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NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

18
BW

ROBERT A. BROWN, an individual)
)
Plaintiff,)
)
v.)
)
GOOGLE, INC.; PAYROLLING.COM;)
MARISSA MAYER; and DOES 1 through)
20,)
)
Defendants.)

No. C05 01779 PVT
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFF
ROBERT A. BROWN'S MOTION TO REMAND**

Date: July 12, 2005
Time: 10:00 a.m.
Dept.: 5
Judge: Hon. Patricia V. Trumbull

BY FAX

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MEMORANDUM OF POINTS AND AUTHORITIES

1 I. INTRODUCTION

2 Plaintiff Robert A. Brown respectfully submits the following points and authorities in
3 support of his Motion to Remand this action back to the Santa Clara Superior Court.

4 II. FACTUAL BACKGROUND

5 Plaintiff Robert A. Brown ("Brown") filed his Complaint against Google, Inc. ("Google"),
6 Paryolling.com ("Payrolling") and Marissa Mayer ("Mayer") on February 24, 2005. Brown alleged
7 eleven causes of action in his Complaint, all based upon the laws of the State of California
8 pertaining to wage & hour, employment and contract. On April 29, 2005, Google filed a Notice of
9 Removal of Action, under 28 U.S.C. §1441 (original jurisdiction). Google claims Plaintiff's Eighth
10 Cause of Action - for breach of contract - raises a federal question and is preempted by ERISA
11 because it relates to Google's employee benefits plan. (Not. of Removal, §3, 2:6-4:8.) Specifically,
12 Google claims that Brown's Eighth Cause of Action "is preempted by ERISA because it "relates to"
13 [Google's] employee benefit plans" through Brown's claim for certain ERISA benefits as damages
14 for his contract claim. (Not. of Removal, §3, 3:23-4:3). Google does not claim that any other cause
15 of action alleged by Brown is preempted by Federal law or is one over which this Court has
16 original jurisdiction.

17 The specific allegations of Brown's Eight Cause of Action that are pertinent to this Court's
18 jurisdiction analysis are as follows:

19 92. Plaintiff Brown alleges that, at all times that he worked for
20 Defendant Google, between September 3, 2002, and May 14, 2004, Google was his
21 "employer", as that term is defined in California Wage Order 9 and 8 CCR
22 §§11010, et seq., including §11090, subdiv. 2(F), and he was Google's "employee"
23 as such term is defined by the DLSE Enforcement Policies & Interpretation
24 Manual §28.3.2.1 and also as that term is defined under the criteria enunciated
25 and adopted in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48
26 Cal.3d 341.

27 102. Through its custom and practice, through its employee manual
28 and through various other writings, including its website, Google made express
29 promises to provide all of its employees with certain compensation, such as ten
30 (10) paid holidays per year, fifteen (15) paid vacation days for the first year of
31 employment, twenty (20) vacation days for the second year of employment, paid
32 sick days as necessary, full premium coverage medical and dental insurance
33 plans from the date of hire, matched contribution employee 401(k) plan,

1 eligibility for stock options and bonuses.

2 103. As his employer, Defendant Google failed to pay Plaintiff Brown
3 the additional benefit wages they promised to provide to all other employees
4 such that the current value of all such benefit wages is currently owing to Plaintiff
5 Brown.

6 106. WHEREFORE, Plaintiff prays for judgment against defendants in
7 the amount of the value of the vacation days, holidays, sick days, medical
8 premiums, dental premiums, profit sharing, stock options and such other
9 identified damages and such other relief permitted by law, including any interest
10 and attorney's fees, as more fully set forth below.

11 (Brown's Complaint at 16:16-22, 17:21-18:4 & 18:22-25.)

