

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

D. CUMMINS CORPORATION and)	Case No. 14-cv-935-SC
D. CUMMINS HOLDING LLC,)	
)	<u>ORDER REMANDING CASE</u>
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES FIDELITY AND)	
GUARANTY COMPANY, UNITED STATES)	
FIRE INSURANCE COMPANY, and DOES)	
1-100,)	
Defendants.)	
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I. INTRODUCTION

Plaintiffs D. Cummins Corporation ("Cummins Corp.") and D. Cummins Holding LLC ("Cummins Holding") brought this action in California Superior Court against Defendants United States Fidelity and Guaranty Company ("USF&G") and United States Fire Insurance Company ("US Fire") seeking declaratory judgment regarding the terms of Cummins Corp.'s insurance contracts. Defendants removed the action to federal court pursuant to 28 U.S.C. § 1441.

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1 Now before the Court is Plaintiffs' motion to remand the
2 matter to state court. The motion is fully briefed¹ and suitable
3 for determination without oral argument per Civil Local Rule 7-
4 1(b). For the reasons set forth below, Plaintiffs' motion is
5 GRANTED and the matter is REMANDED to the California Superior
6 Court.

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8 **II. BACKGROUND**

9 Cummins Corp., formerly known as Valley Asbestos Company, was
10 an installer of insulation products. Some of the products it
11 installed contained asbestos, and it now faces hundreds of asbestos
12 bodily injury lawsuits. ECF No. 1 ("Removal Not.") at 31-32.
13 Cummins Corp. is insured by Defendants. Id. at 33. Plaintiffs
14 brought this action in California state court seeking declaratory
15 relief. Primarily, Cummins Corp. seeks declarations that the
16 insurance policies provide defense and indemnity coverage for
17 liability arising out of claims alleging bodily injury as a result
18 of exposure to asbestos, and that the policies require Defendants
19 to defend and indemnify Cummins Corp. against such claims. Id. at
20 31. Defendants removed this action to federal court.

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22 **III. LEGAL STANDARD**

23 Defendants to a civil action brought in state court may remove
24 the matter to federal district court, so long as the district court
25 has original jurisdiction. 28 U.S.C. § 1441. "If at any time
26 before final judgment it appears that the district court lacks

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28 ¹ ECF Nos. 15 ("Mot."), 20 ("Opp."), 22 ("Reply").

1 subject matter jurisdiction, the case shall be remanded." 28
2 U.S.C.A. § 1447(c). Courts "strictly construe the removal statute
3 against removal jurisdiction," and "[f]ederal jurisdiction must be
4 rejected if there is any doubt as to the right of removal in the
5 first instance." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir.
6 1992).

7 Federal district courts have original jurisdiction over "all
8 civil actions arising under the Constitution, laws, or treaties of
9 the United States." 28 U.S.C. § 1331. They also have original
10 jurisdiction over civil actions where the amount in controversy
11 exceeds \$75,000 and is between citizens of different states. 28
12 U.S.C. § 1332.

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14 **IV. DISCUSSION**

15 The parties agree that federal question jurisdiction does not
16 exist in this case, as the sole cause of action is grounded in
17 California law. However, the parties differ as to whether
18 diversity jurisdiction exists.

19 **A. Diversity Jurisdiction**

20 Diversity jurisdiction exists in civil actions between
21 citizens of different states where the amount in controversy
22 exceeds \$75,000. There appears to be no dispute in this case as to
23 whether the amount in controversy requirement is met; the sole
24 issue in dispute is whether the parties are diverse. Diversity
25 jurisdiction under 28 U.S.C. § 1332(a) requires complete diversity:
26 no plaintiff can be from the same state as any defendant. Kuntz v.
27 Lamar Corp., 385 F.3d 1177, 1181 (9th Cir. 2004).

28 A corporation is a citizen of the state in which it is

1 incorporated and the state where it has its principal place of
2 business. 28 U.S.C. § 1332(c)(1); Johnson v. Columbia Properties
3 Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006). Plaintiff
4 Cummins Corp. is incorporated in California, and its principal
5 place of business is there as well. Id. at 31. Therefore Cummins
6 Corp. is a citizen of California only. USF&G is incorporated in
7 Connecticut with its principal place of business in Connecticut.
8 Id. at 3. USF&G is a citizen of Connecticut only. US Fire is
9 incorporated in Delaware with its principal place of business in
10 New Jersey. Id. at 31. US Fire is therefore a citizen of both
11 Delaware and New Jersey. Those parties are plainly diverse, as no
12 defendant has citizenship in California.

13 The diversity problem arises with Plaintiff Cummins Holding,
14 which is a limited liability company ("LLC"). An LLC is a citizen
15 of every state of which its members are citizens. Columbia
16 Properties, 437 F.3d at 899. Cummins Holding has two members:
17 Kyrtos Ltd. ("Kyrtos"), a corporation, and Raymond Tellini, an
18 individual. ECF No. 25-1 ("Tellini Decl.") ¶¶ 2-3. Kyrtos and Mr.
19 Tellini have been members of Cummins Holding since its inception.
20 Id. Kyrtos is incorporated in the British Virgin Islands, and its
21 business address is in Hong Kong. Id. ¶ 4. Kyrtos is therefore a
22 citizen of the United Kingdom and China. Mr. Tellini resides in
23 Connecticut and intends to remain there indefinitely. Id. ¶¶ 5-6.
24 He is therefore a citizen of Connecticut, and his citizenship is
25 imputed to Cummings Holding. Because Plaintiff Cummins Holding and
26 Defendant USF&G are both citizens of Connecticut, the parties to
27 this case are not diverse.

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1 **B. Fraudulent Joinder**

2 Defendants argue that Cummins Holding was fraudulently joined
3 and that its citizenship should be ignored for diversity purposes.
4 A defendant is fraudulently joined if the plaintiff's failure to
5 state a cause of action against that defendant is "obvious
6 according to the well-settled rules of the state." United Computer
7 Sys., Inc. v. AT&T Corp., 298 F.3d 756, 761 (9th Cir. 2002). A
8 fraudulently joined defendant's "presence in the lawsuit is ignored
9 for purposes of determining diversity" Morris v. Princess
10 Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001). Were the Court
11 to ignore Cummins Holding's citizenship, no plaintiff and no
12 defendant would be citizens of the same state, and complete
13 diversity would exist.

14 Defendants' claim that Cummins Holding is fraudulently joined
15 is based on the principle that an insurance policy's duties run
16 only to the insured. A number of California state courts have held
17 that only parties to an insurance contract may sue on it; the
18 owners of an insured corporation may not sue the insurer on the
19 corporation's behalf. See, e.g., C&H Foods Co. v. Hartford Ins.
20 Co., 163 Cal. App. 3d 1055, 1068 (Cal. Ct. App. 1984) (holding that
21 two 50 percent owners of corporation could not state a cause of
22 action against corporation's insurers); Gantman v. United Pac. Ins.
23 Co., 232 Cal. App. 3d 1560, 1566-69 (Cal. Ct. App. 1991) (members
24 of homeowners association lacked standing to sue on association's
25 insurance policy). Were Plaintiffs suing in a contract action on
26 the insurance policy or the express or implied covenants derived
27 therefrom, there would be no doubt that Cummins Holding lacks
28 standing. But those are not the causes of action that Plaintiffs

1 bring in this case.

2 Instead, Plaintiffs bring only a claim for declaratory relief
3 under California Code of Civil Procedure Section 1060. That
4 section permits "[a]ny person interested under a written
5 instrument . . . or under a contract" to bring an action "for a
6 declaration of his or her rights and duties in the premises,
7 including a determination of any question of construction or
8 validity arising under the instrument or contract." Cal. Civ.
9 Proc. Code § 1060. Plaintiffs argue that Cummins Holding, as the
10 owner of Cummins Corp. is a "person interested" in the resolution
11 of the questions of contract construction for which they seek
12 declaratory relief. Whether the owner of an insured corporation
13 qualifies as an interested person under Section 1060 appears to be
14 an unresolved question of California state law.²

15 Defendants cite two cases for the proposition that "a
16 shareholder such as [Cummins Holding] has no standing to maintain a
17 cause of action under the corporation's insurance policy, including
18 for declaratory relief." Opp. at 4-5. The first is Seretti v.
19 Superior National Insurance Co. 71 Cal. App. 4th 920 (Cal. Ct.
20 App. 1999). A close reading of Seretti, however, reveals that the
21 court's discussion of the shareholders' standing to sue a
22 corporation's insurer is limited to claims for bad faith and

23 _____
24 ² The declaratory relief statute is embodied in California's Code
25 of Civil Procedure but creates a cause of action. Federal courts
26 sitting in diversity apply the substantive law of the forum state
27 but follow federal procedural rules. Erie R.R. v. Tompkins, 304
28 U.S. 64, 78 (1938). Federal courts "have consistently applied
California Code of Civil Procedure § 1060 rather than the federal
Declaratory Judgment Act when sitting in diversity." Schwartz v.
U.S. Bank, Nat. Ass'n, CV 11-08754 MMM JCG, 2012 WL 10423214 at *15
(C.D. Cal. Aug. 3, 2012).

1 negligent infliction of emotional harm. Id. at 928-31. There is
2 no discussion of shareholders as interested persons under Section
3 1060 in that case. The second case Defendants cite is similarly
4 limited to bad faith and emotional distress claims in its
5 discussion of shareholder standing. C&H Foods, 163 Cal. App. 3d at
6 1068 (Cal. Ct. App. 1984). It too fails to analyze the "interested
7 person" standard of Section 1060.

8 With no California authority interpreting the "interested
9 person" standard in this context, the Court must conclude that
10 whether the shareholder of an insured corporation has standing to
11 sue the corporation's insurer for declaratory relief under Section
12 1060 is not a well-settled matter of California law. But the Court
13 can find fraudulent joinder only if Plaintiffs' failure to state a
14 cause of action against Cummins Holding is "obvious according to
15 the well-settled rules of the state." See United Computer Sys.,
16 298 F.3d at 761. The Court therefore finds that it is not obvious
17 according to California law that Plaintiffs fail to state a claim
18 against Cummins Holding. The Court cannot conclude that Cummins
19 Holding was fraudulently joined and accordingly cannot ignore its
20 presence in the case for diversity purposes. As discussed above,
21 Plaintiff Cummins Holding and Defendant USF&G share Connecticut
22 citizenship. Because complete diversity does not exist in this
23 case, this Court lacks subject-matter jurisdiction, and the case
24 must be remanded to state court.

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' motion and REMANDS this case to the Superior Court of California, County of Alameda.

IT IS SO ORDERED.

Dated: May 28, 2014


UNITED STATES DISTRICT JUDGE