

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

ERNEST P. SANCHEZ,  
individually and on behalf  
of all others similarly  
situated,

NO. CIV. S-09-1454 FCD/DAD

Plaintiff,

v.

MEMORANDUM AND ORDER

AVIVA LIFE AND ANNUITY  
COMPANY, a foreign entity of  
unknown origin; LOOMIS WEALTH  
SOLUTIONS, INC., an Illinois  
corporation; LAWRENCE LELAND  
LOOMIS, an individual; et al.,

Defendants.

----oo0oo----

This matter is before the court on plaintiff Ernest P. Sanchez' ("plaintiff") motion to remand this class action, alleging defendants misrepresented and sold sham investments to plaintiff and others similarly situated.<sup>1</sup> On May 27, 2009, defendant Aviva Life and Annuity Company ("Aviva") removed this

---

<sup>1</sup> Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

1 action on the basis of the Class Action Fairness Act of 2005  
2 ("CAFA"). Under CAFA, a federal court has "original  
3 jurisdiction" over civil matters in which: the aggregate amount in  
4 controversy exceeds the sum or value of \$5,000,000.00 (exclusive  
5 of interest and costs); the aggregate number of putative class  
6 members is 100 or greater; and any member of the putative class  
7 is a citizen of a state different from that of any defendant. 28  
8 U.S.C. § 1332(d). Plaintiff concedes that these basic  
9 requirements are met in this case, but argues that remand is  
10 warranted because (1) Aviva's notice of removal is procedurally  
11 defective for failure to join all defendants who had been served;  
12 (2) the mandatory, "local controversy" exception to CAFA  
13 jurisdiction applies; and/or (3) the discretionary, "interests of  
14 justice" exception to CAFA jurisdiction applies.

15 For the reasons set forth below, the court DENIES  
16 plaintiff's motion. Aviva's notice of removal is not  
17 procedurally defective since CAFA expressly permits any defendant  
18 to remove an action without the consent or joinder of the other  
19 defendants (28 U.S.C. § 1453(b)), and plaintiff has not met his  
20 burden to show that either of the above exceptions to CAFA  
21 jurisdiction applies in this case.

#### 22 **BACKGROUND**

23 The putative class, consisting of hundreds of members,  
24 allege they were defrauded of tens of millions of dollars through  
25 a real estate "Ponzi" scam masterminded by defendant Lawrence  
26 Leland Loomis ("Loomis"). (Compl., filed May 27, 2009, ¶s 1,  
27 25(a).) Beginning in 2006, plaintiff, on his own behalf and on  
28 behalf of the class, alleges defendants Loomis, Loomis Wealth

1 Solutions, Inc. ("LWS") and Aviva developed a multi-step  
2 investment scheme called the "Income Advantage Plan." (Id. at ¶s  
3 13, 15.) During the first phase of the Plan, Loomis and LWS  
4 offered free seminars to potential investors and allegedly sold  
5 them "free" life insurance from Aviva at no cost because the  
6 Income Advantage Plan would pay all of their premiums. (Id. at  
7 ¶s 14-15.) Investors allegedly had to purchase an Aviva life  
8 insurance policy to become eligible to participate in the second  
9 phase of the Plan. (Id. at ¶s 13, 15, 19-20, 24.) During the  
10 second phase of the Plan, Loomis and LWS sold investors, who had  
11 purchased Aviva life insurance policies, shares of defendant  
12 NARAS Secured Fund #2, LLC ("Naras"), which was allegedly  
13 administered, funded and managed by defendants Lismar Financial  
14 Services ("Lismar") or Nationwide Lending Group ("Nationwide").  
15 (Id. at ¶ 19.) Plaintiff asserts "defendants represented that  
16 the pooled money in the NARAS Fund was to be loaned out to  
17 subprime borrowers at 14%. This supposedly enabled [d]efendants  
18 to return 12% to investors, clearing a modest 2% as profit for  
19 the NARAS fund." (Id. at ¶ 20.) In or around 2008, investors  
20 allegedly learned their investments "were gone," and that they  
21 would have to pay their own premiums to maintain their Aviva life  
22 insurance policies. (Id. at ¶ 22.)

