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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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10 DENNIS NASRAWI, *et al*,

1:09-CV-02061-OWW-GSA

11 Plaintiffs,

MEMORANDUM DECISION RE:
DEFENDANTS' MOTION TO DISMISS
(Doc. 19.)

12
13 v.

14 BUCK CONSULTANTS, LLC, *et al.*,

15
16 Defendants.

17 I. INTRODUCTION.

18 Before the court for decision is Defendants' motion to dismiss
19 Plaintiffs' third party beneficiary action pursuant to Fed. R. Civ.
20 P. 12(b)(6), on the grounds that Plaintiffs lack standing.
21 Additionally, Defendants contend that the action against Loeb must
22 be dismissed because Loeb was a "sham defendant" named solely for
23 removal purposes. Plaintiffs oppose the motion to dismiss on the
24 grounds that they have standing because Buck and Loeb aided and
25 abetted a breach of trust for personal financial gain.¹
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27
28 ¹ The Plaintiffs have filed a separate motion to remand the
case to state court.

1 II. BACKGROUND.

2 This is a negligence action filed by three beneficiaries of a
3 public retirement trust against a provider of actuarial services,
4 Buck Consultants, LLC, ("Buck") and one of its employees, Harold
5 Loeb ("Loeb"). Defendant Buck, a Delaware limited liability
6 company,² provided actuarial services to StanCERA, a public
7 employee retirement system covering employees of the County of
8 Stanislaus, City of Ceres, the Stanislaus Superior Court, and five
9 special districts located within Stanislaus County, under a written
10 consulting contract. Loeb is not a party to the contact. (Compl. ¶
11 2.) Loeb, a California resident, is employed by Buck Consultants
12 as an actuary. (Compl. ¶ 4, 7.) Buck is wholly owned by ACS Human
13 Resources Solutions, a Pennsylvania Corporation with its principal
14 place of business in New Jersey.

15 Plaintiffs Dennis Nasrawi, Michael O'Neal, and Rhonda
16 Bieseimeir, California residents and beneficiaries of StanCERA,
17 filed a complaint against Defendants Buck and Loeb in Stanislaus
18 County Superior Court on October 8, 2009.³ The substance of the
19 complaint is that "Buck and Loeb breached their duty of care in
20 preparing StanCERA's January 9, 2007 actuarial valuations by using
21 inappropriate actuarial assumptions." (Compl. ¶ 14.) In
22 particular, Plaintiffs allege that the "9.22% employer contribution
23

24 ² Buck's principal place of business is New York.

25 ³ Plaintiffs, all former employees of Stanislaus County,
26 allege that they obtained "vested contractual rights to receive
27 pension and related benefits." (Compl. ¶ 1.) Plaintiffs state
28 that they filed a "representative suit" because "StanCERA has
failed or refused to assert a negligence claim on behalf of itself
or the pension trust." (Compl. ¶ 22.)

1 rate adopted by StanCERA, in reliance upon the actuarial valuation
2 negligently prepared by Buck and Loeb, was insufficient to
3 actuarially fund the benefits promised by the County." (Compl. ¶
4 15.) As a result of Defendants' actuarial negligence, Plaintiffs
5 allege that StanCERA suffered harm in the form of: (1) lost County
6 employer contributions; (2) lost earnings on those contributions;
7 and (3) costs paid to other actuarial firms to discover Defendants'
8 negligence. The report is issued on Buck's letterhead as
9 Consulting Actuary for StanCERA.

10 As to Defendant Loeb, Plaintiffs allege that he "owed a duty
11 to exercise due care in performing actuarial services for
12 StanCERA," and breached that duty. (Compl. ¶ 13.) They also
13 allege that he "actively participated with, aided, and abetted in
14 StanCERA's breach of fiduciary duty by concealing their negligence
15 for almost two years." (Compl. ¶ 18.) According to Plaintiffs,
16 Loeb covered up the effects of his actuarial negligence - and that
17 of Buck and StanCERA - for his "own financial gain." (Compl. ¶ 19.)
18

19 On November 22, 2009, this case was removed to the Federal
20 Court on the basis of diversity jurisdiction. (Doc. 1.) The
21 notice of removal provides that the presence of Loeb as a defendant
22 in the action does not defeat diversity jurisdiction because Loeb
23 is a fraudulently joined "sham defendant." (Id.)

24 On January 19, 2010, Defendants moved to dismiss this action
25 based on their assertion that Plaintiffs lack standing and that
26 Loeb cannot be sued individually. (Doc. 19.) According to
27 Defendants, "the action can only be brought by StanCERA in its
28

1 capacity as trustee, and cannot be brought by Plaintiffs as trust
2 beneficiaries." (Id.) Further, Plaintiffs' failure to state a
3 claim against Loeb is established by the Court's Order (Doc. 37)
4 finding that Loeb is a "sham defendant".

5 Plaintiffs opposed the motion on April 26, 2010. (Doc. 26.)
6 Plaintiffs argue that they have standing to sue because Buck is a
7 third party who aided and abetted a breach of trust and the trustee
8 declined to sue. Additionally, that Loeb has personal liability
9 for personally aiding and abetting the breach of trust. (Id.)

10
11 III. LEGAL STANDARD.

12 A motion to dismiss brought under Federal Rule of Civil
13 Procedure 12(b)(6) "tests the legal sufficiency of a claim."
14 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding
15 whether to grant a motion to dismiss, the court "accept[s] all
16 factual allegations of the complaint as true and draw[s] all
17 reasonable inferences" in the light most favorable to the nonmoving
18 party. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002).
19 To survive a motion to dismiss, a complaint must "contain
20 sufficient factual matter, accepted as true, to 'state a claim to
21 relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.
22 Ct. 1937, 1949 (May 18, 2009) (quoting *Bell Atl. Corp v. Twombly*,
23 550 U.S. 544, 570 (2007)).

24 A claim has facial plausibility when the plaintiff
25 pleads factual content that allows the court to
26 draw the reasonable inference that the defendant is
27 liable for the misconduct alleged. The plausibility
28 standard is not akin to a "probability
requirement," but it asks for more than a sheer
possibility that defendant has acted unlawfully.
Where a complaint pleads facts that are "merely

1 consistent with" a defendant's liability, it "stops
2 short of the line between possibility and
3 plausibility of 'entitlement to relief.'"

4 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be based
5 on the lack of a cognizable legal theory. *Balistreri v. Pacifica*
6 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

7 IV. DISCUSSION.

8 A. *Motion to Dismiss Loeb Individually*

9 Defendants move to dismiss Loeb from the action on the grounds
10 that as agent (corporate employee) for a disclosed
11 principal (corporation) acting within the scope of his corporate
12 employment, Loeb is not individually liable. Plaintiffs contend
13 that Loeb is individually liable because he breached professional
14 duties owed to the trust and beneficiaries. This issue was fully
15 briefed and heard by the Court on May 10, 2010, during Plaintiffs'
16 motion for remand. The Court held: "Defendants have met their
17 burden of establishing Loeb is a 'sham defendant' whose presence in
18 this action does not bar removal and exists for the purposes of
19 defeating diversity jurisdiction." (Doc. 37 at 2:3-5.)

20 "Directors and/or officers of a corporation do not incur
21 personal liability for torts of the corporation merely by reason of
22 their official position, unless they personally participate in the
23 wrong." *United States Liability Ins. Co. V. Haidinger-Hayes, Inc.*,
24 1 Cal. 3d 586, 594-595 (Cal. 1970). As a corporate employee acting
25 within the scope of employment, Loeb cannot be held personally
26 liable for his negligence in performing employment duties for the
27 corporation. Loeb can be held personally liable only if he
28 independently, outside his scope of employment, participated in the

1 breach of trust. Plaintiffs' do not specifically allege any
2 independent wrongdoing by Loeb to gain a personal benefit.
3 "Disregarding the conclusions of law that Loeb 'aided and abetted'
4 his employer, the complaint does not allege any specific acts of
5 affirmative misfeasance with respect to the performance of his
6 actuarial duties. (Doc. 34 at 19:7-10.) Accordingly, Loeb is
7 entitled to be dismissed for failure to state a claim.

8
9 *B. Plaintiff's Standing as Trust Beneficiaries*

10 Defendants move the court to dismiss the claim against Buck
11 for lack of standing. Defendants argue that Plaintiffs lack
12 standing because: (1) trust beneficiaries generally lack standing
13 to sue on behalf of a trust; and (2) Plaintiffs' conclusory
14 allegations do not meet the requirements of the exception to that
15 rule.

16 Plaintiffs assert that they met the standing requirement by
17 pleading: (1) Defendants actively participated and aided and
18 abetted in StanCERA's "breach of fiduciary duty" by "concealing"
19 their negligence for almost two years; (2) Defendants did so for
20 their "own financial gain"; (3) Defendants participated and
21 assisted with StanCERA's breach of trust"; and (4) Plaintiffs
22 therefore can pursue this action because StanCERA has not done so
23 itself. (Compl. ¶ 18-19, 21-22.)

24 Under Cal. Gov. Code § 53216.6, the trustees of the StanCERA
25 trust have a fiduciary duty to the trust beneficiaries:

26 The legislative body, trust, or other body authorized to
27 make investments for a pension trust, shall discharge its
28 duties with respect to investing the assets of the
pension trust.

1 1. (a) Solely in the interest of, and for the exclusive
2 purposes of providing benefits to, participants and their
3 beneficiaries, minimizing employer contributions thereto,
and defraying reasonable expenses of administering the
trust.

