such date exceeded
7 \$10,000, and that, therefore, the Trust ceased to be effective. It alleges that Pacific
8 knew this to be the case, but failed to notify any Trust beneficiaries, failed to take steps
9 to trigger Alliance’s duty under the Trust Agreement to replenish the Trust, or provide
10 notice to the Federal Motor Carrier Safety Administration (“FMCSA”) about Alliance’s
11 delinquency as was required under the Trust Agreement. It alleges that the plaintiffs
12 thereafter hauled freight for Alliance pursuant to contracts without knowing that their
13 contracts were not secured by the Trust. The complaint alleges that plaintiffs were not
14 paid for their services and ultimately filed claims against the Trust for payment, which
15 were also never paid. It further alleges that Pacific did not pay any claims until after the
16 Trust was cancelled and that Pacific then chose to pay claimants based on
17 chronological order of delivery, meaning the Trust did not have any funds remaining to
18 pay plaintiffs, who had claims for deliveries after October of 2011.

19 Defendants removed the case to federal court. In the removal notice defendants
20 state that plaintiffs’ claims depend upon 49 U.S.C. § 13906, 49 C.F.R. § 387.307, and
21 the federally prescribed Form BMC-85. Thus, they assert that the court has original
22 jurisdiction over the action pursuant to 28 U.S.C. § 1331 for federal question jurisdiction
23 and pursuant to 28 U.S.C. § 1337(a) for jurisdiction over an act of Congress that
24 regulates commerce. Plaintiffs now seek to remand.

1 **III. STANDARD OF REVIEW**

2 Federal courts strictly construe the removal statute against removal jurisdiction.⁴
3 There is a strong presumption against removal and “[f]ederal jurisdiction must be
4 rejected if there is any doubt as to the right of removal in the first instance.”⁵ The party
5 seeking removal bears the burden of establishing federal jurisdiction.⁶

6 **IV. DISCUSSION**

7 Defendants assert that this court has jurisdiction over the case pursuant to 28
8 U.S.C. § 1331, which confers jurisdiction over cases “arising under” the Constitution or
9 law of the United States, and pursuant to 28 U.S.C. § 1337, which confers federal
10 jurisdiction over cases “arising under” federal statutes regulating commerce. The
11 “arising under” language of § 1337 is interpreted in the same manner as the “arising
12 under” language of § 1331, and it is therefore proper to apply the principles of general
13 federal-question jurisdiction to determine whether this court has jurisdiction over the
14 case as defendants contend.⁷ Under federal-question jurisdiction principles, the court
15 has jurisdiction over cases where federal law creates the cause of action.⁸ It also has
16 jurisdiction over cases where state law creates the cause of action when state law
17 nonetheless requires resolution of a disputed and substantial question of federal law
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21 ⁴*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

22 ⁵*Id.*

23 ⁶*Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999), *superceding by*
24 *statute on other grounds as explained in Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d
25 676, 681 (9th Cir. 2006).

26 ⁷See *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir. 1974) (“[T]he ‘arising under’
27 language in 1337 is interpreted in essentially the same way as the ‘arising under’ phrase in
28 1331.”).

⁸*Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312.

1 and as long as entertaining the action in a federal forum will not disturb “any
2 congressionally approved balance of federal and state judicial responsibilities.”⁹

3 **A. Federal cause of action**

4 The question of whether a claim arises under federal law must be determined by
5 reference to the complaint.¹⁰ All of plaintiffs’ counts allege causes of action arising
6 under Arizona statutory or common law based on defendants’ conduct as trustee.
7 Defendants argue that although plaintiffs’ claims are directed at them as the trustee and
8 framed in terms of Arizona state law, plaintiffs actually seek to recover the amounts
9 owed to them by the broker, Alliance, pursuant to the Trust Agreement, which is a
10 federal form and thus governed by the relevant federal statutes. Defendants argue that
11 plaintiffs could have brought a federal claim against the broker, Alliance, under 49
12 U.S.C. § 14707(a) for failure to comply with 49 U.S.C. § 13906, and therefore this case
13 is one rooted in federal law. However, even assuming defendants are right about
14 § 14707(a), the fact that plaintiffs could have brought a federal claim does not mean
15 federal law creates the cause of action. A plaintiff is the “master of his complaint” and
16 “where he may pursue state and federal claims, he is free to pursue either or both, so
17 long as fraud is not involved.”¹¹ Plaintiffs did not opt to bring a claim against the broker
18 for failure to comply with federal law. Instead, they chose to bring a claim against the
19 trustee based on a state law theory—that the trustee breached its fiduciary duties and
20 was negligent in its execution of its duties under the Trust Agreement. “When a claim
21 can be supported by alternative and independent theories—one of which is a state law
22 theory and one of which is a federal law theory—federal question jurisdiction does not
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26 ⁹*Id.* at 314.

27 ¹⁰*Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983).

28 ¹¹*Ultramar America, Ltd. v. Dwellle*, 900 F.2d 1412, 1414 (9th Cir. 1990).

1 attach because federal law is not a necessary element of the claim.”¹² Therefore,
2 federal law does not create the cause of action against Defendants.¹³

3 **B. Substantial question of federal law**

4 Defendants argue that federal jurisdiction exists because even if plaintiffs’ cause
5 of action arises from state law, their right to relief requires resolution of an essential,
6 substantial question of federal law. They point out that the Trust Agreement is actually
7 controlled by the provisions set forth in 49 U.S.C. § 13906¹⁴ and 49 C.F.R. § 387.307.¹⁵

8 The case certainly involves issues of federal law. Federal law requires that a
9 transportation broker such as Alliance be federally registered and, pursuant to 49
10 U.S.C. § 13906, registration requires that a broker file a bond or evidence of other
11 security, such as a trust, to ensure that the transportation for which a broker arranges is
12 provided. The Trust Agreement is thus a means to comply with federal law, and
13 moreover, the Trust Agreement itself is actually a federal form, Form BMC-85. Form
14 BMC-85 is the form a broker must use pursuant to 49 C.F.R. § 387.307 as evidence of
15 the required trust. However, despite the interplay of federal law in relation to the Trust
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18 ¹²*Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 346 (9th Cir. 1996).

19 ¹³*Ultramar America*, 900 F.2d at 1414 (“Whether the complaint states a claim ‘arising
20 under’ federal law must be ascertained by the legal construction of [the plaintiff’s] allegations,
21 and not by the effect attributed to those allegations by the adverse party.” (internal quotations
omitted)).

22 ¹⁴49 U.S.C. §13906(b) provides: “(b) Broker requirements.--The Secretary may register
23 a person as a broker under section 13904 only if the person files with the Secretary a bond,
24 insurance policy, or other type of security approved by the Secretary to ensure that the
transportation for which a broker arranges is provided. The registration remains in effect only as
long as the broker continues to satisfy the security requirements of this subsection.”

25 ¹⁵49 C.F.R. § 387.307 provides: “(a) Security. (1) A property broker must have a surety
26 bond or trust fund in effect for \$10,000. The FMCSA will not issue a property broker license
27 until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The
broker license shall remain valid or effective only as long as a surety bond or trust fund remains
28 in effect and shall ensure the financial responsibility of the broker.”

1 Agreement, the court concludes that federal issues are not substantial to the resolution
2 of the case.

3 First, the terms of the Trust Agreement (Form BMC-85) indicate that the
4 agreement is governed by state law to the extent that state law is not inconsistent with
5 the applicable federal rules and regulations.¹⁶ The only federal regulation applicable to
6 the Trust Agreement is 49 C.F.R. § 387.307. It requires that the trust be in the amount
7 of \$10,000 and states that the broker's license is only valid as long as the trust fund
8 remains in effect and ensures the broker's financial responsibility.¹⁷ It also requires that
9 the trust agreement "ensure the financial responsibility of the broker by providing for
10 payments to shippers or motor carriers if the broker fails to carry out its contracts,
11 agreements, or arrangements for the supplying of transportation by authorized motor
12 carriers."¹⁸ It does not set forth the duties of the trustee or discuss the requirements of
13 parties seeking to recover from the trust. Thus, federal law is not inconsistent, and by
14 its own terms the Trust Agreement is governed by state law.

15 Second, contrary to defendants' assertion, there is no federal private right of
16 action for plaintiffs' claims against them as trustees under 49 U.S.C. § 14707(a). The
17 existence of a federal private right of action for a plaintiff's claims is a sufficient
18 indication that there are substantial federal issues at stake and that Congress intended
19 those issues to be within the scope of federal jurisdiction.¹⁵ Here, there is no such
20 congressional intent. Section 14707(a) provides for private right of action to enforce a
21 broker's compliance with the registration requirements of § 13906, but that does not
22 suggest that Congress intended to provide carriers with a federal cause of action
23 against trustees to recover delinquent shipping charges from a broker's trust. While the

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25 ¹⁶Doc. 18-1 at p. 3, ¶12.

