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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GENESIS SPECIALTY TILE &
ACCESSORIES, LLC; ELEFThERIOS
EFSTRATIS; ELEFThERIOS D.
EFSTRATIS; PATRICIA E.
EFSTRATIS; JESSICA N.
EFSTRATIS; THOMAS A. JOHNSON;
NORA E. RUNDELL,

Plaintiffs,

v.

NO. CIV. S-11-2489 LKK/DAD

O R D E R

AMERUS LIFE INSURANCE
COMPANY OF IOWA; AVIVA LIFE
AND ANNUITY COMPANY f/k/a
AMERUS LIFE INSURANCE
COMPANY, a corporation;
RAYMOND F. OLMO, an individual,
R.F. OLMO & ASSOCIATES, INC.,
a corporation; MARSHALL
KATZMAN, an individual;
UNITED FINANCIAL GROUP, LTD,
a corporation; DAVID ZUCCOLOTTO;
and DOES 1 through 100,
inclusive,

Defendants.

_____ /

This action was removed from state court on September 19,
2011. Plaintiffs move to remand back to state court for lack of

1 federal subject matter jurisdiction. For the reasons that follow,
2 plaintiffs' remand motion will be granted.

3 **I. BACKGROUND**

4 **A. The Complaint**

5 The Complaint alleges that the individual plaintiffs are the
6 owners and employees of plaintiff Genesis Specialty Tile &
7 Accessories ("GSTA"). Defendants are life insurance salesmen. But
8 instead of selling ordinary life insurance, defendants set out to
9 deceive plaintiffs into thinking that they (defendants) would set
10 up for plaintiffs a "Single Employer Welfare Benefit Plan" ("Plan")
11 that would qualify as such under Internal Revenue Code ("IRC")
12 419(e), 26 U.S.C. § 419(e), and would be governed by the Employee
13 Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001,
14 et seq. The scheme was to obtain payments from plaintiffs that
15 would purportedly be used to purchase life insurance policies, and
16 those funds would be administered by a trust to be created by
17 defendants.

18 The complaint further alleges that defendants lured plaintiffs
19 into the scheme by falsely assuring them, among other things, that
20 their payments would be tax deductible under IRC § 419(e).
21 Defendants kept plaintiffs in the scheme, and kept the premiums
22 coming, by fraudulently concealing the true nature of the scheme
23 plaintiffs had bought into. In fact, defendants were simply
24 insurance salesmen who pretended to be selling ERISA-covered Plans
25 in order to "facilitate the sale of life insurance policies which
26 would generate exorbitant commissions."

1 As relief, plaintiffs want the insurance contracts rescinded
2 and they want their premiums refunded. They do not seek to enforce
3 the scheme in any way, they do not seek to collect benefits under
4 the scheme, they do not claim that defendants violated ERISA or the
5 terms of the scheme in any way. They just want out of their
6 contracts.

7 **B. Removal**

8 Defendants removed the action to federal district court,
9 alleging that plaintiffs' claims "are completely preempted by
10 Section 502(a) of ERISA, 29 U.S.C. § 1132(a).¹ In defendants'
11 view, plaintiffs are participants in an ERISA plan administered by
12 defendants, and are simply complaining about "the design, sale,
13 funding, and administration" of the Plan, and about "excessive
14 charges" imposed by the Plan. Such issues, defendants argue, are
15 within the scope of the civil enforcement provisions of ERISA,
16 Section 502(a), 11 U.S.C. § 1132(a). In that case, say defendants,
17 the matter is preempted by Section 502(a), and federal jurisdiction
18 lies.

19 Plaintiffs have moved for a remand back to state court, saying
20 that their complaint is not preemption by Section 502(a). They
21 agree that Section 502(a) preemption exists only when their lawsuit
22 is within the scope of the civil enforcement provisions of ERISA.

23
24 ¹ Defendants also say there is bankruptcy jurisdiction since
25 two of the plaintiffs and one of the defendants have filed for
26 bankruptcy. However, the bankruptcy cases are now concluded, and
do not provide a basis for removal under 28 U.S.C. § 1452(a). The
court grants plaintiffs' Request for Judicial Notice of these
bankruptcy proceedings (Dkt. No. 57).

1 However, they say that their lawsuit is not within its scope.

2 **C. Multidistrict Litigation**

3 The action was briefly stayed while the Panel on Multidistrict
4 Litigation (MDL Panel) determined whether this case should become
5 part of a multidistrict litigation, In re Indianapolis Life Ins.
6 Co. IRS § 412(i) and § 419 Plans Life Ins. Marketing Litigation,
7 MDL No. 1983 (J.P.M.L. November 10, 2011). Ultimately the MDL
8 Panel determined that the case should not be a part of the
9 multidistrict litigation, and returned the matter to this court.
10 See Dkt. No. 43.

