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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EAST BAY MUNICIPAL UTILITY  
DISTRICT,

No. C 09-0614 PJH

Plaintiff,

**ORDER DENYING MOTION  
TO REMAND**

v.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA,

Defendant.

\_\_\_\_\_ /

Before the court is plaintiff East Bay Municipal Utility District's ("EBMUD") motion to remand, which defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") opposes. Because the court finds this matter suitable for decision without oral argument, the hearing date of April 15, 2009 is VACATED pursuant to Civil Local Rule 7-1(b). Having carefully read the parties' papers and considered the relevant legal authority, the court hereby DENIES EBMUD's motion to remand, for the reasons stated below.

**BACKGROUND**

The following facts are undisputed. On October 31, 2008, EBMUD commenced the instant action in the Superior Court of California, County of Contra Costa, alleging causes of action for breach of contract and for breach of the covenant of good faith and fair dealing. EBMUD's complaint named "National Union Fire Insurance Company" as the defendant, a nonexistent corporate entity. On December 30, 2008, EBMUD's process server personally served a copy of the summons and complaint on Becky DeGeorge of Corporation Service Company ("CSC")-National Union's authorized agent for receiving service of process on its behalf in California-at 2730 Gateway Oaks Drive, Suite 100,

1 Sacramento, CA 95833. On that same day, CSC notified EBMUD's counsel that service of  
2 process was being returned because "the name of the company for whom service is  
3 directed MUST BE IDENTICAL to the company name on file with the Secretary of State, or  
4 other appropriate state agency." EBMUD filed a proof of service in state court on January  
5 9, 2009. The proof of service states that the party served was "National Union Fire  
6 Insurance Company."

7 On January 14, 2009, EBMUD filed an amended complaint, naming "National Union  
8 Fire Insurance Company of Pittsburgh, PA" as the defendant. EBMUD's complaint was  
9 otherwise unchanged. On January 15, 2009, EBMUD's process server personally served a  
10 copy of the amended summons and complaint on Becky DeGeorge of CSC. EBMUD filed  
11 a proof of service in state court on February 4, 2009. The proof of service states that the  
12 party served was "National Union Fire Insurance Company of Pittsburgh, PA."

13 On February 11, 2009, National Union filed a Notice of Removal on the basis of  
14 diversity jurisdiction. In its filing, National Union stated that formal service of process was  
15 completed as of January 15, 2009, and thus its request was timely insofar as fewer than 30  
16 days had elapsed prior to the filing of the removal notice. On March 11, 2009, EBMUD filed  
17 the instant motion to remand.

## 18 **DISCUSSION**

19 EBMUD argues that remand is appropriate because National Union's removal notice  
20 was untimely filed insofar as it was filed more than 30 days after service of the original  
21 summons and complaint on December 30, 2008. National Union counters by arguing that  
22 its removal notice was timely filed on February 11, 2009, because service of the original  
23 summons and complaint was not properly effected insofar as EBMUD failed to name  
24 "National Union Fire Insurance Company of Pittsburgh, PA" as the defendant. National  
25 Union maintains that EBMUD properly effected service of the amended summons and  
26 complaint on January 15, 2009, thereby triggering the 30-day period to remove this case  
27 from state court to federal court.

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1 Because National Union filed its removal notice within 30 days after service of the  
2 amended summons and complaint,<sup>1</sup> the sole issue presented is whether EBMUD properly  
3 effected service of the original summons and complaint on National Union on December  
4 30, 2008.

5 A. Standard

6 “[A]ny civil action brought in a State court of which the district courts of the United  
7 States have original jurisdiction, may be removed by the defendant or the defendants, to  
8 the district court of the United States for the district and division embracing the place where  
9 such action is pending.” 28 U.S.C. § 1441(a). A district court has original federal  
10 jurisdiction over an action founded on a claim or right arising under the Constitution,  
11 treaties or laws of the United States (federal question jurisdiction), 28 U.S.C. § 1331, or an  
12 action between citizens of two different states and with a matter in controversy exceeding  
13 \$75,000 (diversity jurisdiction), 28 U.S.C. § 1332. The burden of establishing federal  
14 jurisdiction rests on the removing party, and the removal statute is strictly construed against  
15 removal jurisdiction. Duncan v. Stuezle, 76 F.3d 1480, 1485 (9th Cir. 1996); Emrich v.  
16 Touche-Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988).

17 For a notice of removal to be timely, it “shall be filed within thirty days after the  
18 receipt by the defendant, through service or otherwise, of a copy of the initial pleading  
19 setting forth the claim for relief upon which such action or proceeding is based . . .” 28  
20 U.S.C. § 1446(b). “[A] named defendant’s time to remove is triggered by simultaneous  
21 service of the summons and complaint, or receipt of the complaint, ‘through service or  
22 otherwise,’ after and apart from service of the summons, but not by mere receipt of the  
23 complaint unattended by any formal service.” Murphy Bros. v. Michetti Pipe Stringing, 526  
24 U.S. 344, 347-48 (1999). In reaching this conclusion, the Supreme Court read Congress’  
25 provisions for removal in light of the following bedrock principal: “An individual or entity  
26 named as a defendant is not obliged to engage in litigation unless notified of the action, and  
27 brought under a court’s authority, by formal process.” Id. at 347. “In the absence of service  
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<sup>1</sup> National Union filed its removal notice 27 days after service of the amended summons and complaint on January 15, 2009.

1 of process . . . a court ordinarily may not exercise power over a party the complaint names  
2 as a defendant.” Id. at 350. “[O]ne becomes a party officially, and is required to take action  
3 in that capacity, only upon service of a summons or other authority-asserting measure  
4 stating the time within which the party served must appear and defend.” Id. “Unless a  
5 named defendant agrees to waive service, the summons continues to function as the *sine*  
6 *qua non* directing an individual or entity to participate in a civil action or forgo procedural or  
7 substantive rights.” Id. at 351.

8 The sufficiency of process in federal courts is determined by Rule 4 of the Federal  
9 Rules of Civil Procedure. Rule 4(h) provides two ways of effecting service on a  
10 corporation. First, service may be accomplished in accordance with Rule 4(e)(1), which  
11 allows service according to the procedures of the state in which the federal court sits.  
12 Second, service may be accomplished “by delivering a copy of the summons and of the  
13 complaint to an officer, a managing or general agent, or any other agent authorized by  
14 appointment or by law to receive service of process . . .” Fed.R.Civ.P. 4(h)(1). Once  
15 service is challenged, the plaintiff bears the burden of establishing that service was valid  
16 under Rule 4. See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

17 Service on a corporation under California law is effectuated by delivery of summons  
18 and complaint to some authorized person on behalf of the corporation. Dill v. Berquist  
19 Const. Co., Inc., 24 Cal.App.4th 1426, 1437 (1994).<sup>2</sup> A corporation may be served “by  
20 delivering a copy of the summons and complaint . . . [t]o the person designated as agent for  
21 service of process . . .” Cal.Code Civ. Proc. § 416.10(a). “It is well settled that strict  
22 compliance with statutes governing service of process is not required. Rather, in deciding  
23 whether service was valid, the statutory provisions regarding service of process should be  
24 liberally construed to effectuate service and uphold the jurisdiction of the court if actual  
25 notice has been received by the defendant.” Summers v. McClanahan, 140 Cal.App.4th  
26 403, 410-11 (2006); see also Dill, 24 Cal.App.4th at 1436-37, 1439 n. 12 (Defining

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28 <sup>2</sup> In California, “[a] civil action is commenced by filing a complaint with the court.”  
Cal.Code Civ. Proc. § 411.10. “[T]he court in which an action is pending has jurisdiction over  
a party from the time summons is served on him as provided by Chapter 4 (commencing with  
Section 413.10).” Cal.Code. Civ. Proc. § 410.50.

1 “substantial compliance” as “ ‘actual compliance in respect to the substance essential to  
2 every reasonable objective of the statute.’ ”). Once service is challenged, the plaintiff bears  
3 the burden of establishing that service was valid under § 416.10. See Dill, 24 Cal.App.4th  
4 at 1439-40.

5 Because service on National Union was attempted on December 30, 2008, before  
6 removal from state court, the sufficiency of service of process is determined under state  
7 law. Lee v. City of Beaumont, 12 F.3d 933, 936-37 (9th Cir. 1993), *overruled on a different*  
8 *ground*, California Dept. of Water Resources v. Powerex Corp., 533 F.3d 1087, 1091 (9th  
9 Cir. 2008).

10 B. Analysis

11 The parties do not dispute that CSC refused to accept service of the original  
12 summons and complaint on behalf of National Union on the basis that EBMUD did not  
13 name “National Union Fire Insurance Company of Pittsburgh, PA” as the defendant in this  
14 action. Rather, the parties dispute whether service was nonetheless valid under California  
15 law. EBMUD, for its part, argues that service was valid because it substantially complied  
16 with California’s service statutes. National Union counters by arguing that service was  
17 invalid because it never received a copy of the original summons and complaint, nor was it  
18 otherwise notified of this lawsuit until service of the amended summons and complaint on  
19 January 15, 2009. The court agrees with National Union.

20 The court finds that EBMUD did not properly effect service of the original summons  
21 and complaint on National Union under California law to trigger the 30-day removal period.  
22 It is undisputed that CSC refused to accept service of the original summons and complaint  
23 on behalf of National Union and returned service to EBMUD’s counsel unexecuted.  
24 Furthermore, the uncontroverted evidence before the court indicates that National Union  
25 did not actually receive a copy of the original summons and complaint. See Decl. of Anne  
26 Winnick; Decl. of James Grier. EBMUD offered no evidence contradicting National Union’s  
27 contention that it did not obtain actual knowledge of this lawsuit until the amended  
28 summons and complaint were served on January 15, 2009. While minor errors in the name  
of a defendant, through misspelling or other error do not render the summons substantially

1 defective when the summons and complaint are actually received by the defendant and the  
2 defendant is not misled by the error, see Billings v. Edwards, 91 Cal.App.3d 826, 830-31  
3 (1979), the consequences of the error are very different when, as here, incorrect spelling  
4 prevents discovery of the filing. This is because the purpose of service is to give notice of  
5 the pending litigation to defendant such that counsel can be retained and defendant's  
6 interests protected.

7 EBMUD has neither presented compelling argument nor citation to controlling  
8 authority demonstrating that it substantially complied with § 416.10. EBMUD, for instance,  
9 did not cite to any case finding substantial compliance with § 416.10 where, as here,  
10 service was returned unexecuted by a corporation's authorized agent for service of process  
11 and the corporation did not have actual notice of the lawsuit through receipt of a copy of the  
12 summons and complaint. To the extent that EBMUD relies upon Billings, 91 Cal.App.3d  
13 826 and Cory v. Crocker National Bank, 123 Cal.App.3d 665 (1981) in support of its  
14 argument that it substantially complied with § 416.10, because the omission of "of  
15 Pittsburgh, PA" from defendant's name constitutes a minor error that is "ineffective to  
16 undermine otherwise valid service on National Union," the court finds such reliance  
17 misplaced. These cases are factually distinguishable and therefore inapposite. Neither  
18 case involved the circumstances presented here; namely, a lack of actual notice of the  
19 pending litigation due to the refusal of the corporation's authorized agent to accept service.  
20 In short, because EBMUD has failed to demonstrate substantial compliance with § 416.10,  
21 the court concludes that EBMUD failed to sustain its burden to show that service was  
22 properly effectuated under California law.

23 To the extent that EBMUD asks this court to find substantial compliance on the basis  
24 that CSC had no "valid excuse" to reject service of the original summons and complaint, the  
25 court find this argument unpersuasive. First, the court is not persuaded by EBMUD's  
26 assertion that CSC should have known that EBMUD sought to sue National Union Fire  
27 Insurance Company of Pittsburgh, PA, rather than two other entities that share a similar  
28 name to National Union Fire Insurance Company of Pittsburgh, PA-National Union Fire  
Insurance Company of Louisiana and National Union Fire Insurance Company of Vermont-

1 because National Union Fire Insurance Company of Pittsburgh, PA is “presumably the only  
2 company among the three that [has] a registered agent of process in California.” Even  
3 assuming that this is true, EBMUD did not cite to any authority supporting the proposition  
4 that a corporation’s authorized agent for service of process is required to accept service on  
5 behalf of an entity it does not represent. Indeed, it is undisputed that “National Union Fire  
6 Insurance Company” is a nonexistent corporate entity.

7         Second, the court is not persuaded by EBMUD’s assertion that CSC could have  
8 easily verified the identity of the named defendant by reading the letters attached to the  
9 complaint, identifying the named defendant as National Union Fire Insurance Company of  
10 Pittsburgh, PA. EBMUD did not cite to any authority supporting the proposition that a  
11 corporation’s authorized agent for service of process is required to read letters attached to  
12 a complaint to ascertain the “real” identity of the named defendant when the name of the  
13 defendant plaintiff seeks to sue is plainly stated on the face of the summons and complaint.  
14 To the extent that EBMUD urges the court to adopt such a duty, the court declines to do so.

15         Finally, the court notes that while EBMUD maintains that CSC had no valid excuse  
16 to reject service, it is clear to the court that EBMUD could have averted this entire issue by  
17 exercising a modicum of diligence by checking with the Secretary of State to verify National  
18 Union’s exact name before filing the instant action.<sup>3</sup> Indeed, as the master of its complaint,  
19 it is EBMUD that has no valid excuse for naming the wrong defendant. This is particularly  
20 so given that EBMUD was readily aware of National Union’s correct name, as evidenced by  
21 the letters attached to the complaint. EBMUD’s attempt to gain a tactical advantage out of  
22 its own lack of due diligence and care is not well-taken.

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25         <sup>3</sup> A search of the California Secretary of State’s website using the term “National Union  
26 Fire Insurance Company” produced one result: “National Union Fire Insurance Company of  
27 Pittsburgh, PA.” In opposition to EBMUD’s motion, National Union has submitted a document  
28 in the form of an exhibit, attached to the declaration of Kevin McCurdy, identifying information  
available from the Secretary of State regarding National Union. Although National Union did  
not ask the court to take judicial notice of this information, the court will nonetheless do so  
given that this information is from an official government website and its contents are not  
reasonably in dispute. Fed.R.Evid. 201(b)(2); see also Denius v. Dunlap, 330 F.3d 919,  
926-27 (7th Cir. 2003) (taking judicial notice of information on official government website); Cali  
v. E. Coast Aviation Servs., Ltd., 178 F.Supp.2d 276, 287 n. 6 (E.D.N.Y. 2001) (taking judicial  
notice of documents from Pennsylvania state agencies and Federal Aviation Administration).

1 In sum, because EBMUD has not met its burden of showing that service of the  
2 original summons and complaint was properly effected under California law, the court  
3 concludes that National Union's removal notice was timely filed. The 30-day removal  
4 period did not commence until National Union's authorized agent for service of process was  
5 properly served with a copy of the amended summons and complaint on January 15, 2009.  
6 National Union timely filed its removal notice 27 days later on February 11, 2009.  
7 Accordingly, EBMUD's motion to remand is DENIED.<sup>4</sup>

8 **CONCLUSION**

9 For the reasons stated above, the court hereby DENIES EBMUD's motion to  
10 remand.

11 **IT IS SO ORDERED.**

12 Dated: April 10, 2009

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15 PHYLLIS J. HAMILTON  
16 United States District Court  
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28 <sup>4</sup> Because the court finds that National Union's removal notice was timely filed, the court need not consider National Union's alternative argument in opposition to EBMUD's motion to remand.