

TAB 23

Not Reported in F.Supp.2d, 2001 WL 1658315 (N.D.Cal.), 146 Lab.Cas. P 59,571
(Cite as: 2001 WL 1658315 (N.D.Cal.))

C

United States District Court, N.D. California.
Malcolm SMITH, et al., Plaintiffs,
v.
GENSTAR CAPITAL LLC, et al., Defendants
No. C 01-3936MMC.

Dec. 20, 2001.

ORDER GRANTING PLAINTIFFS' MOTION TO
REMAND; DENYING PLAINTIFFS' MOTION
TO STRIKE; GRANTING PLAINTIFFS' RE-
QUEST FOR FEES AND COSTS; VACATING
HEARING

CHESNEY, District J.

*1 Before the Court are plaintiffs' motions to remand the above-entitled action pursuant to 28 U.S.C. § 1447(c) and to strike paragraph 5 of defendants' notice of removal pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendant Chris Healy ("Healy") filed opposition, to which plaintiffs replied. Also, before the Court are responses to the Court's order to show cause why the action should not be remanded, filed, respectively, by Healy and defendants Genstar Capital LLC, Genstar Capital Partners II, LP, and SWY Acquisition Corporation (collectively, "Genstar defendants"), as well as plaintiffs' reply thereto.

Having considered the papers filed in support of and in opposition to the motions, and the parties' responses to the Court's order to show cause, the Court deems the matters appropriate for decision on the papers, VACATES the hearing scheduled for December 14, 2001, and rules as follows.

A. Removal Based on WARN Act

Plaintiffs' First Amended Complaint, filed on or about January 8, 2001, alleges causes of action for

fraud, concealment and negligent misrepresentation. Defendants first assert that plaintiffs' claims, although pleaded under state law, are preempted by the WARN Act, 29 U.S.C. § 2101, *et seq.* Ordinarily, federal preemption is a defense to a state action, but does not provide a basis for removing that action to federal district court. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 66 (1987). An exception exists, however, where Congress has "so completely pre-empt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *See id.* at 63-64.

In enacting the WARN Act, Congress provided employees with certain remedies where an employer closes a plant or announces lay-offs without giving proper notice. *See 29 U.S.C. §§ 2102, 2104.* Congress, however, also included language in the WARN Act expressly indicating that the Act was not intended to completely preempt that particular area. *See 29 U.S.C. § 2105* (providing that remedies available under WARN Act "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees") Consequently, as defendants cannot establish that the WARN Act completely preempts the field, removal may not be based on the theory that plaintiffs' state claims are preempted by the WARN Act. *See Metropolitan Life Ins.*, 481 at 63-64.

B. Removal Based on ERISA

Defendants also assert that plaintiffs' state law claims are preempted by ERISA. Assuming *arguendo* that plaintiffs' state law claims are preempted by ERISA, defendants were on notice of ERISA preemption more than 30 days before filing they filed their notice of removal.

A complaint must be removed "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such ac-

tion or proceeding is based” or, where the initial pleading is not removable, “within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” See 28 U.S.C. § 1446(b).

*2 Plaintiffs' original complaint, filed July 28, 2000, alleged that the damages plaintiffs incurred as a result of defendants' fraudulent representations included the loss of “employment benefits,” (see Def.'s Supp. to Notice of Removal Ex. 1 at ¶¶ 16 (Healy), 37 (Genstar)), which the complaint further identified as “accrued vacation pay,” “COBRA conversion benefits,” and “employment benefits that they had accrued.” (See *id.* Ex. 1 at ¶¶ 15, 37.) Those allegations were repeated in plaintiffs' First Amended Complaint filed on or about January 8, 2001. (See *id.* Ex. 28 at ¶¶ 15, 16, 37.) As plaintiffs point out, when defendants filed their respective answers in state court, defendants asserted the affirmative defense that plaintiffs' claims were barred by reason of plaintiffs' failure to exhaust administrative remedies available under an “ERISA plan.” (See *id.* Ex. 7 at ¶ 16 (Healy, in answer filed October 13, 2000, alleging that plaintiffs' claims are barred because “plaintiffs have failed to exhaust ERISA plan provided administrative procedures, and therefore have failed to exhaust any administrative remedies”)); Ex. 41 at ¶ 11 (Genstar, in answer filed July 25, 2001, alleging that plaintiffs' claims are barred because “plaintiffs have failed to exhaust ERISA plan provided administrative procedures, and therefore have failed to exhaust any available administrative remedies”).

The defense that a plaintiff has failed to exhaust administrative remedies available under an ERISA plan is available only where ERISA governs the plan at issue. See *Sarraf v. Standard Ins. Co.*, 102 F.3d 991, 993 (9th Cir.1996) (holding where ERISA governs the plan at issue, the plaintiff must first exhaust administrative remedies available under the plan). Defendants' answers, filed more than

30 days before defendants removed the instant action, demonstrate that defendants were aware that plaintiffs' claims were governed by ERISA. ^{FN1} Accordingly, defendants have waived their right to remove the instant action based on ERISA preemption. See *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249, 1256 (9th Cir.1989) (holding defendants “lost their opportunity” to remove on grounds of ERISA preemption where notice filed more than thirty days after defendants' receipt of complaint giving defendants notice of federal question).

^{FN1}. In their notice of removal, defendants assert that on October 11, 2001, during a mediation, plaintiffs' counsel made “oral” statements indicating that plaintiffs were seeking damages under ERISA and the WARN Act. (See Notice of Removal at ¶ 5.) Plaintiffs move to strike the subject allegation on the theory that such statements are inadmissible under state and federal rules of evidence. State evidentiary rules, however, are not applicable to proceedings in federal courts. Under [Rule 408 of the Federal Rules of Evidence](#), although “[e]vidence of conduct or statements made in compromise negotiations” is not admissible to prove liability or the invalidity of a claim, it is not otherwise subject to exclusion. Here, defendants rely on the statement to establish their state of mind and lack of notice. Accordingly, plaintiff's motion to strike is hereby DENIED.

C. Fees and Costs

In their motion to remand, plaintiffs seek an award of attorneys' fees and costs. 28 U.S.C. § 1447(c) provides, in relevant part, that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” See 28 U.S.C. § 1447(c). A district court has “wide discretion” in deciding whether to award attorneys' fees under § 1447(c). See *Moore v. Permanente Medical Group*,

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981 F.2d 443, 447 (9th Cir.1992). “[B]ad faith need not be demonstrated.” *See id.* at 448.

*3 Here, in its order to show cause, the Court observed that defendants' notice of removal failed to provide any authority to support a finding that a complaint may be removed based on a theory of WARN Act preemption. Nevertheless, defendants, in opposing remand, continue to rely on that theory without citing any authority in support thereof, and without addressing 29 U.S.C. § 2105, which indicates Congress did not intend that the WARN Act completely preempt the field. Moreover, defendants have failed to respond in any respect to plaintiffs' argument that defendants' answers demonstrate defendants were on notice that plaintiffs' complaint and First Amended Complaint were subject to removal on grounds of ERISA preemption.

Under such circumstances, the Court finds that plaintiffs are entitled to the fees necessarily incurred in filing the instant motion. Plaintiffs' counsel has filed declarations stating that those fees total \$1,800, (*see* Clapp Decl. at ¶¶ 6, 8; Clapp Supp. Decl. at ¶¶ 3), a sum the Court finds reasonable.

CONCLUSION

For the reasons expressed above,

1. Plaintiffs' motion to remand is hereby GRANTED, and the action is hereby REMANDED to the Superior Court of California for the County of San Francisco pursuant to 28 U.S.C. § 1447(c).

2. Plaintiffs' motion to strike is hereby DENIED.

2. Plaintiffs' request for fees and costs is hereby GRANTED, and plaintiffs are awarded the sum of \$1,800.

The Clerk shall close the file.

IT IS SO ORDERED.

N.D.Cal.,2001.

Smith v. Genstar Capital LLC.

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