11 **II. REMOVAL JURISDICTION STANDARD**

12 Defendants bear the burden of establishing the existence of
13 removal jurisdiction:

14 The "strong presumption against removal jurisdiction
15 means that the defendant always has the burden of
16 establishing that removal is proper," and that the court
17 resolves all ambiguity in favor of remand to state
18 court.

19 Hunter v. Philip Morris USA, 582 F.3d 1039, 1042 (9th Cir. 2009),
20 quoting Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (per
21 curiam).

22 **III. ANALYSIS**

23 Defendants premise removal, and federal jurisdiction, on the
24 principle of preemption under Section 502(a) of ERISA, 28 U.S.C.

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1 § 1132(a) ("502(a) Preemption").² The basic enforcement section
2 provides:

3 A civil action may be brought ... by a participant or
4 beneficiary ... to recover benefits due to him under the
5 terms of his plan, to enforce his rights under the terms
6 of the plan, or to clarify his rights to future benefits
7 under the terms of the plan.

8 29 U.S.C.A. § 1132(a)(1)(B). However, other enforcement provisions
9 of ERISA's Section 502(a) include actions for breach of fiduciary
10 duties, and actions arising from violations of ERISA or the Plan.³
11 Paulsen v. CNF Inc., 559 F.3d 1061, 1084 (9th Cir. 2009)
12 (summarizing some of the enforcement provisions), cert. denied, 558
13 U.S. ___, 130 S. Ct. 1053 (2010).

14 Ordinarily, a state court action cannot be removed to federal
15 court on the basis of a federal preemption defense.⁴ However, in

16
17 ² This preemption is also variously referred to in the cases
18 as "complete preemption" and "conflict preemption." See Fossen v.
19 Blue Cross and Blue Shield of Montana, Inc., 660 F.3d 1102 (9th
20 Cir. 2011) (using both terms to refer to Section 502(a)
21 preemption), petition for cert. filed, 80 U.S.L.W. 3566 (U.S. Mar.
22 21, 2012) (No. 11-1155).

23 ³ See 29 U.S.C. § 1132(a)(1)(A) (action against administrator
24 for failure to provide requested information); (a)(2) (action
25 against fiduciary for breach of duties created by ERISA); (a)(3),
26 (a)(4) & (a)(9) (actions arising out of violations of ERISA itself
or of a Plan under ERISA).

27 ⁴ "Federal pre-emption is ordinarily a federal defense to the
28 plaintiff's suit. As a defense, it does not appear on the face of
29 a well-pleaded complaint, and, therefore, does not authorize
30 removal to federal court." Metropolitan Life Ins. Co. v. Taylor,
31 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of
32 action arises under federal law only when the plaintiff's
well-pleaded complaint raises issues of federal law"), citing

1 ERISA's case, "Congress has clearly manifested an intent to make
2 causes of action within the scope of the civil enforcement
3 provisions of § 502(a) removable to federal court." Metropolitan
4 Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (finding Section
5 502(a) to be comparable, for these purposes, to Section 301 of the
6 Labor Management Relations Act of 1947). Thus, even if the
7 complaint "purports to raise only state law claims," if it is
8 within the scope of Section 502(a), it "is necessarily federal in
9 character" and is therefore removable to federal court by the
10 defendants. Id., 481 U.S. at 66-67.

11 In the Ninth Circuit, a state-law cause of action is preempted
12 by Section 502(a), and therefore removable to federal court if (but
13 only if):

14 (1) "an individual, at some point in time, could have
15 brought [the] claim under ERISA § 502(a)(1)(B)," and (2)
16 "where there is no other independent legal duty that is
17 implicated by a defendant's actions."

18 Marin General Hosp. v. Modesto & Empire Traction Co., 581 F.3d 941,
19 946 (9th Cir. 2009), quoting Aetna Health Inc. v. Davila, 542 U.S.
20 200, 210 (2004).⁵ Both prongs of this test must be satisfied in

21
22 Franchise Tax Board v. Construction Laborers, 463 U.S. 1 (1983) and
Gully v. First National Bank, 299 U.S. 109 (1936).

23 ⁵ Although Marin specifies Section 502(a)(1)(B) as the
24 enforcement provision that must be involved, later Ninth Circuit
25 cases have clarified that Section 502(a) preemption will occur if
26 the purported state claim is within the scope of any of ERISA's
enforcement provisions. See Fossen, 660 F.3d at 1109 ("The
complete preemption doctrine applies to the other subparts of §
502(a) as well," and finding preemption where an ERISA claim could

1 order for Section 502(a) preemption to apply. Fossen v. Blue Cross
2 and Blue Shield of Montana, Inc., 660 F.3d 1102, 1108 (9th
3 Cir. 2011) ("Because this 'two-prong test ... is in the
4 conjunctive[,] [a] state-law cause of action is preempted by §
5 502(a)(1)(B) only if both prongs of the test are satisfied'"),
6 quoting Marin, 581 F.3d at 947.

7 **A. Can Plaintiffs Sue Under 502(a)?**

8 Defendants do not dispute that claims that are predicated upon
9 pre-plan fraud are not preempted by ERISA. See Dkt. No. 36 at
10 p.21. They argue that their Notice of Removal was not based upon
11 such claims, but upon the post-plan allegations. The problem for
12 defendants is that all the causes of action in plaintiffs'
13 complaint are based upon pre-plan fraud. The complaint does
14 contain allegations of bad conduct that occurred after the plan was
15 formed, but all the causes of action seek relief based upon the
16 fraud that occurred before the plan was created, and that induced
17 plaintiffs to contribute to the plan in the first place.⁶

18 First, the complaint alleges "fraudulent misrepresentation,"

19 _____
20 have been brought under Section 502(a)(3)); Paulsen, 559 F.3d at
21 1084-85 (finding no preemption after considering whether the state
22 claim was within the scope of any of ERISA's enforcement
23 provisions).

24 ⁶ Plaintiffs have arguably over-pled their case by including
25 allegations of post-plan conduct, or perhaps they are guilty of
26 wishing to tell the complete story (as they see it). At oral
argument, defendants focused on Paragraph 26, saying that it
alleges wrong-doing by defendants post-plan. That may be, but
those allegations do not form the basis of plaintiffs' causes of
action. The court does not view Section 502(a) preemption as a
game of "gotcha," where any mention of post-plan conduct gets an
entire lawsuit removed to federal court.

1 in that defendants fraudulently induced plaintiffs to let
2 defendants set up a welfare benefit plan for them. Second, it
3 alleges "negligent representation," in that defendants lied to
4 plaintiffs about what the plan would entail and its alleged tax
5 benefits. Third, it alleges fraudulent concealment, in that
6 defendants failed to tell plaintiffs that the plan lacked tax
7 advantages, and that the tax authorities were scrutinizing "tax-
8 avoidance" schemes like the one proposed. Fourth and Eighth, it
9 alleges "professional negligence" and "breach of fiduciary duty,"
10 in that defendants, insurance salesmen, breached their (alleged)
11 duties as insurance salesmen to plaintiffs in selling them the
12 insurance policies.⁷ Ninth, it alleges "common counts" for money
13 had and received because of the fraudulent representations and
14 concealment.⁸

15 The one claim that possibly alleges post-plan conduct is the
16 Tenth. It alleges breach of the covenant of good faith and fair
17 dealing that arose after the insurance contracts "because of the
18 insurance relationship." Even if this is post-plan conduct,
19 however, it is not within the scope of the civil enforcement
20 provisions of ERISA. Plaintiffs still do not seek any benefits
21 under the plan, they do not ask for enforcement of the plan, they

22
23 ⁷ The court expresses no view on whether life insurance
24 salesmen are fiduciaries under California law. That will be for
25 the state court to determine after remand. The point here, is that
26 the fiduciary duty allegedly arises out of California law, and not
out of any fiduciary duty arising under ERISA.

⁸ "Claims" 5-7 are for rescission, restitution and
constructive trust.

1 do not claim that defendants violated ERISA or the Plan, they do
2 not claim that defendants did not furnish documents required by
3 ERISA. There simply is nothing these plaintiffs want from ERISA.
4 They just want out of a scheme they say they were fraudulently
5 induced to enter into.

6 **B. The ERISA Civil Enforcement Provisions**

7 Even if plaintiffs' claims were predicated upon post-plan
8 conduct however, the complaint is simply not within the enforcement
9 provisions of ERISA, as set out below.

10 **1. Section 502(a)(1)(B)**

11 Section Section 502(a)(1)(B) provides plan beneficiaries with
12 a private right of action to recover benefits under the Plan, to
13 enforce their rights under the terms of the plan, or to clarify
14 their rights to future benefits under the terms of the plan.
15 Plaintiffs' claims are not within the scope of this provision.
16 They do not seek benefits, or to enforce or clarify any provision
17 of the Plan, they simply want out of it because they say they were
18 fraudulently induced to enter into the contracts in the first
19 place.