23 Based on these essential allegations, plaintiff commenced  
24 this putative class action on April 15, 2009 in Sacramento County  
25 Superior Court, alleging causes of action for breach of fiduciary  
26 duty, negligence, rescission for mistake and fraud, violation of  
27 the California Business and Professions Code § 17200 et seq. and  
28 violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ.

1 Code § 1750 et seq., against Loomis, LWS, Lismar, Nationwide,  
2 Naras and Aviva. Plaintiff sought on behalf of himself and the  
3 class, compensatory and punitive damages, rescission, restitution  
4 and injunctive relief, together with costs and attorneys' fees.  
5 To date, service of the summons and complaint has been effected  
6 only upon Aviva and Lismar.

7 **STANDARD**

8 With the enactment of CAFA, Congress adopted a new policy  
9 that broadened federal diversity jurisdiction over class actions,  
10 with any doubts resolved in favor of retaining federal  
11 jurisdiction. Lowery v. Ala. Power Co., 483 F.3d 1184, 1193  
12 (11th Cir. 2007) (holding that "Congress enacted CAFA to address  
13 inequitable state court treatment of class actions and to put an  
14 end to certain abusive practices by plaintiffs' class counsel . .  
15 . [by] broadening federal diversity jurisdiction over class  
16 actions with interstate implications"). Indeed, the legislative  
17 history of CAFA instructs that CAFA's jurisdictional provisions  
18 "should be read broadly, with a strong preference that interstate  
19 class actions should be heard in a Federal court if removed by  
20 any defendant." In re Textainer Partnership Sec. Litig., 2005 WL  
21 1791559, \*3 (N.D. Cal. July 27, 2005) (internal quotations and  
22 citations omitted). Thus, courts recognize that if the propriety  
23 of federal court jurisdiction is uncertain, courts should "err in  
24 favor of exercising jurisdiction over the case." Id. Therefore,  
25 under CAFA, any doubt about federal jurisdiction is resolved in  
26 favor of removal.

27 A defendant has the burden of establishing removal  
28 jurisdiction under CAFA (Abrego Abrego v. Dow Chem. Co., 433 F.3d

1 676, 685 (9th Cir. 2006); however, a plaintiff seeking remand  
2 bears the burden of establishing that an exception to CAFA  
3 jurisdiction applies. Serrano v. 180 Connect, Inc., 478 F.3d  
4 1018, 1019 (9th Cir. 2007) (reversing district court and joining  
5 all sister circuits to have addressed this issue in holding that  
6 the party seeking remand bears the burden of establishing the  
7 exceptions to CAFA jurisdiction).

## 8 ANALYSIS

### 9 1. Adequacy of Notice of Removal

10 Plaintiff contends Aviva's removal is procedurally defective  
11 because it lacks the consent/joinder of co-defendant, Lismar, who  
12 had been served at the time of the notice of removal. Plaintiff  
13 is incorrect. Under CAFA, the consent or joinder of other  
14 defendants to removal of a putative class action is *not* required.  
15 28 U.S.C. § 1453(b) ("A class action may be removed . . . by any  
16 defendant without the consent of all defendants."); Abrego, 443  
17 F.3d at 681 (noting that Section 1453(b) "overrides the judge-  
18 created requirement that each defendant consent to removal").  
19 Therefore, the lack of consent or joinder by Lismar in Aviva's  
20 notice of removal is of no consequence and does not defeat  
21 removal as a matter of law. United Steel v. Shell Oil Co., 549  
22 F.3d 1204, 1207-08 (9th Cir. 2008) (reversing district court's  
23 remand order because "CAFA entitles one defendant to remove the  
24 entire action").

