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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

LAURA J. FLAM,	)	1:12cv1052 AWI DLB
	)	
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF’S
vs.	)	MOTION TO REMAND
	)	
MARSHALL S. FLAM, M.D.,	)	(Document 8)
	)	
Defendant.	)	

Plaintiff Laura J. Flam (“Plaintiff”) filed this Motion to Remand on July 19, 2012. The matter was heard on August 31, 2012, before the Honorable Dennis L. Beck, United States Magistrate Judge. Tim Buchanan appeared on behalf of Plaintiff. Wiley Driskill appeared on behalf of Defendant Marshall S. Flam, M.D. (“Defendant”).

**BACKGROUND**

Plaintiff filed a Summons and Order to Show Cause Complaint (“OSC”) in the Fresno County Superior Court on June 8, 2012.<sup>1</sup> The OSC sought damages pursuant to California Family Code section 1101(g) for an alleged breach of fiduciary duty in the management and control of Plaintiff’s pension account. The OSC also requested attorneys’ fees and costs.

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<sup>1</sup> All motions in Fresno County Superior Court were filed in Laura J. Flam v. Marshall S. Flam, Case No. 587455-0.

1 On June 27, 2012, Defendant removed the action to this Court based on federal question  
2 jurisdiction. According to Defendant, Plaintiff sued him in his capacity as Co-Trustee of the  
3 Employment Pension Plan, and the action is therefore preempted by the Employee Retirement  
4 Income Security Act of 1974 (“ERISA”).

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6 Defendant filed his answer on July 5, 2012.

7 On July 19, 2012, Plaintiff filed a Motion to Remand the action. Defendant opposed the  
8 motion on August 17, 2012. Plaintiff filed a reply on August 22, 2012, and Defendant filed a  
9 sur-reply on August 24, 2012.<sup>2</sup>

10 **PROCEDURAL HISTORY OF SUPERIOR COURT ACTION**

11 On January 26, 2001, the Fresno County Superior Court issued a judgment of dissolution  
12 of the marriage between Plaintiff and Defendant. The judgment provided that the parties each  
13 receive one-half of the community property portion of the retirement, pension and/or profit-  
14 sharing plan known as “Hematology-Oncology Medical Group of Fresno, Inc.” (the “Plan”).  
15 The judgment further provided that the court “expressly reserves jurisdiction over any and all  
16 issues, regardless of nature, relating to the InTrust Pension Account including, but not limited to,  
17 issues which may arise concerning the QDRO to effectuate the transfer of same.” Declaration of  
18 William S. Ryden (“Ryden Dec.”), Exh. A.

19  
20 As of 2001, the community property interests of Plaintiff and Defendant in the Plan, and  
21 the separate property interests of Defendant, were maintained at InTrust.<sup>3</sup> In 2004, Defendant  
22 transferred all of his assets in the Plan from Millennium to an account at Morgan Stanley.

23 On November 22, 2011, Plaintiff filed an OSC for Enforcement of Judgment and to  
24 Implement Division of Community Property Pension in the Fresno County Superior Court  
25 action. The order requested that Defendant provide her with an accounting of the parties’  
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27 <sup>2</sup> Defendant requested permission to file a sur-reply to address timeliness arguments made for the first time in  
28 Plaintiff’s reply.

<sup>3</sup> InTrust was later renamed Millennium Trust Co., LLC.

1 community property interests in the Plan. Plaintiff alleges that the OSC was necessary because  
2 Defendant refused to advise her of her pension account's location after she learned that it was no  
3 longer maintained at its original location. The OSC also requested attorneys' fees and costs.  
4 Ryden Dec., ¶ 2.

5  
6 In response to a deposition notice and request for production of documents, Defendant  
7 produced copies of account statements showing that in June 2007, he liquidated Plaintiff's  
8 pension account at Millennium in the amount of \$431,822.59, and reinvested the funds in an  
9 account at Morgan Stanley held in the name of "Marshall S. Flam, Trustee Hematology  
10 Oncology Medical Group of Fresno, Inc. Employee Pension Plan fbo MS Flam." Ryden Dec., ¶  
11 3. Defendant filed a Responsive Declaration to the OSC on May 24, 2012, setting forth this  
12 information. Ryden Dec., ¶ 4. The OSC was set to be heard on June 11, 2012.

13 On June 8, 2012, Plaintiff filed an OSC for Breach of Fiduciary Duty against Defendant  
14 in the Fresno County Superior Court action. Plaintiff requested that Defendant pay her  
15 \$151,263.81 pursuant to California Family Code section 1101(g) as damages attributable to his  
16 breach of fiduciary duty to Plaintiff in the management and control of her share of the  
17 community property interest in the Plan. She alleges that Defendant is a participant employee in  
18 the Plan and Co-Trustee. The acts complained of include Defendant's transfer of assets to  
19 Morgan Stanley without Plaintiff's knowledge or consent. Exh. A, attached to Notice of  
20 Removal.

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22 The first OSC was heard on June 11, 2012, with only the attorneys' fee issue remaining.  
23 On June 18, 2012, Judge Allen-Hill ordered Defendant to pay \$12,500.00 in attorneys' fees and  
24 found that Defendant's failure and refusal to respond to Plaintiff's requests for the location of her  
25 account had caused her to incur unnecessary legal expenses. Ryden Dec., ¶ 6.

26 On June 27, 2012, Defendant filed his notice of removal.  
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1 **LEGAL STANDARD**

2 A. **Removal Jurisdiction**

3 By statute “any civil action brought in a State court of which the district courts of the  
4 United States have original jurisdiction, may be removed by the defendant or the defendants, to  
5 the district court of the United States for the district and division embracing the place where such  
6 action is pending.” 28 U.S.C. § 1441(a). The party seeking to invoke federal jurisdiction bears  
7 the burden of establishing jurisdiction. See Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090,  
8 1092 (9th Cir. 1990).

9  
10 Generally, if the initial pleading is removable on its face, the notice of removal must be  
11 filed within 30 days after receipt by the defendant. 28 U.S.C. § 1446(b).

12 B. **ERISA Preemption**

13 The United States Supreme Court has made clear that a state law “relates to” a benefit  
14 plan and is preempted if it is specifically designed to affect ERISA benefit plans, or singles out  
15 such plans, by express reference, for special treatment. Burch v. George, 7 Cal.4th 246, 269  
16 (1994) (citing Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829, 838, fn. 12  
17 (1988)).

18  
19 However, where a state law is a neutral law of general application that indirectly affects  
20 an ERISA benefit plan, ERISA preemption is less certain. Although it is settled that “even  
21 indirect state action bearing on private pensions may encroach upon the area of exclusive federal  
22 concern,” it is also established that a state law may affect a pension plan in “too tenuous, remote,  
23 or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.” Burch, 7 Cal.4th  
24 269 (citations omitted).

25 In finding that California’s no contest law was not preempted to the extent pension plan  
26 benefits were at issue, the California Supreme Court explained:

27  
28 Preliminarily we observe that the no contest law fails to fit into any of the four categories  
of laws that have previously been found to “relate to” ERISA plans: (1) laws that regulate

1 the type of benefits or terms of ERISA plans; (2) laws that create reporting, disclosure,  
2 funding or vesting requirements for ERISA plans; (3) laws that provide rules for the  
3 calculation of the amount of benefits to be paid under ERISA plans; and (4) laws and  
4 common law rules that provide remedies for misconduct growing out of the  
5 administration of ERISA plans. Moreover, application of the law does not call for any  
6 interpretation of an ERISA provision, other than that relating to preemption, or for a  
7 ruling on the validity of any terms or conditions of an ERISA plan.

8 Burch, 7 Cal.4th at 269-270 (citations omitted).

### 9 DISCUSSION

10 Plaintiff's motion is based on her contention that she sues Defendant for breach of  
11 fiduciary duty as a former spouse in the management and control of her plan, NOT in his  
12 capacity as Co-Trustee. She characterizes her claim as arising from the former marital  
13 relationship, and from allegations that Defendant knowingly liquidated an account that he knew  
14 belonged to her and re-invested the funds in his own name with a different brokerage, without  
15 her knowledge or consent. Plaintiff argues that the claim arises solely from California Family  
16 Code sections 721(b), 1100 and 1101, and therefore this Court does not have subject matter  
17 jurisdiction.

18 California Family Code section 1100(e) states:

19 (e) Each spouse shall act with respect to the other spouse in the management and control  
20 of the community assets and liabilities in accordance with the general rules governing  
21 fiduciary relationships which control the actions of persons having relationships of  
22 personal confidence as specified in Section 721, until such time as the assets and  
23 liabilities have been divided by the parties or by a court. This duty includes the obligation  
24 to make full disclosure to the other spouse of all material facts and information regarding  
25 the existence, characterization, and valuation of all assets in which the community has or  
26 may have an interest and debts for which the community is or may be liable, and to  
27 provide equal access to all information, records, and books that pertain to the value and  
28 character of those assets and debts, upon request.

Section 1101(a) provides the remedy for breach:

(a) A spouse has a claim against the other spouse for any breach of the fiduciary duty that  
results in impairment to the claimant spouse's present undivided one-half interest in the  
community estate, including, but not limited to, a single transaction or a pattern or series

1 of transactions, which transaction or transactions have caused or will cause a detrimental  
2 impact to the claimant spouse's undivided one-half interest in the community estate.

3 Defendant, however, believes that Plaintiff's claims are made by a plan beneficiary  
4 against a plan administrator, and that the claims are therefore preempted. Although Defendant  
5 characterizes the parties' marriage as a "coincidence," their former relationship is the exact  
6 reason why Defendant's arguments against remand fail.

7 Plaintiff's interest in the Plan derives solely from her community interest established by  
8 the QDRO, not from her contributions as an employee.<sup>4</sup> Moreover, Plaintiff was no longer a  
9 beneficiary of the Plan after dissolution of the marriage because the terms of the QDRO required  
10 that her interests be held in a separate account. As such, Defendant's fiduciary duties arose  
11 specifically from the QDRO and related California Family Code sections.

12 Indeed, the duties at issue go beyond those imposed by ERISA. Plaintiff alleges that  
13 Defendant knowingly liquidated an account that he knew belonged to her and re-invested the  
14 funds in his own name with a different brokerage, without her knowledge or consent. Such  
15 duties arose from Defendant's role as Plaintiff's former spouse. Even though there may be some  
16 overlap between the duties imposed on a former spouse under California law and those imposed  
17 on a plan administrator under ERISA, this does not result in ERISA preemption. As Plaintiff  
18 explains, this is an action to recover damages from a former spouse, separate and apart from the  
19 recovery of actual Plan proceeds. Resolution of the issues "does not call for any interpretation of  
20 an ERISA provision, other than that relating to preemption, or for a ruling on the validity of any  
21 terms or conditions of an ERISA plan." Burch, 7 Cal.4th at 269-270.

22 Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's claims.  
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28 <sup>4</sup> At the hearing, Plaintiff's counsel stated that there was no evidence to indicate that she was an employee participant in the Plan.

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2 **ORDER**

3 Based on the above, Plaintiff's Motion to Remand is GRANTED and this action is  
4 REMANDED to Fresno County Superior Court. Plaintiff's request for attorneys' fees is  
5 DENIED.

6 IT IS SO ORDERED.

7  
8 Dated: September 5, 2012

/s/ Dennis L. Beck  
9 UNITED STATES MAGISTRATE JUDGE

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