20 **2. Section 502(a)(2)**

21 This provision creates a right to sue if a fiduciary under the
22 Plan "breaches any of the responsibilities, obligations, or duties
23 imposed upon fiduciaries by this subchapter." 29 U.S.C. §
24 1132(a)(2) (right of action for violation of 29 U.S.C. § 1109).
25 Plaintiffs here do have a claim for breach of fiduciary duty. But
26 it is for breach of the alleged fiduciary duty owed by sellers of

1 life insurance, not the duty imposed on fiduciaries under ERISA.

2 **3. Section 502(a)(3), (a)(4) & (a)(9)**

3 These provisions create a right to sue for conduct that
4 constitutes a violation of ERISA, including failure to furnish
5 statements to participants under of 29 U.S.C. § 1025(c), and other
6 violations. Plaintiffs do not allege any such violation of ERISA.
7 And, the law violations they do allege are not covered by ERISA.
8 They are simple fraud-in-the-inducement violations of common law.

9 **C. Post Davila Ninth Circuit ERISA Cases**

10 Prior to the Supreme Court decision in Aetna Health Inc. v.
11 Davila, 542 U.S. 200, 209 (2004), the Ninth Circuit rule had been
12 that Section 502(a) preemption required that "ERISA expressly
13 preempts the state law cause of action under 29 U.S.C. § 1144(a)
14 [Section 514(a) preemption]," and in addition, the cause of action
15 must be "encompassed by the scope of the civil enforcement
16 provision of ERISA." Fossen, 660 F.3d at 1112. The first part of
17 the test is no longer the law in the Ninth Circuit as a result of
18 Davila. Id. It has been replaced by a requirement that there be
19 "no other independent legal duty that is implicated by a
20 defendant's actions." Id., 660 F.3d at 1108. Accordingly,
21 although pre-Davila cases may possibly still be relevant
22 (especially if they relied only on the requirement that the claim
23 be "encompassed by the scope of civil enforcement provisions of
24 ERISA"), the court summarizes only post-Davila Ninth Circuit ERISA
25 cases that appear to touch upon the issues facing the court.

26 ////

1 **1. Fossen**

2 In Fossen v. Blue Cross and Blue Shield of Montana, Inc., 660
3 F.3d 1102, 1108 (9th Cir. 2011), plaintiffs were employers who had
4 purchased health insurance for their workers. They sued Blue Cross
5 Blue Shield, which had raised their premium payments in a way that
6 was prohibited by a Montana Law (its "Little HIPAA"). The Ninth
7 Circuit found that plaintiffs could have sued under ERISA Section
8 502(a)(3)(A), which also prohibits the type of discriminatory
9 premium pricing prohibited by Montana law. Since the lawsuit was
10 within the civil enforcement provisions of Section 502(a), the
11 Ninth Circuit found that 502(a) preemption existed, and the case
12 was properly removed to federal court.

13 Fossen does not help defendants because they have identified
14 no enforcement provision of ERISA that would cover plaintiffs'
15 claims. Plaintiffs were fraudulently induced to participate in
16 this scheme, they say, and now they are suing to get out of it
17 entirely, not to enforce it or get benefits out of it. Defendants'
18 argument seems to be that once they have fraudulently induced
19 plaintiffs into signing these contracts, plaintiffs are then stuck
20 with the remedies provided by ERISA, even though ERISA apparently
21 provides no remedy for the state claims they are asserting.⁹

22
23 ⁹ "Express preemption" is yet another form of preemption
24 implicated in cases that purportedly involve ERISA. This is a form
25 of preemption created by Section 514(a) of ERISA, 11 U.S.C. §
26 1144(a), and is distinct from Section 502(a) preemption ("complete"
or "conflict" preemption). Section 514(a) provides:

 Except as provided in subsection (b) of this section,
the provisions of this subchapter and subchapter III of

1 **2. Marin**

2 In Marin General Hosp. v. Modesto & Empire Traction Co., 581
3 F.3d 941, 949 (9th Cir. 2009), plaintiff hospital called the
4 patient's ERISA insurer and reached an oral contract that the
5 hospital would be reimbursed for 90% of the costs of the patient's
6 care. When the insurer got the bill for \$178,926.54, it paid the
7 hospital \$46,655.14 - apparently the amount called for by the
8 patient's ERISA plan - and said it would pay no more. The hospital
9 sued in state court for the remainder, and the insurer removed to
10 federal court, asserting Section 502(a) preemption.