4 (b) With the care, skill, prudence, and diligence under
5 the circumstances then prevailing that a prudent person
6 acting in a like capacity and familiar with these matters
would use in the conduct of an enterprise of a like
character and with like aims.

7 (c) Shall diversify the investments of the trust so as to
8 minimize the risk of loss and to maximize the rate of
9 return, unless under the circumstances it is clearly
prudent not to do so.

10 *Id.*

11 The violation by a trustee of any duty owed to the
12 beneficiaries of the trust constitutes a breach of trust.
13 Restatement (Second) Trusts § 201 (1959). A breach of trust
14 entitles trust beneficiaries to file an action against the
15 trustees. Cal. Prob. Code § 16420 (1991). Here the statutory
16 trustee is StanCERA.

17 In general, a trust beneficiary does not have standing to sue
18 a third party on behalf of a trust because the beneficiary is not
19 a real party in interest. *City of Atascadero v. Merrill Lynch*, 68
20 Cal. App. 4th 445, 462, 80 Cal. Rptr. 2d 329 (Cal. Ct. App. 1998).
21 The exception to the general rule is that beneficiaries have
22 standing to sue third parties who; (1) For their own financial gain
23 or advantage, (2) Induced the trustee to commit the breach of
24 trust, and (3) actively participated with, aided or abetted the
25 trustee in that breach, or received and retained trust property
26 from the trustee in knowing breach of trust. *Id.* Under this
27 exception, standing hinges on whether there was a breach of duty by
the trustee. *Id.*

28 Trust beneficiaries have a limited right to sue in situations

1 where the third party acted for her or his own financial gain or
2 advantage. *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1103-1106, 3
3 Cal. Rptr. 2d 236. (Cal. Ct. App. 1991). "As long as the third
4 parties were acting to further their own individual economic
5 interest, they may be liable for actively participating in a
6 fiduciary's breach of his or her trust." *City of Atascadero*, 68
7 Cal. App. at 464; see also *Pierce*, 1 Cal. App. 4th at 1105-1106
8 (holding that personal gain in the form of fees and investment
9 opportunities constituted financial gain); *Wolf v. Mitchell*,
10 *Silberberg & Knupp*, 76 Cal. App. 4th 1030, 1040 (Cal. Ct. App.
11 1999) (holding that allegations of a greater amount of fees met the
12 requirements for personal financial gain).

13 Plaintiffs cite *City of Atascadero v. Merrill Lynch*, 68 Cal.
14 App. 4th 445 (Cal. Ct. App. 1998) for the proposition that "it is
15 well established that where a trustee has committed a breach of
16 trust, the trust beneficiaries may prosecute an action against
17 third persons who, for their own financial gain or advantage [...]
18 actively participated with, aided or abetted the trustee in that
19 breach." (Doc. 26 at 4:15-4:19.) In *City of Atascadero*, the
20 beneficiaries alleged in their complaint that Merrill Lynch made
21 direct misrepresentations, actively concealed information, and
22 participated with the trustee in breaches of trust for financial
23 gain. *Id.* at 457-458. The complaint alleged that Merrill Lynch
24 advised the trustees to undertake a program of investment "which
25 was imprudent and unsuitable for the trust". *Id.* at 484.
26 Additionally, Merrill Lynch actively concealed the risks of the
27 investment program and misled beneficiaries for financial gain.
28 The court held that the beneficiaries had standing to sue Merrill

1 Lynch for breach of fiduciary duty and aiding and abetting a breach
2 of fiduciary duty. *Id.*

3 Plaintiffs cite three additional cases which illustrate the
4 requirements to meet the standing exception. In *Pierce*, the court
5 held that the beneficiaries had standing because the complaint
6 alleged that third party attorneys actively concealed breaches of
7 trust, made misrepresentations to the court, and acted for personal
8 gain. *Pierce*, 1 Cal. App. 4th at 1105-1106. The breaches of duty
9 in *Pierce* involved one trustee's self-dealing and another trustee's
10 failure to stop that self-dealing. *Id.* at 1105. The beneficiaries
11 in *Pierce* alleged that the third party attorneys knew about the
12 breaches and took affirmative steps to conceal the breaches from
13 the court. *Id.* In *Wolf*, the court held that a trust beneficiary
14 had standing to sue a third party based on the allegations that
15 third party attorneys concealed breaches of trust and made
16 misrepresentations to the beneficiary. *Wolf*, 76 Cal. App. 4th at
17 1040. The court reasoned that the specific allegations in *Wolf*
18 satisfied *City of Atascadero* and *Pierce* by alleging identifiable
19 breaches of trust by the trustee. *Id.*

20 Plaintiffs rely on *Harnedy v. Whitty*, 110 Cal. App. 4th 1333
21 (Cal. Ct. App. 2003). In *Harnedy*, a trust beneficiary alleged
22 misfeasance by the trustee and a third party. *Id.* at 1342. The
23 court rationalized the holdings from *City of Atascadero*, *Pierce*,
24 and *Wolf*:

25
26 When the claim being asserted rests in whole or in part
27 on alleged breaches of trust by the trustee, a
28 beneficiary has standing to pursue such a claim against
either (1) the trustee directly, (2) the trustee and
third parties participating in or benefitting from his,

1 her or its breach of trust, or (3) such third parties
2 alone

3 *Id.* at 1341-1342. The court held that the beneficiary had standing
4 because he alleged misfeasance by both the trustee and a third
5 party.