### 25 2. "Local Controversy" Exception to CAFA Jurisdiction

26 Plaintiff argues that remand of this action is warranted  
27 pursuant to CAFA's mandatory "local controversy" exception to  
28 federal jurisdiction. The "local controversy" exception, 28

1 U.S.C. § 1332(d)(4)(A), requires a federal court to decline  
2 jurisdiction if (1) greater than two-thirds of the members of the  
3 putative class are citizens of the state in which the action was  
4 filed; (2) at least one defendant is a defendant from whom  
5 members of the class seek significant relief, whose alleged  
6 conduct forms a significant basis of the asserted claims, and who  
7 is a citizen of the original filing state; (3) the principal  
8 injuries were incurred in the original filing state; (4) no other  
9 class action asserting similar factual allegations has been filed  
10 against any of the defendants during the previous three years.  
11 "Congress intended the local controversy exception to be a narrow  
12 one, with all doubts resolved 'in favor of exercising  
13 jurisdiction over the case." Evans v. Walter Indus., Inc., 44  
14 F.3d 1159, 1163 (11th Cir. 2006). All four criteria must be  
15 satisfied for the exception to apply. Thus, if any one of the  
16 four criteria is not met, remand should be denied. 28 U.S.C.  
17 § 1332(d)(4); Hart v. FedEx Ground Package Sys. Inc., 457 F.3d  
18 675, 676 (7th Cir. 2006). Here, because the court finds that  
19 plaintiff cannot establish the first criteria for remand, it does  
20 not consider the remaining requirements.

21 Plaintiff concedes in his reply that based on the evidence  
22 proffered by Aviva in support of its opposition to the motion,  
23 plaintiff cannot demonstrate that greater than two-thirds of the  
24 members of the putative class are California citizens.  
25 (Stuetelberg Decl. in Supp. of Aviva's Opp'n, filed June 26,  
26 2009, ¶ 3 [providing that from January 1, 2006 to April 15, 2009,  
27 only 58.71% of the Aviva life insurance policies purchased  
28 through or in association with Loomis were sold to California

1 citizens; the remaining 41.27% were sold to non-California  
2 citizens, including 30.27% in Illinois, 6.42% in Washington and  
3 4.58% in other states).

4         Instead, plaintiff argues that when properly read, his  
5 complaint limits the putative class to California residents only.  
6 (Pl.'s Reply, filed July 2, 2009, at 2-3.) Plaintiff asserts  
7 that to the extent his complaint is confusing on this issue, he  
8 seeks as part of this motion to "clarify" his pleading. (Id.)  
9 However, plaintiff cannot "clarify" away the plain language of  
10 his complaint, which asserts class claims on behalf of "all  
11 individuals who participated in the Income Advantage Plan and  
12 either purchased life insurance through AVIVA or one of its  
13 predecessors or purchased shares of the NARAS fund, or both"  
14 since 2006, regardless of their state of residence. (Compl., ¶s  
15 13, 24.)

16         Moreover, the propriety of removal is based on the complaint  
17 as it existed at the time the notice of removal is filed. Hill  
18 v. Roller, 615 F.2d 886, 889 (9th Cir. 1980); Abrego, 443 F.3d  
19 at 686. Thus, plaintiff's last-ditch attempt to narrow the  
20 putative class is irrelevant. Plaintiff cannot oust this court  
21 of jurisdiction by selectively excising those allegations of the  
22 complaint that made removal proper in the first instance. Hill,  
23 615 F.2d at 889. Here, when Aviva filed its notice of removal on  
24 May 27, 2009, plaintiff's complaint defined the putative class to  
25 include "all individuals" who had participated in Loomis' Income  
26 Advantage Plan since 2006, without regard to their state of  
27 residency. Aviva has shown that such a putative class would  
28 include at least 40% non-Californians. Accordingly, because

1 fewer than two-thirds of those putative class members were  
2 California residents, the mandatory "local controversy" exception  
3 to CAFA jurisdiction is inapplicable. Plaintiff cannot defeat  
4 this court's CAFA jurisdiction *after removal* by seeking to narrow  
5 the putative class to California residents, since such post-  
6 removal amendments are not relevant for removal jurisdiction  
7 purposes.<sup>2</sup>

8 Because plaintiff cannot establish at least one of the  
9 required elements of the "local controversy" exception to CAFA  
10 jurisdiction, his motion for remand on this basis must be denied.