26 ¹⁷49 C.F.R. §387.307(a)(1).

27 ¹⁸49 C.F.R. §387.307(b).

28 ¹⁵*Grable*, 545 U.S. at 317.

1 lack of a federal cause of action does not foreclose jurisdiction, it is relevant to the
2 jurisdictional analysis and suggests that Congress did not intend such actions to fall
3 within the realm of federal jurisdiction.¹⁶ This, coupled with the fact that the Trust
4 Agreement is to be construed pursuant to the laws of Arizona by its very terms, causes
5 the court to conclude that this dispute over a trustee's fiduciary duties is squarely within
6 the realm of state law and does not involve substantial federal questions.

7 Defendants argue that even if there is not a federal private right of action, the
8 Sixth Circuit's decision in *Milan Express Co., Inc. v. Western Surety Co.*¹⁷ is persuasive
9 and demonstrates how disputes related to a security instrument required by § 13906
10 invoke federal jurisdiction. *Milan* involved a dispute between a motor carrier and the
11 sureties of brokers regarding the proceeds of surety bonds created on a federal form
12 (Form BMC-84), administered under federal regulations, and required by federal
13 statute. The Sixth Circuit stated, "The historical federal interest in the regulation of
14 interstate commerce persuades us that plaintiffs' claims for recovery under the bonds,
15 which are clearly creatures of federal law, should . . . be heard in a federal forum that
16 possesses substantial expertise in matters of interstate commerce."¹⁸ *Milan*, however,
17 is distinguishable. First, *Milan* involved surety bonds, not trust agreements, and
18 therefore Form BMC-84, not BMC-85, was at issue. Form BMC-85 explicitly states that
19 the agreement shall be governed by state law: Form BMC-84 does not. Moreover,
20 *Milan* involved the failure of a surety to make payment on a bond, and this case
21 involves the more complex issue of a trustee's fiduciary duties related to the
22 management and supervision of a trust, duties not outlined in the applicable federal
23 statutes and regulations, but instead addressed in Arizona statutory and common law.

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25 ¹⁶*Id.* at 317-18 (clarifying that while a federal cause of action is a sufficient condition for
26 federal question jurisdiction, it is not a necessary one).

27 ¹⁷886 F.2d 783 (6th Cir. 1989).

28 ¹⁸*Milan*, 886 F.2d at 787.

1 **C. Judicial estoppel**

2 Defendants argue that plaintiff OOIDA should be judicially estopped from arguing
3 that the court does not have jurisdiction.¹⁹ They cite and provide a copy of a case filed
4 by OOIDA in the United States District Court for the Middle District of Florida wherein
5 OOIDA recognized that federal jurisdiction exists over claims involving “activities of
6 transportation brokers engaged in the interstate transportation of property by motor
7 carriers.”²⁰ In the Florida case, OOIDA brought an action against a broker for violation
8 of 49 C.F.R. § 317.9(a). Here, in contrast, OOIDA is suing a trustee under state law,
9 not a broker under a federal regulation. Thus, OOIDA is not taking an inconsistent
10 position which might warrant judicial estoppel.

11 **D. Attorneys’ fees**

12 Plaintiffs request attorneys’ fees pursuant to 28 U.S.C. § 1447(c), which states
13 that “[a]n order remanding the case may require payment of just costs and any actual
14 expenses, including attorneys’ fees, incurred as a result of the removal.” This court
15 concludes that, while ultimately not successful, defendants’ removal was objectively
16 reasonable.²¹ It was not clearly foreclosed based upon the Sixth Circuit’s holding in
17 *Milan*, and nothing in the record suggests that removal was for an improper purpose,
18 such as imposing costs on plaintiffs or prolonging litigation.¹⁴ Thus, attorneys’ fees are
19 not warranted.

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25 ¹⁹Doc. 18 at p.2, n.1.

26 ²⁰Doc. 18-2 at p. 3, ¶ 4.

27 ²¹*Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005);

28 ¹⁴*Id.* at 140-41.

