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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Brenda Morales Beltran, et al.,  
  
Plaintiffs,  
  
v.  
  
Monterey County, et al.,  
  
Defendants.

NO. C 08-05194 JW

**ORDER GRANTING PLAINTIFFS’  
MOTION TO REMAND; DENYING  
DEFENDANT STATE OF  
CALIFORNIA’S MOTION TO DISMISS  
AS MOOT**

**I. INTRODUCTION**

Brenda Morales Beltran, Reina Morales, Evelyn Delgado, Mario Delgado, and Angel Gamaliel Beltran (collectively, “Plaintiffs”) bring this action against Monterey County (“Monterey”), City of Salinas (“Salinas”), City of Soledad (“Soledad”), the State of California (“State”), National Railroad Passenger Corporation<sup>1</sup> (“NRPC”) and Union Pacific Railroad Corporation (“Union Pacific”) (collectively, “Defendants”), alleging premises liability and negligence. Plaintiffs allege, *inter alia*, that Defendants negligently created dangerous conditions at the intersection of an unmarked road and a single track of railroad, leading to the death of Maria Felix Sencion.

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<sup>1</sup> Although Plaintiffs name “Amtrak California” as a Defendant, NRPC is the corporate entity that owns and operates Amtrak. (Defendant National Railroad Passenger Corporation’s Notice of Removal at 2, hereafter, “Notice of Removal,” Docket Item No. 1.)

1 Presently before the Court are Plaintiffs' Motion to Remand and Defendant State of  
2 California's Motion to Dismiss.<sup>2</sup> The Court conducted a hearing on March 2, 2009. Based on the  
3 papers submitted to date and oral argument, the Court GRANTS Plaintiffs' Motion to Remand and  
4 DENIES Defendant State of California's Motion to Dismiss as moot.

5 **II. BACKGROUND**

6 **A. Factual Allegations**

7 In a Complaint filed on August 6, 2008 in California Superior Court for the County of  
8 Monterey, Plaintiffs allege as follows:

9 On August 2, 2007, Maria Felix Sencion ("Decedent") was traveling south east in  
10 Monterey County on an unnamed road. (Defendant National Railroad Passenger  
11 Corporation's Notice of Removal, Ex. A ¶ 3, hereafter, "Complaint," Docket Item No. 1.)  
12 She was driving towards the intersection of the unnamed road and Sillman Road. (Id. ¶ 3.)  
13 There is a stop sign just west of the intersection of the unnamed road and Sillman. (Id.) Just  
14 west of the stop sign, there is single track of Union Pacific Railroad that runs north-to-south  
15 and intersects the unnamed road. (Id.)

16 As Decedent pulled up towards the intersection of the unnamed road and Sillman, she  
17 stopped behind cars that were stopped at the stop sign. (Complaint ¶ 3.) While she was  
18 stopped behind the cars at the stop sign, another car pulled up directly behind her, making  
19 her unable to clear the tracks. (Id.) A southbound train crossed the intersection with the  
20 unnamed road and struck Decedent's vehicle. (Id.) Decedent died from her injuries. (Id.)

21 On the basis of the allegations outlined above, Plaintiffs allege two causes of action against  
22 all Defendants: (1) Premises Liability and (2) Negligence.

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26 <sup>2</sup> (Plaintiffs' Notice of Motion and Motion to Remand, hereafter, "Motion to Remand,"  
27 Docket Item No. 12; Defendant State of California's Motion to Dismiss for Lack of Jurisdiction,  
Docket Item No. 11.)

1 **B. Procedural History**

2 After filing their Complaint on August 6, 2008, Plaintiffs served Defendant State on October  
3 2, 2008, Defendant Union Pacific on November 5, 2008, and Defendants Salinas, Soledad and  
4 Monterey on November 12, 2008. (Declaration of Aaron B. Markowitz in Support of Plaintiffs’  
5 Motion to Remand, Exs. 2-6, hereafter, “Markowitz Decl.,” Docket Item No. 13.)

6 On November 17, 2008, Defendant NRPC voluntarily appeared without yet being served and  
7 removed this action to federal court on the ground that NRPC was incorporated by an Act of  
8 Congress and the United States owns more than fifty-percent of its capital stock, giving rise to  
9 federal question jurisdiction. See 45 U.S.C. § 501, *et seq.*; 28 U.S.C. § 1349. Only Union Pacific  
10 joined in the removal. (Notice of Removal at 2.) In its Notice of Removal, NRPC alleged that  
11 Defendants State, Salinas and Soledad did not need to consent to the removal pursuant to the judge-  
12 created rule requiring unanimity amongst defendants because (1) they are “sham” Defendants who  
13 were fraudulently joined; (2) claims against those entities are separate and independent from those  
14 against NRPC and Union Pacific; and (3) Defendants Salinas and Soledad had not yet been served  
15 by Plaintiffs at the time of removal. (Notice of Removal at 3.)

16 **III. STANDARDS**

17 The defendant seeking removal of an action to federal court bears the burden of establishing  
18 grounds for federal jurisdiction. Quinones v. Target Stores, No. C 05-03570, 2005 WL 3157515, at  
19 \*2 (N.D. Cal. Nov. 23, 2005). Removal statutes are construed restrictively. Ethridge v. Harbor  
20 House Restaurant, 861 F.2d 1389, 1393 (9th Cir. 1988). If the district court discovers that all  
21 defendants have not joined or consented to removal, it must remand the case. Prize Frize, Inc. v.  
22 Matrix (U.S.) Inc., 167 F.3d 1261, 1266 (9th Cir. 1999). Doubts as to removability are resolved in  
23 favor of remanding the case to state court. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100,  
24 108-09 (1941); Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

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1 **IV. DISCUSSION**

2 **A. Motion to Remand**

3 Plaintiffs move to remand this action to California Superior Court for the County of  
4 Monterey on the ground that NRPC’s removal was procedurally defective. (Motion to Remand at 5-  
5 6.) Plaintiffs contend that NRPC failed to obtain the requisite consent from Defendants State,  
6 Monterey, Salinas and Soledad. (Id. at 6.) NRPC and Union Pacific dispute whether it was required  
7 to obtain consent from all Defendants on two grounds: (1) NRPC was not required to obtain the  
8 consent of Monterey, Salinas and Soledad because there was no proof of service as to those  
9 Defendants at the time of removal and (2) NRPC was not required to obtain consent from State  
10 because it was fraudulently joined.<sup>3</sup> The Court first considers the issue of unanimity of removal  
11 because it may be dispositive.

12 Removal is governed by 28 U.S.C. § 1446. A defendant removing an action to federal court  
13 under § 1446 must satisfy the judge-made rule that all proper defendants in the action must  
14 unanimously join or consent to the removal. Prize Frize, 167 F.3d at 1266, *superseded by statute on*  
15 *other grounds as stated in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006)  
16 (noting that jurisdiction under the Class Action Fairness Act does not require joinder of all  
17 defendants). Failure to obtain joinder or consent from all proper defendants renders a notice of  
18 removal procedurally defective. Id.; Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 (9th Cir.  
19 1988). “Where fewer than all the defendants have joined in a removal action, the removing party  
20 has the burden under section 1446(a) to explain affirmatively the absence of any co-defendants in  
21 the notice for removal.” Prize Fize, 167 F.3d at 1266.

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24 <sup>3</sup> (Opposition of Defendants National Railroad Passenger Corporation and Union Pacific  
25 Railroad Company to Plaintiffs’ Motion to Remand at 6-11, hereafter, “Opposition to Remand,”  
26 Docket Item No. 19.) NRPC and Union Pacific also contend that this case involves issues of federal  
27 preemption. (Opposition to Remand at 11-12.) However, Defendants provide no authority for the  
28 proposition that possible federal preemption of certain state law claims is a ground for denying  
remand. Significantly, federal jurisdiction pursuant to 45 U.S.C. § 502, *et seq.* and 28 U.S.C. § 1349  
is not exclusive. Accordingly, the Court declines to address Defendants’ preemption contentions.

1           The Ninth Circuit recognizes a few narrow exceptions to the unanimity requirement. All  
2 parties must consent to removal except “for nominal, unknown or fraudulently joined parties.”  
3 United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 762 (9th Cir. 2002) (citing Emrich, 846  
4 F.2d at 1193 n.1). The exception for “unknown” parties includes a party that has not been served at  
5 the time of removal. Salverson v. Western States Bankcard Ass’n., 731 F.2d 1423, 1429 (9th Cir.  
6 1984). However, “[a] removing defendant must exercise due diligence to ascertain if other  
7 defendants have been served, and simply checking if a proof of service has been filed with the court  
8 is insufficient.” Orozco v. EquiFirst Corp., No. C 08-8064 PA, 2008 WL 5412364, at \*1 (C.D. Cal.  
9 2008).

10           In this case, Defendants Monterey, Salinas and Soledad were served prior to NRPC’s  
11 removal. On November 17, 2008, before filing its notice of removal, NRPC’s counsel called the  
12 Civil Clerk for the Superior Court of California, County of Monterey to determine if the other  
13 Defendants had been served. (Declaration of Jason B. Shane in Support of Opposition to Motion to  
14 Remand ¶ 3, hereafter, “Shane Decl.,” Docket Item No. 20.) NRPC’s counsel determined that no  
15 proof of service was on file for Defendants Monterey, Salinas and Soledad. (Shane Decl. ¶ 3.)  
16 Thus, NRPC filed its Notice of Removal that same day. (Id.)

17           The circumstances of NRPC’s removal are almost identical to the circumstances presented in  
18 Pianovski v. Laurel Motors, Inc., 924 F. Supp. 86 (N.D. Ill. 1996). In Pianovski, counsel for the  
19 removing party called the county clerk, who informed her that no proof of service of a co-defendant  
20 had been filed. Id. at 87. The removing party’s counsel took the additional step of directing an  
21 employee to confirm the county clerk’s information. Id. After counsel’s employee confirmed the  
22 clerk’s statement, the removing party filed its notice of removal. Id. The court found that, despite  
23 the removing parties’ efforts, it had failed to show “reasonable diligence” in attempting to determine  
24 whether its co-defendant had been served. “A phone call to the Clerk and an instruction to a  
25 docketing employee are insufficient to demonstrate diligence. [The removing party] should have  
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1 taken further action to determine whether [the co-defendant] had been served, such as attempting to  
2 contact [the co-defendant].” Id.

3         Similar to Pianovski, NRPC called the Civil Clerk in Monterey County to determine if a  
4 proof of service had been filed as to the other Defendants in this case. NRPC was informed that no  
5 proof of service had been filed for Defendants Monterey, Salinas and Soledad. However, there is no  
6 showing by NRPC that it took any further steps to determine if these Defendants had been served.  
7 Thus, the Court finds that NRPC failed to exercise due diligence, and therefore failed to meet its  
8 burden to show that unanimous consent to removal was unnecessary.

9         In light of the Court’s finding that NRPC’s removal was procedurally defective for failing to  
10 obtain consent from Defendants Monterey, Salinas and Soledad, the Court need not address NRPC  
11 and Union Pacific’s contention that Defendant State was fraudulently joined. Accordingly, the  
12 Court GRANTS Plaintiffs’ Motion to Remand.

13 **B. Attorneys Fees**

14         Plaintiffs move for attorneys fees on the ground that Defendants lacked an objectively  
15 reasonable basis for removing this action. (Motion to Remand at 8-9.) An order remanding a  
16 removed case to state court “may require payment of just costs and any actual expenses, including  
17 attorney fees, incurred as a result of the removal.” Martin v. Franklin Capital Corp., 546 U.S. 132,  
18 134 (2005) (quoting 28 U.S.C. § 1447(c)). Courts may award attorney fees only where the removing  
19 party lacks an objectively reasonable basis for seeking removal. Id. In this case, the Court declines  
20 to award fees and costs since there is no evidence that the removal was made in bad faith.

21 **C. Motion to Dismiss**

22         Defendant State moves to dismiss Plaintiffs’ Complaint on the ground that it is entitled to  
23 sovereign immunity in federal court. (Motion to Dismiss at 2.) In light of the Court’s decision to  
24 remand this action to California Superior Court, the Court DENIES the State of California’s Motion  
25 to Dismiss as moot.

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**V. CONCLUSION**

The Court GRANTS Plaintiffs' Motion for Remand and DENIES Defendant California's Motion to Dismiss as moot.

The Clerk shall immediately remand this case to the Superior Court of California County of Monterey and close this file. Each party shall bear their own fees and costs.

Dated: March 6, 2009

  
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JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Aaron Benjamin Markowitz [carcionelaw@yahoo.com](mailto:carcionelaw@yahoo.com)  
3 B. Clyde Hutchinson bch@llcllp.com  
4 Daniel Pierre Weingarten daniel\_weingarten@dot.ca.gov  
5 Jason Bradley Shane jshane@llcllp.com

6 **Dated: March 6, 2009**

**Richard W. Wieking, Clerk**

7 **By: /s/ JW Chambers**  
8 **Elizabeth Garcia**  
9 **Courtroom Deputy**

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