

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEN LEWIS,

No C 08-3228 VRW

Plaintiff,

ORDER

v

THE CCPOA BENEFIT TRUST FUND
HEALTH AND WELFARE PLAN; THE
CCPOA BENEFIT TRUST FUND; THE
TRUST'S ADMINISTRATOR OF THE
CCPOA BENEFIT TRUST FUND; THE
BOARD OF TRUSTEES OF THE CCPOA
BENEFIT TRUST FUND,

Defendants.

_____ /

Plaintiff initiated this action in state court on July 3,
2008. The complaint alleged two causes of action under ERISA, 29
USC § 1001 et seq. Doc #1 at 10-15. Defendants removed to this
court. Id. Following removal, plaintiff filed two amended
complaints. Doc ##17, 22. Both amended complaints alleged causes

1 of action under the same ERISA provisions that were alleged in the
2 initial complaint in state court. 29 USC §§ 1132(a)(1)(B),
3 1132(a)(3). The court then granted defendants' motion for summary
4 adjudication of the standard of review, deciding that abuse of
5 discretion was appropriate. Doc #42.

6 After this ruling, plaintiff sought to file a fourth
7 complaint, but this time dropped the ERISA claim altogether,
8 asserting only two state law claims, and sought to remand to state
9 court. Doc #44, Exh A. Plaintiff predicated this maneuver on the
10 argument that defendant was a governmental plan exempt from ERISA
11 under 29 USC §§ 1003(b)(1), 1002(32).

12 Although the parties have briefed and argued whether
13 defendant is or is not a governmental plan exempt from ERISA, they
14 have paid little heed to the consequences of that determination,
15 save for whether remand is appropriate. The court requests the
16 parties to submit not later than April 27, memoranda not exceeding
17 ten pages addressing the following questions:

18 As the motion to amend is subject to the
19 presumption that leave "should freely [be] give[n]," FRCP
20 15(a)(2), but the motion to remand is subject to no such
21 presumption, does the FRCP 15(a)(2) presumption yield
22 upon a determination that the plan at issue is not a
23 governmental plan? Or, alternatively, should the outcome
24 of these two motions be considered independent of one
25 another?

26 If plaintiff is afforded leave to amend to drop
27 his ERISA claims, but this or another court determines
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the plan at issue is not a governmental plan, are
plaintiff's ERISA claims revived?

Is there a basis for this court to retain
plaintiff's state law claims if the motion to amend is
granted?

The parties should compare Crull v GEM Insurance Co, 58
F3d 1386 (9th Cir 1995) with Marx v Loral Corporation, 87 F3d 1049
(9th Cir 1996).

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge