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2 UNITED STATES DISTRICT COURT  
3 NORTHERN DISTRICT OF CALIFORNIA

4 BANK OF THE WEST,  
5 Plaintiff,

No. C 09-03280 MHP

6 v.

**MEMORANDUM & ORDER**

**Re: Plaintiff's Motion to Remand**

7 UBS AG, UBS SECURITIES LLC, UBS  
8 LIMITED, JAMES GIBBONS, and DOES 1-  
9 10  
10 Defendants.

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11  
12 Plaintiff Bank of the West ("plaintiff") brought suit against defendants UBS AG, UBS  
13 Securities LLC, UBS Limited (together "UBS") and James Gibbons ("Gibbons") (collectively  
14 "defendants") in the Superior Court of California for the County of San Francisco. Defendants  
15 removed the action to the United States District Court for the Northern District of California. Now  
16 before the court is plaintiff's motion to remand the action on grounds that there is no diversity  
17 jurisdiction. The court has considered the parties' arguments fully, and for the reasons set forth  
18 below, rules as follows.

19  
20 **BACKGROUND**

21 Plaintiff's claims arise from its investment in notes issued by a collateralized debt obligation  
22 ("CDO") known as TABS 2007-7 ("TABS"). Docket No. 1, Exh. A (Compl.) ¶¶ 2, 12. A CDO is  
23 an investment vehicle that offers investors the opportunity to receive a stream of payments based  
24 upon the performance of an underlying pool of assets. *Id.* ¶¶ 2, 20. Gibbons is a Senior Vice  
25 President of UBS Financial Services, Inc., a subsidiary of UBS. *Id.* ¶16. Plaintiff claims that in  
26 January 2007 defendant Gibbons contacted representatives from Bank of the West's Treasury  
27 Department to promote the TABS investment which was structured and marketed by defendant  
28 UBS. *Id.* ¶18. Plaintiff received a Preliminary Investor Presentation for TABS in early 2007 and an

1 Offering Memorandum on March 19, 2007. Id. ¶19. These materials described the structure of the  
2 TABS CDO and contained certain disclosures and statements regarding purported risks of the  
3 investment. Id. ¶19. Plaintiff alleges that it relied on these disclosures and statements in making its  
4 decision to invest in the TABS CDO. Id. ¶19. Plaintiff purchased \$100 million of notes at a price of  
5 \$94.82 million. Id. ¶23. In December 2007, plaintiff received notice that defendant UBS had  
6 exercised its right to direct liquidation of the collateral. Id. ¶51. Plaintiff alleges that it lost its  
7 entire investment in the TABS CDO. Id. ¶64. Plaintiff argues that the materials provided by  
8 defendants were replete with misleading statements and omissions intended by the defendants to  
9 deceive or defraud the plaintiff. Plaintiff alleges that it relied upon these statements to its detriment.  
10 The complaint alleges that each defendant engaged in fraud and negligent misrepresentation.

11 The defendants removed this action to this court on July 17, 2009 on the basis of diversity  
12 jurisdiction alleging that plaintiff fraudulently joined Gibbons. The parties do not dispute that Bank  
13 of the West both is incorporated and has its principal place of business in California, that Gibbons is  
14 a domiciliary of California, that UBS is a citizen of a state other than the state of California, and that  
15 this action does not involve any federal questions. See Docket No. 1 (Notice of Removal) ¶¶ 6, 10;  
16 Compl. ¶¶ 13-16. Plaintiff then filed this Motion to Remand on August 24, 2009, alleging lack of  
17 complete diversity because Gibbons and plaintiff are both citizens of California. Docket No. 22  
18 (Motion to Remand).

## 19

## 20 LEGAL STANDARD

21 Civil actions not involving a federal question are removable to a federal district court only if  
22 there is diversity of citizenship between the parties. 28 U.S.C. § 1332(a)(1). Section 1332 requires  
23 complete diversity of citizenship; each of the plaintiffs' citizenship must be diverse from each of the  
24 defendants' citizenships. Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68 (1996). The federal removal  
25 statute provides that an action filed in state court may be removed if the federal court would have  
26 original jurisdiction over the action had it been filed in federal court. 28 U.S.C. § 1441(a). The  
27 statute is strictly construed and the defendant seeking removal bears the burden of proving that  
28

1 federal jurisdiction exists; all doubts are resolved in favor of remand. Shamrock Oil & Gas Corp. v.  
2 Sheets, 313 U.S. 100, 108-09 (1941); California ex rel. Lockyer v. Dynege, Inc., 375 F.3d 831, 838  
3 (9<sup>th</sup> Cir. 2004), cert. denied, 544 U.S. 974 (2005); Gaus v. Miles, Inc., 980 F.2d 564 (9<sup>th</sup> Cir. 1992).

4 Defendants assert that despite these strict rules the California defendant in this case may be  
5 disregarded because he has been fraudulently joined. This puts into play the “fraudulent joinder” or  
6 “sham” defendant rule which holds that a defendant who has been fraudulently joined need not be  
7 considered in evaluating diversity of citizenship. Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318  
8 (9<sup>th</sup> Cir. 1998). A defendant asserting this rule bears the burden of proving fraudulent joinder. This  
9 burden is generally characterized as a “heavy” burden; indeed, some courts have referred to it as  
10 requiring “clear and convincing evidence”. Hamilton Materials, Inc. v. Dow Corning Co., 494 F.3d  
11 1203, 1206 (9<sup>th</sup> Cir. 2007) (citing Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir.  
12 1998)).

13 The Ninth Circuit has held that “[i]f the plaintiff fails to state a cause of action against a  
14 resident defendant, and failure is obvious according to the settled rules of the state, joinder of the  
15 resident defendant is fraudulent and the defendant’s presence in the lawsuit is ignored for purposes  
16 of determining diversity.” McCabe v. General Foods, 811 F.2d 1336, 1339 (9<sup>th</sup> Cir. 1987).  
17 Defendants must be able “to show that the individuals joined in the action cannot be liable on any  
18 theory.” Ritchey, 139 F.3d at 1318. The Ninth Circuit has recently held that if there is “any  
19 possibility that the state law might impose liability on a resident defendant under the circumstances  
20 alleged in the complaint, the federal court cannot find that joinder of the resident defendant was  
21 fraudulent, and remand is necessary.” Hunter v. Phillip Morris USA, \_\_\_ F.3d \_\_\_, 2009 WL  
22 3068161, at \*4 (9<sup>th</sup> Cir. Sept.28, 2009) (quoting Florence v. Crescent Res., LLC, 484 F.3d 1293,  
23 1299 (11<sup>th</sup> Cir. 2007)).

24 A defendant will be deemed fraudulently joined only if, “after all disputed questions of fact  
25 and all ambiguities in the controlling state law are resolved in plaintiff’s favor,” plaintiff could not  
26 recover against the non-diverse party. Id. (quoting Soo v. United Parcel Serv., Inc., 73 F. Supp. 2d  
27 1126 (N.D. Cal. 2001) (Breyer, J.)). In deciding whether a cause of action is stated, the court looks  
28

1 “only to a plaintiff’s pleadings to determine the removability.” Gould v. Mutual Life Ins. Co. of  
2 New York, 790 F.2d 769, 773 (9th Cir. 1986). Where fraudulent joinder is an issue, however, the  
3 court “will go somewhat further.” Ritchey, 139 F.3d at 1318. Accordingly, a “defendant seeking  
4 removal to the federal court is entitled to present the facts showing joinder to be fraudulent.”  
5 McCabe, 811 F.2d at 1339.

6  
7 DISCUSSION

8 In the case at bar, Gibbons is a resident of the state of California, the same state of which  
9 plaintiff is a citizen. Defendants assert that Gibbons should not be considered in evaluating diversity  
10 of citizenship because he was fraudulently joined. This question hinges on whether the complaint  
11 forecloses the possibility of a claim against Gibbons. UBS alleges that defendant Gibbons served as  
12 a “conduit through which certain UBS-prepared materials were forwarded to an investor” and that  
13 defendant Gibbons was not personally involved in the creation or preparation of the TABS structure  
14 or TABS materials. Notice of Removal ¶ 15. UBS also argues that due to Gibbons’ limited role as  
15 an agent of UBS, Gibbons would not have the requisite knowledge for fraud and therefore he cannot  
16 be personally liable. Engaging in this analysis at this stage would be premature; however, the court  
17 notes that a plaintiff’s decision to join employer and employee does not automatically constitute  
18 fraudulent joinder. “An agent or employee is always liable for his own torts, whether his employer  
19 is liable or not.” Shafer v. Berger, 107 Cal. App. 4th 54, 68 (2003) (quoting Holt v. Booth, 1 Cal.  
20 App. 4th 1074, 1080 n.5 (1991)). “In other words, when the agent commits a tort, such as ... fraud . .  
21 . , then . . . the agent [is] subject to liability in a civil suit for such wrongful conduct.” Shafer, 107  
22 Cal. App. 4th at 68 (quoting Mottola v. R.L. Kautz & Co., 199 Cal. App. 3d 98, 108 (1988)).

23 Simply

24 because plaintiff elected to join tortfeasors does not suggest plaintiff’s motive in joining them is  
25 fraudulent. The court finds that plaintiff’s claims against Gibbons are not so obviously meritless as  
26 to conclude that he has been fraudulently joined. There are possible claims of fraud and  
27 misrepresentation that can be stated against him and state law might impose liability. Because

1 Gibbons has not been fraudulently joined, his status as a California citizen destroys diversity  
2 between plaintiff and defendants. Accordingly, because this court lacks diversity jurisdiction over  
3 this matter, 28 U.S.C. § 1332(a)(1), remand to the Superior Court for the County of San Francisco is  
4 necessary.

5  
6 CONCLUSION

7 For the foregoing reasons, plaintiff's motion to remand to the Superior Court for the County  
8 of San Francisco is GRANTED. The Clerk of Court shall transmit forthwith a certified copy of this  
9 order to the Clerk of the Superior Court.

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11 IT IS SO ORDERED.

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13 Dated: October 6, 2009

  
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MARILYN HALL PATEL  
United States District Court Judge  
Northern District of California