12 **III. LEGAL ARGUMENT**

13 Any removal of a State complaint, under the guise of 28 U.S.C. §1441, requires that such
14 complaint contain one or more claims that are within the original subject matter jurisdiction of the
15 Federal court. *Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir. 1998); *Abraham v. Norcal Waste Systems*
16 *Inc.*, 265 F.3d 811, 819 (9th Cir. 2001). For a district court to have original subject matter
17 jurisdiction, the complaint must contain a claim that "aris[es] under the Constitution, laws, or
18 treaties of the United States." 28 U.S.C. §§1331, 1441(b). A claim or cause of action only "arises
19 under" federal law "when the plaintiff's well-pleaded complaint raises issues of federal law."
20 *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

21 One way that a removal of a state complaint is proper on the basis of original federal
22 jurisdiction is when the existence of a federal claim or question is evident from the face of the well-
23 pleaded complaint. *Metropolitan*, 481 U.S. at 63-64; *Abraham*, 265 F.3d at 819. In such case, "a right
24 or immunity created by the Constitution or laws of the United States must be an element, and an
25 essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936).

26 Further, original federal jurisdiction is unavailable on the claim a complaint "arises under"
federal law "unless it appears that some substantial, disputed question of federal law is a
necessary element of one of the well-pleaded state claims." *Franchise Tax Bd. for the State of Cal. v.*
Construction Laborers Vacation Trust for So. Cal., 463 U.S. 1, 7, 13 (1983). When no federal claim or
question is evident from the face of the complaint, original jurisdiction removal can only be proper

1 when the state law claim is so completely preempted by an area of federal law that such claim is
2 necessarily deemed to "arise under" federal law. *Metropolitan*, 481 U.S. at 63-64; *Abraham*, 265 F.3d
3 at 819.

4 In the context of an original jurisdiction removal based upon claimed ERISA preemption,
5 "complete preemption can be invoked only when two conditions are satisfied: (1) ERISA expressly
6 preempts the state law cause of action under 29 U.S.C. §§ 1144(a) (i.e. 'conflict preemption') and (2)
7 that cause of action is encompassed by the scope of the civil enforcement provision of ERISA, 29
8 U.S.C. §§ 1132(a) (i.e. 'displacement')". *Abraham*, 265 F.3d at 819, citing *Metropolitan*, 481 U.S. at 60
9 and *Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 201 F.3d 1212, 1216 (9th Cir. 2000), amended
10 by *Rutledge v. Seyfarth, Shaw, Fairweather, & Geraldson*, 208 F.3d 1170 (9th Cir. 2000). See also, *Cal.*
11 *Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 336 (1997) [hereinafter
12 *Dillingham*] [Justice Scalia confirmed that, in ERISA preemption cases, the Supreme Court applies
13 "ordinary field pre-emption, and, of course, ordinary conflict pre-emption".]; *Toumajian*, 135 F.3d
14 at 654. "If both conditions are not met, however, the federal court does not have subject matter
15 jurisdiction and the matter should be remanded." *Toumajian*, 135 F.3d at 654. Neither condition
16 can be met in this case.

17 **A. Brown's Claims Do Not Have "Reference To" or "Connection With" ERISA.**

18 The first condition of express or "conflict" preemption can only be met when the state law
19 claims are determined to "relate to" an ERISA benefit plan within the meaning of 29 U.S.C.
20 §1144(a). Despite a historically broad interpretation of "relate to" (in favor of a finding of
21 preemption), recent judicial guidance has "markedly narrowed" the scope of its application.
22 *Toumajian*, 135 F.3d at 653 n. 3.

23 In this case, remand is required upon first inquiry as the preemptive power of ERISA does
24 not refer to state laws relating to "employee benefits," but only to state laws relating to "employee
25 benefit plans." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 (1987). Brown's Eighth Cause of
26 Action for breach of contract relates only to the recovery of predetermined *benefits* under the

1 contract and does not trigger interpretation or manipulation of the benefits *plan*. As explained by
 2 *Fort Halifax*, nothing in the case law on ERISA preemption supports a position that “the word
 3 ‘plan’ should in effect be read out of the statute.” *Id.* “The words “benefit” and “plan” are used
 4 separately throughout ERISA ... [g]iven the basic difference between a ‘benefit’ and a ‘plan,’
 5 Congress’ choice of language is significant in its pre-emption of only the latter. *Id.* Congress’
 6 decision “to legislate with respect to plans rather than to benefits” is directly supported by both
 7 the purpose of the pre-emption section and the regulatory scheme “as a whole”. *Id.* Mr. Brown’s
 8 Eighth Cause of Action relates only to benefits – and then only in the context of damages – and
 9 does not relate to any aspect of a benefit *plan* itself. For this reason alone, Brown’s claim for
 10 benefits as damages for breach of his State law contract claim is not preempted by ERISA and
 11 must be remanded.

12 Remand is further required as plaintiff’s State law contract claim does not conflict with any
 13 provision of ERISA and does not frustrate any purpose of Congress in devising the comprehensive
 14 ERISA scheme. In an attempt by Courts to refine the admittedly vague nature of “relate to”,
 15 modern precedent only permits a finding of conflict preemption when a state law claim has
 16 “reference to” or “connection with” the ERISA benefit plan. *Blue Cross of Cal. v. Anesthesia Care*
 17 *Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1052 (9th Cir. 1999), citing *Dillingham*, 519 U.S. at 324. See
 18 also, *Abraham*, 265 F.3d at 820. Conflict preemption with respect to ERISA has thus become a
 19 “two-step analysis” in which the court must determine, “(1) whether California law conflicts with
 20 any specific provision of ERISA and then (2) whether application of California law would frustrate
 21 Congress’ purposes in enacting ERISA.” *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 957 (9th Cir.
 22 1998).

23 **B. State Contract Claims for Benefits Damages Do Not Have “Reference To” ERISA.**

24 To resolve the first “conflict” step, analysis must focus on whether any ERISA provision
 25 has a “reference to” State law – whether ERISA either expressly governs disputes alleged under
 26 the state law claim or implicitly conflict with the California law at issue. *Emard v. Hughes Aircraft*

1 Co., 153 F.3d at 957. In order for a state law claim to have "reference to" an ERISA plan, the state
2 law in question must either act "immediately and exclusively" upon an ERISA plan or be such that
3 the ERISA plan is "essential" to the operation of the law. *Rutledge v. Seyfarth, Shaw, Fairweather, &*
4 *Geraldson*, 201 F.3d at 1216, quoting *Dillingham*, 519 U.S. at 325. See also, *Emard v. Hughes Aircraft*
5 *Co.*, 153 F.3d at 954.

6 In the context of plaintiff's Complaint, ERISA does not have any "reference to" the State
7 law contract claims sufficient to justify preemption. There has been no claim that Google's ERISA
8 plan expressly governs Mr. Brown's claim to qualify as a regular employee or his claim that
9 Google breached their promise to treat him like other employees. There is no claim, nor could
10 there be, that the State law regarding breach of contract act either immediately or exclusively upon
11 an ERISA plan. Nor is the ERISA plan, or any part of it, essential to the operation of the State
12 contract law.

13 Most often, a state law is found to have "reference to" and ERISA plan if it is determined
14 that the state law subjected the plan's administrative scheme to conflicting requirements. *Fort*
15 *Halifax*, 482 U.S. at 7, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). In *Alessi*, the Supreme
16 Court struck down a New Jersey State law allowing the offset of workers compensation payments
17 against pension benefits. The Court found the State law to be preempted by ERISA since the State
18 law "force[d] the employer either to structure all its benefit payments in accordance with New
19 Jersey law, or to adopt different payment formulae for employees inside and outside the State."
20 *Alessi*, 451 U.S. at 10. Accordingly, the State law required the creation of an ERISA scheme for
21 administration of its benefits to "accommodate conflicting regulatory schemes... precisely the
22 burden that ERISA pre-emption was intended to avoid". *Id.* California State contract laws simply
23 do not create any such conflict for any claimed ERISA plan of Google or otherwise, nor do they
24 require an inquiry into the administrative scheme of the alleged ERISA plan such as might trigger
25 preemption. *Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1045 (9th Cir. 2003).
26 Finally, the "reference to" requirement, and preemption, fails because the State law contract claim

1 "does not require a court to make an independent assessment" of whether defendant violated any
2 rules of the alleged ERISA. *Id.* Preemption is avoided since the State law contract claim, at most,
3 only requires the court to use ordinary contract principles to determine whether defendants
4 complied with their own rules. *Id.*, citing, *Barbara v. NYSE*, 99 F.3d 49, 54-55 (2d Cir. 1996) [no
5 subject matter jurisdiction where plaintiff's claims required a court to use "ordinary principles of
6 contract law" to determine whether NYSE disciplinary proceedings comported with its own
7 internal rules].

8 Plaintiff's State contract law claims are not preempted merely because the application of
9 the law might result in damages equivalent to some assets that may be subject to federal ERISA
10 regulation themselves. *In Re Marriage of Pilatti*, 96 Cal.App.3d 63 (1979). Indeed, many cases have
11 agreed with this holding in the arena of community property claims. In *Pilatti*, the plaintiff sought
12 to recover, as damages, certain assets that were subject to the spouse's ERISA plan. *Pilatti* was
13 clear to point out that, "the interpretation and application of specific provisions of ERISA is not
14 involved." *Pilatti*, 96 Cal.App.3d at 66. Despite finding that the wife's community property claim
15 "may impliedly allege rights under ERISA" the Court held it still did "not provide a basis for
16 removal of the claim to federal court." *Id.*, citing *In re Marriage of Pardee*, 408 F.Supp. 666 (Cal.D.
17 1976). *Pilatti* clarified that despite ERISA "comprehensive" statutory scheme, "it hardly bestows
18 exclusive jurisdiction on federal courts." *Pilatti*, 96 Cal.App.3d at 66. It explained that the law of
19 community property was an area "traditionally reserved for state regulation, and is peculiarly
20 unsuited to control by federal courts". *Id.*, citing *Buechold v. Ortiz*, 401 F.2d 371 (1968). Upon this
21 rationale, and a determination that numerous California cases had distributed ERISA benefits
22 despite "concurrent application of ERISA", it concluded that removal to federal court of the
23 community property claim, simply because it requested damages including portions of an ERISA
24 plan benefit, was "an intolerable interference with traditional state functions". *Id.*, citing *In re*
25 *Marriage of Pardee*, 408 F.Supp. at 669.

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C. State Contract Claims For Benefits Damages Do Not Have "Connection With" ERISA.

For the second step of the analysis - whether the state law claim has a "connection with" an ERISA plan sufficient to frustrate the purpose of ERISA - the inquiry must focus on both "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood to survive, as well as to the nature and effect of the state law on ERISA plans." *Abraham*, 265 F.3d at 820, citing *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). See also, *Emard v. Hughes Aircraft Co.*, 153 F.3d at 953, citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Put another way, the "connection with" analysis focuses on whether application of State law interferes with the Congressional purpose of ERISA.

Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

Fort Halifax, 482 U.S. at 7, 11-12.

To resolve whether Congress' purpose for ERISA would be "frustrated" by the state law at issue, four specific inquiries have been identified. *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (9th Cir. 1993). These factors are as follows: (1) whether the state law regulates the types of benefits of ERISA employee welfare benefit plans; (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law; (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee. *Aloha Airlines, Inc. v. Ahue*, 12 F.3d at 1504. This factor has also been described as a determination of whether the state law claim "bears on" or "encroaches" upon any relationships regulated by ERISA, "such as between plan and plan member, plan and employer, and plan and

1 trustee." *Abraham*, 265 F.3d at 820-821, citing *Rutledge*, 201 F.3d at 1219 and *Blue Cross v. Anesthesia*
2 *Care Assocs. Med. Group, Inc.*, 187 F.3d at 1053.

3 The approach implemented to resolve these inquiries often relies upon investigating the
4 "behavior underlying the allegations in the complaint". *Bui v. American Tel. & Tel. Co. Inc.*, 310
5 F.3d 1143, 1147 (9th Cir. 2002). If the behavior underlying the claim is an administrative decision
6 interpreting the terms of the plan, preemption is proper. *Id.* However, as in this case, when no
7 ERISA administrative decision interpreting the plan is subjected to the State law claim, then the
8 intent of Congress for uniform administration of plans is subverted and no basis for asserting
9 preemption exists. *Id.* at 1148. When, as here, the state law does not design to regulate the manner
10 of administrative execution of the fund plan, and thus does not interfere with any relationship
11 between the ERISA administrators and beneficiaries or provide an alternative mechanism to
12 enforce the terms of the plan, then there is no "connection with" the ERISA plan, no conflict and
13 no preemption. *Id.*

14 Moreover, plaintiff's State law contract claims do not trigger any of the other *Aloha* factors.
15 There is no question that the law supporting the State contract claim does not and will not
16 regulates the *type* of benefits of defendant's alleged ERISA benefit plans. Neither does California
17 contract law in any way require, or desire, the establishment of a separate employee benefit plan
18 or affect the reporting, disclosure, funding, or vesting requirements for said ERISA benefit plans.
19 This determination is compelled by the same discussion between State law affecting benefits, but
20 not benefit plans, as discussed above. Since the State law contract claim does not interfere with
21 the administration or execution of the alleged ERISA plan in any manner, the *Aloha* factors do not
22 apply and preemption, thus removal, is not warranted.

23 Nonetheless, even if the state law is found to have a "connection with" ERISA to some
24 extent, preemption will not be found, and removal continues to be inappropriate, if "the
25 connection between the state common law principles and ERISA's regulation of employee benefit
26 plans is simply too tenuous, remote or peripheral". *Abraham*, 265 F.3d at 821, citing *Arizona State*

1 *Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 724 (9th Cir. 1997). Assuming there is some
2 colorable argument that plaintiff's breach of contract claim has a connection with defendants
3 ERISA plan in this case, it is so remote, and so inoffensive to the Congressional intent behind
4 ERISA, that conflict preemption cannot exist.

5 **D. Plaintiff's Contract Claims Do Not Fall Within The ERISA Civil Enforcement**
6 **Scheme.**

7 Having proceeded through the "conflict preemption" analysis, one must also ask whether
8 Congress has indicated an intent to occupy the field so completely that California law is
9 necessarily preempted. *Emard v. Hughes Aircraft Co.*, 153 F.3d at 960-961. If the state law claim is
10 not encompassed within ERISA's §1132 civil enforcement scheme, even after a defendant has
11 proven the elements of a "conflict preemption" under §1144(a) of ERISA, removal still remains
12 improper. *Toumajian v. Frailey*, 135 F.3d at 654-655, citing *Metropolitan*, 481 U.S. at 64-66; *Franchise*
13 *Tax Bd. v. Construction Laborers*, 463 U.S. at 25-26; *Harris v. Provident Life and Accident Ins. Co.*, 26
14 F.3d 930, 934 (9th Cir. 1994); *Roessert v. Health Net*, 929 F.Supp. 343, 349 (N.D. Cal. 1996). Put
15 another way, "a state law claim that falls outside the scope of §1132, even if preempted under
16 §1144(a), is still governed by the well-pleaded complaint rule and is not removable under the
17 complete preemption doctrine described by the Supreme Court." *Toumajian v. Frailey*, 135 F.3d at
18 655, citing *Metropolitan*, 481 U.S. at 64. Therefore, even if the state law claims "relate to" or have a
19 "connection with" an ERISA plan such that a removing defendant has stated a defense of "conflict
20 preemption under §1144(a), but are outside of the civil enforcement scheme of §1132, the district
21 court is without subject mater jurisdiction, cannot rule on the preemption issue and may do
22 nothing except "remand the case to the state court where the preemption issue can be addressed
23 and resolved". *Id.* at 655, citing *Franchise Tax Bd. v. Construction Laborers*, 463 U.S. at 4, 27-28;
24 *Harris*, 26 F.3d at 934; *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995).

25 Plaintiff's Eighth Cause of Action is based upon simple contractual rights arising under
26 State law. No field preemption exists since these contract rights are not "conferred, enforced, or
governed by ERISA (nor upon a violation of the terms of a plan)". *Abraham*, 265 F.3d at 824.

1 Section 1132(a)(2) is inapplicable as plaintiff is not "seeking relief on behalf of an ERISA
 2 plan" (pursuant to 29 U.S.C. §1109(a), incorporated into §1132(a)(2)). *Id.*, see also, *Toumajian*, 135
 3 F.3d at 656. Moreover, plaintiff's contract claims do not "derive from a breach of 'any of the
 4 responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter.'" *Id.* at 824-
 5 825, citing §1109(a), §1132(a)(2). Finally, plaintiff, through the Eighth Cause of Action, is not
 6 triggering §1132(a)(3) by seeking relief "as a participant, beneficiary, or fiduciary to enjoin any act
 7 or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA."
 8 *Id.* at 825, citing *Toumajian*, 135 F.3d at 656. Plaintiff also does not trigger 1132(a)(3) because he is
 9 seeking only ordinary monetary damages through his State law contract claim, and that section
 10 only permits equitable relief "such as injunction, mandamus, and restitution, but not
 11 compensatory damages". *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Abraham*, 265 F.3d at 824.

12 **E. Ellenburg Is Inapposite Without an ERISA Administration of Plan Regulations**

13 Defendants' citation to *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (C.A.9 (Cal.) 1985) is
 14 unhelpful when the state contract claim is not premised upon a challenged determination
 15 regarding the scheme of the ERISA benefits. *Ellenburg* even recognized the distinction, more at
 16 issue here, where the state claim is brought against defendant in their capacity as employer, not
 17 fiduciaries of the plan, and "concerns the employment relationship, rather than the employee
 18 benefit plan." *Id.* at 1095. *Ellenburg* could not avail himself of this exception to ERISA
 19 preemption because the state law claim was actually based upon the administrative "handling and
 20 disposition of *Ellenburg's* claim for early retirement benefits." *Id.* Upon only this basis did
 21 *Ellenburg* find that the state law claim was "directly connected with the employee benefit plan
 22 and preempted by ERISA." *Id.*

23 The State law claim in this case is more a non-preempted breach of contract claim to
 24 enforce an undisputed plan provision. *Providence Health Plan v. McDowell*, 361 F.3d 1243 (9th Cir.
 25 2004). In *Providence Health*, the District Court determined ERISA preemption existed because the
 26 breach of contract claim sought enforcement of a reimbursement provision of the plan itself.

1 However, this determination was reversed, and preemption denied, because the breach claim,
2 despite relating to a specific plan provision, did not require any interpretation of the plan
3 provision. *Id.* at 1248. See also, *Blue Cross*, 187 F.3d at 1053-54 [action for reimbursement between
4 insurers and medical providers not preempted, because the claims did not require *construction* of
5 the terms of the plan].

6 **F. Sanctions Are Appropriate Against Removing Defendant.**

7 Pursuant to 28 USC §1447(c), “[a]n order remanding the case may require payment of just
8 costs and any actual expenses, including attorney fees, incurred as a result of the removal.” An
9 award of attorney fees to compensate the counsel who is successful in his remand motion for his
10 efforts is appropriate when the Court determines removal was not legally supported. *Ansley v.*
11 *Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir. 2003). There is no requirement that the removal
12 has been made in bad faith before an award of attorneys’ fees is justified. *Moore v. Permanente*
13 *Med. Group, Inc.*, 981 F.2d 443, 448 (9th Cir. 1992). An attorney fee award will only be reversed if
14 the determination to remand supporting the fee award was not correct as a matter of law. *Gibson v.*
15 *Chrysler Corp.*, 261 F.3d 927, 950 (9th Cir. 2001).

16 Upon this authority, plaintiff respectfully requests an award of attorney fees from
17 defendant Google and its counsel of record, Akin Gump Strauss Hauer & Feld LLP. Counsel for
18 plaintiff, Gregory M. Sheffer, has expended a total of 14.4 hours reviewing defendant’s Notice of
19 Remand, researching relevant law, conferring with the client and opposing counsel, and drafting
20 plaintiff’s Motion for Remand. (Declaration of G. Sheffer, ¶1). Mr. Sheffer’s usual hourly rate for
21 employment law matters is \$250.00 per hour. (Declaration of G. Sheffer, ¶2). These claimed hours
22 do not include any time expended by paraprofessional staff of Mr. Sheffer in preparing this
23 Motion. Plaintiff will also incur costs of filing of this Motion and additional attorney fees in
24 responding to any opposition or attending a hearing on the matter. Accordingly, plaintiff
25 respectfully requests an award of attorney fees in his favor, and against Google and its counsel of
26 record, Akin Gump Strauss Hauer & Feld LLP, in the amount of \$3,600.

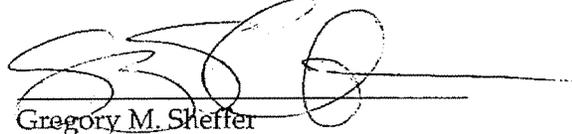
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CONCLUSION

Based upon all of the foregoing points and authorities, plaintiff's Eight Cause of Action, for State law breach of contract, does arise under Federal law or "relate to" an ERISA plan under §1144. The claim in question does not conflict with defendants' ERISA plan, either by having a "reference to" or "connection with" such plan. As important, the contract claim does not fall within the scope of the civil enforcement scheme under §1132. Absent either of these factors being met, much less both, the State law breach of contract claim, involving only benefits and not the benefit *plan*, is not be preempted by ERISA. Without both of these factors being met, original federal question jurisdiction is absent and removal is inappropriate. Plaintiff therefore respectfully requests the Court remand this case back to the State court. Plaintiff further respectfully requests sanctions in the amount required to secure correction of defendant's improper removal.

Dated: May 27, 2005

Respectfully Submitted,
THE SHEFFER LAW FIRM



Gregory M. Sheffer
Attorneys for Plaintiff
ROBERT A. BROWN

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My business address is 160 Sansome Street, 2nd Floor, San Francisco, CA 94104.

On May 27, 2005, I served the following document(s), entitled MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF ROBERT A. BROWN'S MOTION TO REMAND, on each interested party as follows:

Heather Burror
Akin Gump Strauss Hauer & Feld LLP
580 California Street, Suite 1500
San Francisco, CA 94104-1036

XX ___ (BY HAND DELIVERY) I placed a true and correct copy of the foregoing document(s) in a sealed envelope addressed to each interested party as set forth above. I then caused said envelope to be served personally by a messenger known to me.

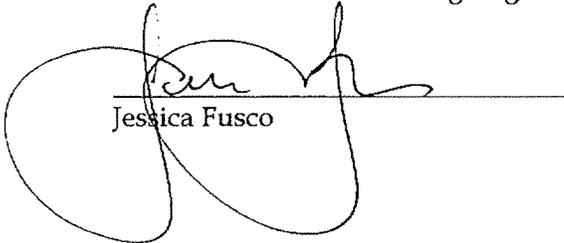
Ronald H. Blumberg
Aniko M. Felsen
Blumberg Lorber Nelson LLP
137 Acacia Avenue
Solana Beach, CA 92075

Catherine A. Conway, Esq.
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3012

XX ___ (BY FEDERAL EXPRESS) I deposited in a box or other facility maintained by Federal Express, an express carrier service, or delivered to a courier or driver authorized by said express carrier service to receive documents, a true and correct copy of the foregoing document(s), in an envelope designated by said express service carrier, with delivery fees paid or provided for.

XX ___ (BY ELECTRONIC MAIL) I caused a true and correct copy of the foregoing document(s) to be served by electronic mail at the time shown on the mailing to each interested party at the electronic mail address shown above. Each mailing was reported as sent and without error.

Executed this 27th day of May, 2005, at San Francisco, California. I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Jessica Fusco