6 To meet the requirements under the standing exception
7 Plaintiffs must allege that the StanCERA trustees breached a
8 statutory duty owed to the employee-beneficiaries. Plaintiffs
9 allege that StanCERA failed to assert a negligence claim against
10 Buck, a service provider and Loeb, its actuary, in breach of
11 fiduciary obligations to its members, including the Plaintiffs.
12 (Compl. at ¶ 16.) Plaintiffs do not specifically allege how Buck's
13 actions aided and abetted this breach of trust.

14 As in *City of Atascadero*, the Plaintiffs in this case allege
15 that based on Buck's negligent actuarial services, StanCERA adopted
16 an imprudent employer contribution rate. The complaint also
17 alleges that Buck concealed its negligence for close to two years.
18 (Compl. at ¶ 18.) As a result of this concealment, Buck
19 "participated with, aided, and abetted in StanCERA's breach of
20 fiduciary duty for their own financial gain." (Compl. at ¶ 19).

21
22 The complaint further alleges that "Buck and Loeb have
23 actively participated with, aided, and abetted in StanCERA's breach
24 of fiduciary duty by concealing their negligence for almost two
25 years." (Compl. at ¶ 18.) This is similar to *Pierce and Wolf* only
26 insofar as the third party actions are alleged to involve
27 concealment, without describing the nature of the alleged
28 concealment. Buck's actions are distinguishable from those in

1 *Pierce and Wolf*. In *Pierce and Wolf*, the third parties knowingly
2 concealed the fiduciary breaches of the trustees, whereas
3 Plaintiffs here allege that Buck concealed its own actuarial
4 negligence, in turn causing StanCERA, the fiduciary, to breach
5 underlying duties. Although this difference is likely not fatal to
6 the Plaintiffs' claim, the Plaintiffs' allegations lack the
7 requisite factual detail to survive a motion to dismiss.

8
9 *City of Atascadero, Pierce, and Wolf*, require beneficiaries to
10 allege that the third party acted for personal financial gain. *Id.*
11 at 1040. Plaintiffs' case can be distinguished from *Pierce and*
12 *Wolf* in that Plaintiffs conclusorily allege a "breach of fiduciary
13 duty for financial gain" by Buck (Compl. at ¶ 19.), without
14 describing the nature of the gain. The beneficiaries in *Pierce*
15 specifically alleged personal financial gain in the receipt of
16 greater fees and investment opportunities. *Pierce*, 1 Cal. App. 4th
17 at 1105-1106. The beneficiaries in *Wolf* also alleged financial
18 gain of "receiving a greater amount of fees". *Wolf*, 76 Cal. App.
19 4th at 1040. Here, Plaintiffs only allege that Buck and Loeb acted
20 for personal financial gain, a legal conclusion, without describing
21 the nature of the wrongful conduct and type of gain.

22 23 V. CONCLUSION.

24
25 Taking the allegations in the complaint as true, these
26 allegations fail to state a claim against Defendants, Buck and Loeb.
27 The claim against Loeb must be dismissed as he is a corporate
28 employee for Buck sued for malfeasance (negligence in providing

1 actuarial services) in breach of the duty owed to Plaintiffs by Buck
2 under contract in the court and scope of his employment. *Self-*
3 *Insurers' Sec. Fund v. ESIS, Inc.*, 204 Cal. App. 3d 1148, 1162 (Cal.
4 Ct. App. 1988). These allegations are insufficient. The inclusion
5 of Loeb, as the case has been pleaded is a transparent attempt to
6 defeat federal jurisdiction.

7 For the reasons stated:

- 8 1. Defendants' motion to dismiss Plaintiffs' claim against
9 Loeb is GRANTED WITH LEAVE TO AMEND. NO FURTHER LEAVE
10 SHALL BE GRANTED
- 11 2. Defendants' motion to dismiss Plaintiffs' claim against
12 Buck is GRANTED WITH LEAVE TO AMEND.
- 13 3. Plaintiffs are ORDERED to amend their complaint within 30
14 days of service of this Order.

15 IT IS SO ORDERED.

16 DATED: June 29, 2010

/s/ OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE