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

BERKELEY RESEARCH GROUP, LLC, a California
limited liability company,

Plaintiff,

v.

No. C 16-07205 WHA

UNITED POTATO GROWERS OF AMERICA, INC.,
an Idaho corporation; UNITED POTATO GROWERS
OF IDAHO, INC., an Idaho corporation; IDAGRO,
INC., an Idaho corporation; ALBERT WADA, an
Idaho resident; WADA FARMS, INC., an Idaho
corporation; WADA FARMS POTATOES, INC., an
Idaho corporation; WADA FARMS MARKETING
GROUP, LLC, an Idaho limited liability company;
WADA-VAN ORDEN POTATOES, INC., an Idaho
corporation; CEDAR FARMS, INC., an Idaho
corporation; WADA FAMILY, LLC, an Idaho limited
liability company; PROFRESH, LLC, an Idaho limited
liability company; JEFF RAYBOULD, an Idaho
resident; RAYBOULD BROTHERS FARMS, LLC, an
Idaho limited liability company; MICHAEL
CRANNEY, an Idaho resident; CORNELISON
FARMS, INC., a former Idaho corporation; KEITH
CORNELISON, an Idaho resident; SNAKE RIVER
PLAINS POTATOES, INC., an Idaho corporation;
LANCE FUNK, an Idaho resident; PLEASANT
VALLEY POTATO, INC., an Idaho corporation; KCW
FARMS, INC., an Idaho corporation; KIM WAHLEN,
an Idaho resident; and DOES 1-100,

Defendants.

**ORDER REMANDING
ACTION, DENYING
PLAINTIFF'S AND
DEFENDANTS'
REQUESTS FOR
FEES AND COSTS,
AND DENYING
DEFENDANTS'
MOTION TO FILE
UNDER SEAL**

INTRODUCTION

Following jurisdictional discovery in this contract dispute, remand is unopposed.
Both parties request fees and costs pursuant to Section 1447 of Title 28 of the United States

1 Code. For the reasons stated herein, the action is **REMANDED** and both requests are **DENIED**.
2 Defendants' motion to file under seal is also **DENIED**.

3 **STATEMENT**

4 This action arises out of an expert litigation consulting contract between plaintiff
5 Berkeley Research Group and defendants — a group of potato farmers, farms, and growing
6 associations. Defendants hired BRG to provide expert services in connection with a
7 multi-district litigation in the United States District Court for the District of Idaho.*

8 On November 1, 2016, defendants filed a breach of contract action in the Idaho Fourth
9 Judicial District Court claiming BRG billed defendants inappropriately and provided substandard
10 quality work. On November 18, BRG filed this breach of contract action in the Superior Court
11 of California, County of Alameda, claiming defendants breached by not paying over eight-
12 hundred thousand dollars in outstanding invoices. BRG served defendants in this action over a
13 month *before* defendants served BRG in the Idaho action.

14 In late January 2017, BRG moved to dismiss the Idaho action pursuant to Idaho Rule of
15 Civil Procedure 12(b)(8) on the ground that another action was pending between the same parties
16 for the same cause. That motion was heard on March 1 and denied on April 12, finding costs
17 and delay would be minimized for the plaintiffs (our defendants) if the Idaho action proceeded,
18 and BRG would need to travel regardless of whether the action were in California or Idaho (Dkt.
19 No. 48-2 at 11). The Idaho judge, however, stayed the proceedings there pending the resolution
20 of the jurisdictional challenges in California (*ibid.*).

21 Prior to the Idaho motion practice and prior to serving BRG in the Idaho proceedings,
22 defendants removed this action to federal court on December 16 (Dkt. No. 1). In early
23 February 2017, BRG moved to remand for lack of subject-matter jurisdiction on diversity
24 grounds, alleging BRG did not share a state of citizenship with any of the defendants (Dkt.
25 No. 10). More than two weeks later, defendants filed their opposition to the motion to remand
26

27 _____
28 * Previously, only six of the twenty-one captioned defendants had been served in this action (Dkt.
No. 20 at 2). As of March 22, all remaining defendants have been served (Dkt. Nos. 28–42).

1 (Dkt. No. 14), and separately moved to dismiss for lack of personal jurisdiction or to transfer
2 venue (Dkt. No. 12).

3 Defendants opposed remand, citing the insufficiency of BRG’s supporting declarations
4 as to their Utah members’ citizenship (Dkt. No. 14). Defendants conceded that United Potato
5 Growers of America was a citizen of Utah and that a Utah member of BRG would destroy
6 diversity jurisdiction, due to BRG’s limited liability company status (Dkt. No. 14 at 4–5).

7 BRG provided new evidence of its members’ citizenship in its reply (Dkt. No. 17), and
8 defendants were given (and took) an opportunity to file a surreply to that evidence (Dkt. No. 19).
9 Following briefing and oral argument, an order held the motion to remand in abeyance and
10 permitted jurisdictional discovery limited to determining the citizenship of the four BRG
11 members who were purportedly citizens of Utah (Dkt. No. 25).

12 Defendants now file a statement announcing their nonopposition to remand and request
13 fees and costs pursuant to Section 1447(c) of Title 28 of the United States Code (Dkt. No. 44).
14 BRG also requests fees and costs pursuant to Section 1447(c) (Dkt. No. 46).

15 This order follows full briefing on BRG’s motion to remand and defendants’ motion to
16 dismiss; oral argument on the motion to remand; defendants’ statement requesting costs and fees;
17 BRG’s motion for costs and fees; and defendants’ opposition to BRG’s fee motion.

18 **ANALYSIS**

19 Defendants now concede that complete diversity is lacking (Dkt. No. 48 at 3). Because
20 there is no federal subject-matter jurisdiction, this action is **REMANDED** to the Superior Court of
21 California, County of Alameda.

22 Both parties now request costs and fees pursuant to Section 1447(c). Section 1447(c)
23 provides, in pertinent part: “An order remanding the case may require payment of just costs
24 and any actual expenses, including attorney fees, incurred as a result of the removal.” Fees are
25 appropriate “where the removing party lacked an objectively reasonable basis to seek removal.”
26 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Our court of appeals applied this
27 standard in *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008).
28

1 “The appropriate test for awarding fees under [Section] 1447(c) should recognize the
2 desire to deter removals sought for the purpose of prolonging litigation and imposing costs on
3 the opposing party, while not undermining Congress’ basic decision to afford defendants a right
4 to remove as a general matter, when the statutory criteria are satisfied.” *Martin*, 546 U.S. at 140.

5 **1. DEFENDANTS’ REQUEST FOR FEES AND COSTS.**

6 Defendants argue they are entitled to fees because BRG’s inadequate provision of
7 evidence forced defendants to oppose remand at substantial expense. Defendants rely on the
8 following portion of *Martin*:

9 In applying [the objectively reasonable basis test], district courts
10 retain discretion to consider whether unusual circumstances
11 warrant a departure from the rule in a given case. For instance,
12 a plaintiff’s delay in seeking remand or failure to disclose facts
13 necessary to determine jurisdiction may affect the decision to
14 award attorney’s fees. When a court exercises its discretion in this
15 manner, however, its reasons for departing from the general rule
16 should be faithful to the purposes of awarding fees under
17 [Section] 1447(c).

18 *Martin*, 546 U.S. at 141. There, the defendants lacked an objectively reasonable basis for their
19 removal but the plaintiffs were not awarded fees due to their fifteen-month delay in seeking
20 remand.

21 Defendants claim the exception is applicable here as well because BRG allegedly failed
22 to disclose facts necessary to determine jurisdiction until after jurisdictional discovery. Even if
23 *Martin* allows an award of fees to a losing party on remand, an award is not warranted here.
24 While a previous order found the evidence submitted by BRG warranted jurisdictional
25 discovery, it did not find BRG acted with the intention of prolonging litigation and imposing
26 costs on defendants. BRG offered to provide defendants with the driver’s licenses of BRG’s
27 Utah members, but defendants did not take BRG up on that offer, allegedly expending nearly
28 forty thousand dollars in costs and fees instead. As such, the equities guiding the discretion
discussed in *Martin* are not present here.

Moreover, defendants focus on BRG’s *post*-removal conduct only, ignoring their own
flawed decision to remove in the first place. Section 1447(c) is aimed at dissuading removals
carried out for the purpose of prolonging litigation and imposing costs on the opposing party.

1 *Martin*, 546 U.S. at 140. Defendants removed this action to federal court on December 16
2 without attempting to work with BRG to ascertain the citizenship of BRG’s members (Dkt.
3 No. 17-1 ¶ 2). On December 22, BRG notified defendants that the citizenship of some of its
4 limited liability members may ruin complete diversity, to which defendants responded, “[w]e are
5 aware of the LLC issue” (Dkt. No. 17-2). This conduct is contrary to the care Section 1447(c)
6 was meant to encourage. Defendants assert that “[a]ll of this could have been avoided if BRG
7 had more promptly and cooperatively disclosed facts necessary to determine jurisdiction” (Dkt.
8 No. 44). So too if defendants sought this information prior to removal.

9 In their reply, defendants cite a host of non-binding decisions to support their position
10 that a defendant may be awarded fees under Section 1447(c). While the decisions all awarded
11 fees to defendants on remand, each is inapplicable to the instant action.

12 *Vaughan v. McArthur Bros.*, 227 F. 364, 368–69 (8th Cir. 1915), awarded costs to the
13 defendant after finding one of the plaintiffs knew all along that he was a citizen of the same state
14 as the defendant and only sought remand eight years after removal. *Duarte v. Donnelley*,
15 266 F. Supp. 380, 384 (D. Haw. Apr. 5, 1967) (Judge Martin Pence), ordered plaintiffs to pay
16 an award of costs once it was revealed that the potential damages were far less than the
17 jurisdictional minimum and plaintiffs had had ample time and responsibility to amend the
18 complaint to the proper amount. *Barracough v. ADP Automotive Claims Services, Inc.*,
19 818 F. Supp. 1310, 1313 (N.D. Cal. Apr. 19, 1993) (Judge Vaughn Walker), awarded the
20 defendant costs and fees on remand based on the plaintiff’s own admission that the only federal
21 claim pled was frivolous. *Brooks v. PrePaid Legal Services, Inc.*, 153 F. Supp. 2d 1299,
22 1302–03 (M.D. Ala. Aug. 8, 2001) (Judge Ira DeMent), awarded costs to the defendant when
23 the plaintiffs sought to limit their damages to below the jurisdictional amount after removal.
24 *Shrader v. Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 369–71 (E.D. Pa. Mar. 9, 1995)
25 (Judge Stewart Dalzell), awarded costs and fees to the defendant when, after removal, the
26 plaintiff changed her story, claiming a defendant she originally asserted was nominal was not
27 actually nominal, thus destroying complete diversity and requiring remand.
28

1 Defendants also rely on *Micrometl Corp. v. Tranzact Technologies, Inc.*, 656 F.3d 467,
2 470 (7th Cir. 2011). Although *Micrometl* did *not* award the defendant costs and fees, it stated in
3 dicta that Section 1447(c) did not contain a party-based limitation. There, the damages were
4 below the jurisdictional minimum. Ultimately, *Micrometl* found an award for the defendants
5 was inappropriate because nothing in the record suggested that plaintiff’s counsel inflated its
6 damages in the state court complaint to dupe defendant into removing, or otherwise exhibited
7 bad faith throughout the proceedings. Finally, defendants rely on *Davis v. Simmons*, 2014
8 WL 3698002, at *10 (N.D. Iowa Jul. 24, 2014) (Judge Linda Reade), which found a defendant
9 may recover fees under Section 1447(c) “if a plaintiff’s conduct that caused the defendant to
10 improperly remove the case was objectively unreasonable” There, the plaintiff’s complaint
11 misled her own name and address. The defendant learned of the plaintiff’s misrepresentations
12 nine months after the defendant removed the action and immediately moved to remand the
13 action. *Davis* found the plaintiff’s misrepresentations unreasonable and awarded the defendant
14 costs and fees incurred as a result of the removal.

15 Here, BRG did not make misrepresentations, plead frivolous claims, engage in forum
16 manipulation, or otherwise provoke an award of fees for defendants. The only “unreasonable
17 conduct” defendants point to is BRG’s allegedly defective declarations and alleged obstructive
18 behavior. The record does not persuasively show BRG was obstructive. It does, however, show
19 that defendants hastily removed this action to federal court and took no action on at least one
20 offer by BRG to provide domicile evidence informally. Defendants shall bear their own costs
21 and fees.

22 **3. BRG’S MOTION FOR FEES AND COSTS.**

23 BRG audaciously makes its own request for fees and costs. The need for jurisdictional
24 discovery alone suggests defendants’ removal was objectively reasonable and that BRG’s
25 motion should be denied.

26 BRG’s argument is two-part. *First*, BRG argues defendants lacked an objectively
27 reasonable basis to remove, primarily because defendants should have inquired further into
28 the citizenship of BRG’s limited liability members. Our court of appeals in *Lussier*, 518 F.3d

1 at 1065, held that “[r]emoval is not objectively unreasonable solely because the removing party’s
2 arguments lack merit, or else attorney’s fees would always be awarded whenever remand is
3 granted.” Here, BRG’s complaint only listed BRG as a Nevada limited liability company with
4 its principal place of business in Emeryville, California (Compl. ¶ 1). Given the thirty-day limit
5 on removal, it was not objectively unreasonable for defendants to remove based on this
6 information in the complaint. BRG could have headed off any potential conflict by providing
7 defendants with proof of its members’ Utah citizenship, rather than simply stating there may be a
8 problem, offering to provide members’ driver’s licenses, and waiting for defendants to respond.
9 Instead, BRG allegedly incurred over sixty thousand dollars drafting and arguing the motion to
10 remand, complying with written discovery, responding to supplemental discovery requests, and
11 now opposing defendants’ request for fees. BRG, like defendants, is responsible for the expense
12 it could have prevented before engaging in this four-month long remand dispute.

13 *Second*, BRG relies on the same “unusual circumstances” exception in *Martin* to argue
14 that even if defendants had an objectively reasonable basis to remove, defendants’ conduct
15 following removal would justify an award of costs and fees. That is, defendants’ insistence on
16 establishing satisfactory proof of the Utah BRG members’ domicile should, according to BRG,
17 stand as the basis for BRG’s award under Section 1447(c). The order permitting jurisdictional
18 discovery sufficiently explained how BRG’s lawyer-prepared and artfully-worded declarations
19 fell short of proving their Utah members were domiciled in Utah (Dkt. No. 25). BRG, like
20 defendants, will bear its own fees and costs associated with defendants’ removal.

21 **4. DEFENDANTS’ MOTION TO DISMISS.**

22 Defendants also ask that their motion to dismiss be revisited. Both parties now agree
23 that there is no federal subject-matter jurisdiction, so this Court cannot entertain the motion to
24 dismiss.

25 **5. DEFENDANTS’ MOTION TO FILE CERTAIN DOCUMENTS UNDER SEAL.**

26 Defendants’ move to file under seal (1) the Buy Sell Agreement between BRG and one
27 of its Utah members, Vernon Calder, (2) the Director Agreement between BRG and Calder, and
28 (3) the Amended & Restated Limited Liability Company Operating Agreement of Berkeley


1 Research Group, LLC. The parties conferred and designated these documents as confidential.
2 BRG filed a declaration pursuant to Local Rule 79-5(e), which requires the designating party to
3 show the documents are sealable. Under Rule 79-5(b), a document is sealable if it is privileged,
4 protectable as a trade secret, or otherwise entitled to protection under the law. BRG's
5 declaration states the documents "contain confidential and proprietary information regarding the
6 ownership structure, management, and business practices of BRG, as well as the terms of
7 membership and employment of an individual member" (Dkt. No. 45 ¶ 5). BRG's declaration
8 hints, but does not allege, that the documents are protectable as trade secrets, or that they are
9 otherwise entitled to protection under the law, as required by Rule 79-5(b). Defendants' motion
10 to file these documents under seal, therefore, is **DENIED**.

11 **CONCLUSION**

12 For the foregoing reasons, BRG's motion to remand is **GRANTED**, both defendants'
13 and BRG's requests for costs and fees are **DENIED**, and defendants' motion to file under seal is
14 **DENIED**.

15
16 **IT IS SO ORDERED.**

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18 Dated: May 2, 2017.

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21 WILLIAM ALSUP
22 UNITED STATES DISTRICT JUDGE
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