11 The Ninth Circuit found that there was no Section 502(a)
12 preemption. The hospital was not suing for benefits under ERISA,
13 or for any violation of ERISA. It was suing under a separate oral

14 _____
15 this chapter shall supersede any and all State laws
16 insofar as they may now or hereafter relate to any
17 employee benefit plan described in section 1003(a) of
18 this title and not exempt under section 1003(b) of this
19 title.

20 29 U.S.C. § 1144(a). Where it applies, Section 514(a) preemption
21 defeats the state claims asserted. Fossen, 660 F.3d at 1107 ("All
22 of these preemption provisions [Sections 502(a), 514(a), and a
23 HIPAA preemption provision] defeat state-law causes of action on
24 the merits"). Unlike Section 502(a) preemption, however, Section
25 514(a) preemption does not also confer federal subject matter
26 jurisdiction, even where it applies. Marin, 581 F.3d at 945
 ("preemption under § 514(a) of ERISA, is an insufficient basis for
 original federal question jurisdiction under § 1331(a) and removal
 jurisdiction under § 1441(a)"); Fossen, 660 F.3d at 1107 ("Conflict
 preemption under ERISA § 502(a), however, also confers federal
 subject matter jurisdiction for claims that nominally arise under
 state law").

 Once this court has determined that there is no federal
 subject matter jurisdiction in a removed action, the correct course
 is to remand so that defendants "may assert in state court" Section
 514(a) preemption arguments, "as well as any other defenses they
 might have." Marin, 581 F.3d at 951.

1 contract - expressly outside of the ERISA plan - for reimbursement
2 of 90% of the hospital costs. The hospital claimed no right to
3 payment under ERISA, and did not claim any violation of ERISA,
4 breach of any ERISA duty, or anything else regarding ERISA. They
5 just wanted their money under the contract they made by telephone
6 with the insurer. As the court concluded:

7 the Hospital's state-law claims based on its alleged
8 oral contract with MBAMD were not brought, and could not
9 have been brought, under § 502(a)(1)(B). Therefore, the
10 Hospital's state-law claims do not satisfy the first
11 prong of Davila.

12 Marin, 581 F.3d at 949.

13 The plaintiffs in this case similarly do not base their claim
14 on any obligation arising out the ERISA plan or the ERISA law.
15 Rather, they say they would never have had anything to do with
16 defendants' scheme, but for the fraudulent inducement. They are
17 not trying to collect benefits, clarify their rights under the
18 insurance contracts or the scheme generally, establish that
19 defendants violated a provision of ERISA, or anything else having
20 to do with ERISA. They just want out of the contracts they were
21 fraudulently induced to participate in. Defendants have not
22 identified a provision of ERISA that covers such a claim.

23 **3. Cleghorn**

24 In Cleghorn v. Blue Shield of California, 408 F.3d 1222, 1226
25 (9th Cir. 2005), "the factual basis of the complaint ... was the
26 denial of reimbursement of plan benefits" under the ERISA plan.

1 None of plaintiffs' "artful pleading" could get around that simple
2 fact, so the matter was subject to Section 502(a) preemption, and
3 thus properly removed to federal court. This case clearly does not
4 apply to these plaintiffs, as they do not claim denial of benefits
5 under the plan, nor do they seek benefits under the plan.

6 **4. Paulsen**

7 In Paulsen v. CNF Inc., 559 F.3d 1061 (9th Cir. 2009), an
8 accounting firm negligently valued a spun-off company, which went
9 bankrupt. The employees then received reduced benefits on the
10 under-funded ERISA plan from the government guarantee agency, the
11 Pension Benefit Guaranty Corporation. The employees sued the
12 accountants for negligence. The Ninth Circuit held that their
13 claim was not preempted by Section 502(a), because:

14 The Employees are suing Towers Perrin for tort damages
15 payable to the class of aggrieved plaintiffs based on a
16 duty owed them by Towers Perrin under state law, not for
17 damages for breach of fiduciary duty payable to the plan
18 (and thus PBGC).

19 Paulsen, 559 F.3d at 1085. This case is applicable to this
20 Complaint, since it is another case in which plaintiffs do not sue
21 under the ERISA enforcement provisions, but under separate, state
22 causes of action.¹⁰

23 ////

24
25 ¹⁰ Nor is there "artful pleading," since in both cases, the
26 claims asserted really do not arise under the ERISA enforcement
provisions. There is no federal character to either lawsuit.