11 **3. "Interests of Justice" Exception to CAFA Jurisdiction**

12 As an alternative to mandatory remand under the "local  
13 controversy" exception, plaintiff argues for discretionary remand  
14 under the "interests of justice" exception to CAFA jurisdiction.  
15 While plaintiff discusses the various factors listed in the CAFA  
16 discretionary exception (see 28 U.S.C. § 1332(d)(3)),<sup>3</sup> he fails

---

18 <sup>2</sup> The court notes that in light of Aviva's evidence  
19 establishing the citizenship of the alleged putative class, it is  
20 also clear that plaintiff could not establish another required  
21 element of the local controversy exception. Here, the principal  
22 injuries occurred throughout the United States. As Aviva's  
23 evidence shows, 41.27% of the putative class members reside  
24 outside California. Plaintiff admits the location of the injured  
25 investors is relevant to this inquiry, and those putative class  
26 members who purchased Aviva life insurance policies through  
27 Loomis span at least five states, including Illinois, Washington,  
28 Wisconsin, Missouri, Maryland and California. Thus, the  
purchases of Aviva policies sold through Loomis to putative class  
members, and accordingly the "principal injuries," were not  
limited to California but occurred broadly throughout several  
states. Thus, the CAFA local controversy exception is  
inapplicable for this additional reason.

<sup>3</sup> These factors include: (1) whether the claims asserted  
involve matters of national or interstate interest; (2) whether  
the claims asserted will be governed by laws of the state in  
which the action was originally filed or by the laws of other  
States; (3) whether the class action has been pleaded in a manner



1 to establish the threshold requirements, including: (1) that  
2 between one-third and two-thirds of the class members are  
3 California citizens, and (2) that *all* of the "primary defendants"  
4 are California citizens. Indeed, "consideration of the various  
5 factors is not implicated unless and until it is shown that the  
6 [discretionary] exception's initial requirements" are satisfied.  
7 Kendrick v. Stnd Fire Ins. Co., 2007 WL 1035018, \*4 (E.D. Ky.  
8 Mar. 31, 2007); see also Preston v. Tenet Healthsystem Mem. Med.  
9 Ctr., 485 F.3d 804, 812 (5th Cir. 2007) (recognizing that the  
10 party moving for remand must first satisfy the citizenship  
11 requirements as a prerequisite to the district court weighing the  
12 statutory remand factors).

13 As set forth above, *plaintiff* provides no evidence regarding  
14 the citizenship of the putative class members, and thus, he fails  
15 to satisfy the first threshold requirement of the discretionary  
16 exception.<sup>4</sup> As to the second requirement, plaintiff also cannot  
17 demonstrate that all "primary defendants" are citizens of  
18 California. "Primary defendant" is not statutorily defined, but  
19 it has been interpreted to mean a defendant who is alleged to be

20 \_\_\_\_\_  
21 that seeks to avoid Federal jurisdiction; (4) whether the action  
22 was brought in a forum with a distinct nexus with the class  
23 members, the alleged harm, or the defendants; (5) whether the  
24 number of potential class members that are citizens of the State  
25 in which the action was originally filed is substantially larger  
26 than the number of citizens from any other State, and whether the  
27 citizenship of the other members of the proposed class is  
28 dispersed among a substantial number of States; and (6) whether,  
during the 3-year period preceding the filing of the class  
action, one or more other class actions asserting the same or  
similar claims on behalf of the same or other persons have been  
filed.

27 <sup>4</sup> Instead, Aviva proffered evidence as to the citizenship  
28 of the putative class, but ultimately, it is plaintiff's burden  
to make this showing.

1 directly liable to the plaintiff, rather than a mere indemnitor,  
2 contributor or third-party defendant. Kearns v. Ford Motor co.,  
3 2005 WL 1035018, \*5 (C.D. Cal. Nov. 21, 2005); Hangerter v. Paul  
4 Revere Life Ins. Co., 2006 WL 213834, \*3 (N.D. Cal. Jan. 26,  
5 2006).

6 Here, all six named defendants are alleged to be *directly*  
7 liable to plaintiff and the putative class, and thus, all six are  
8 "primary defendants." Plaintiff does not dispute that defendants  
9 Aviva, Naras, Lismar and Nationwide are non-California citizens.  
10 Plaintiff alleges all five causes of action against these  
11 defendants, asserting that each directly engaged in tortious or  
12 improper conduct against plaintiff. For example, as to the Iowa-  
13 based Aviva, plaintiff alleges, *inter alia*:

14 [B]eginning in or about 2006, at least AVIVA, LWS  
15 and Loomis together concocted an investment scheme  
16 designed to generate millions of dollars in fees for  
17 themselves by promising free life insurance with  
18 lucrative investment potential and fabulous returns  
19 on the sale of securities.

20 . . .

21 AVIVA's participation in this scheme was absolutely  
22 critical to the eventual success of the entire  
23 conspiracy because AVIVA's funding of the 'free'  
24 insurance products through the table kickbacks was  
25 the lynchpin in hooking investors.

26 (Compl., ¶s 13, 18.) Similar allegations of direct liability are  
27 made against Naras, Lismar, and Nationwide. (Compl., ¶s 19-22  
28 [Naras], 19 [Lismar], 19 [Nationwide].) Thus, all four of these  
non-California citizens are "primary defendants," and as such,  
plaintiff cannot meet the second threshold requirement of the  
discretionary exception. See e.g. Adams v. Federal Materials  
Co., Inc., 2005 WL 1862378, \*19 (W.D. Ky. July 28, 2005) (finding

1 that because one count of the complaint was asserted directly  
2 against a non-resident defendant that was initially sued for  
3 indemnification, there was "simply no basis for treating [that  
4 defendant] as a secondary defendant in the case"); Robinson v.  
5 Cheetah Transportation, 2006 WL 3322580, \*3 (W.D. La. Nov. 14,  
6 2006) (finding that where the plaintiffs had made "essentially  
7 identical" claims against multiple defendants—both resident and  
8 non-resident—relating to the same "significant facet of the  
9 plaintiffs' claims," the home state exception was inapplicable).  
10 Since plaintiff cannot establish this second required element of  
11 the discretionary exception, consideration of the statutory,  
12 discretionary factors is not necessary.<sup>5</sup>

13 Remand of this action is not permitted pursuant to the  
14 discretionary, "interests of justice" exception to CAFA.

15 **4. Plaintiff's Request for Discovery**

16 Finally, plaintiff argues that if the court is inclined to  
17 not remand the case, he should be permitted to conduct limited  
18 discovery in order to carry his burden of proof that a CAFA  
19 jurisdictional exception applies. Plaintiff asserts such  
20 discovery would permit him "to determine the location of  
21

---

22 <sup>5</sup> Plaintiff's further argument that a "conspirator" is  
23 not "directly liable" for the conspiracy's torts betrays a  
24 fundamental misunderstanding of what a conspiracy is. Plaintiff  
25 attempts to equate participation in a conspiracy with "respondeat  
26 superior" liability; however, a conspiracy renders each  
27 participant in the wrongful act directly responsible as a joint  
28 tortfeasor for all damages ensuing from the wrong, irrespective  
of whether or not the participant was a direct actor and  
regardless of the degree of his activity. See Doctors' Co. v.  
Sup. Ct., 49 Cal.3d 39 (1989). Thus, that plaintiff has charged  
Aviva, in part, as a conspirator does not render Aviva an  
indirect defendant.

1 potentially all class members, because each of those class  
2 members would have purchased life insurance from Aviva or one of  
3 its successors." (Pl.'s Mot., filed June 12, 2009, at 11:16-19.)  
4 Plaintiff contends that determining the state of residence of  
5 those putative class members would promptly resolve the issue of  
6 residency that is critical to the "local controversy" and  
7 discretionary exceptions to CAFA jurisdiction. (Id. at 11:19-  
8 21.)

9 Jurisdictional discovery, however, is only permissible "when  
10 the Court is unable to determine, on the existing record, whether  
11 it has jurisdiction." Rippee v. Boston Mkt. Corp., 408 F. Supp.  
12 2d 982, 985 (S.D. Cal. 2005). Here, based on the evidence  
13 proffered by Aviva, demonstrating, among other things, that fewer  
14 than two-thirds of the putative class members are California  
15 citizens, there is sufficient information for this court to  
16 properly determine that it has CAFA jurisdiction over this case.  
17 (Stuetelberg Decl., ¶ 3.) Therefore, plaintiff's request for  
18 jurisdictional discovery is denied.

19 **CONCLUSION**

20 For the foregoing reasons, plaintiff's motion for remand is  
21 DENIED in its entirety.

22 IT IS SO ORDERED.

23 DATED: July 16, 2009

24 

25  
26 

---

FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE