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\*\*E-Filed 6/22/2010\*\*

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

MEHRDAD NIKOONAHAD,

Plaintiff,

v.

GREENSPUN CORPORATION; G.C.  
INVESTMENTS, LLC; THIRD POINT  
PARTNERS L.P.; THIRD POINT PARTNERS  
QUALIFIED L.P.; THIRD POINT OFFSHORE  
FUND, LTD.; THIRD POINT ULTRA LTD.;  
THIRD POINT LLC; TIMOTHY LASH; ROBERT  
SCHWARTZ; and DOES 1 through 25,

Defendants.

Case Number CV 10-01247 JF (PVT)

**ORDER<sup>1</sup> GRANTING MOTION TO  
REMAND**

[re doc. no. 13, 17]

Plaintiff Mehrdad Nikoonahad (“Nikoonahad”) moves to remand the instant action to the Santa Clara Superior Court for lack of diversity jurisdiction pursuant to 28 U.S.C. § 1332, *et seq.* (2006). The Court has considered the moving and responding papers and the oral arguments of counsel presented at the hearing on June 18, 2010. For the reasons discussed below, the motion will be granted.

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<sup>1</sup> This disposition is not designated for publication in the official reports.

1 **I. BACKGROUND**

2 **A. Factual History**

3 Nikoonahad was CEO and director of Solar Notion, Inc. (“Solar Notion”) a Delaware  
4 corporation which had its principal and only place of business in Santa Clara County, California.  
5 (Compl. ¶ 1.) Nikoonanahad is a resident of California and holds 7,900,000 shares of 10,182,984  
6 outstanding Solar Notion common shares. (Compl. ¶ 2.)

7 In August 2007, Nikoonahad, as President and CEO of Solar Notion, entered into an  
8 Investors’ Rights Agreement with Robert Schwartz; Timothy Lash; Third Point Offshore Fund,  
9 Ltd.; Third Point Partners, L.P.; Third Point Partners Qualified, L.P.; and Third Point Ultra  
10 Ltd.(Compl. ¶ 14.) On December 7, 2007 the same parties executed an Amended and Restated  
11 Investors’ Rights Agreement (the “Agreement”) which added two new investors Greenspun  
12 Corporation and G.C. Investments LLC (“G.C. Investments”) (because of the multiple parties  
13 involved, signatories of the Agreement except for Solar Notion will be referred to as the  
14 “Investors”). (Compl. ¶ 15.)

15 Paragraph 2.8 of the Agreement contained a provision that gave joint voting rights to  
16 Third Point LLC (“Third Point”)--the investment manager of Third Point Offshore Fund, Ltd.;  
17 Third Point Partners, L.P.; Third Point Partners Qualified, L.P.; and Third Point Ultra Ltd.--and  
18 G.C. Investments and required Solar Notion to repurchase all of Solar Notion’s Series A  
19 Preferred stock at a formulated price if an agreed “Milestone” was not reached on or before  
20 February 17, 2008. (Compl. ¶ 16.)

21 On or about December 11, 2007, Nikoonahad informed Robert Schwartz (“Schwartz”),  
22 who represented Third Point LLC, that Solar Notion would have difficulty reaching the  
23 Milestone set out in the Agreement. Nikoonahad outlined an alternative approach that would  
24 meet the same objectives but at a later date. (Compl. ¶ 20.) Nikoonahad alleges Third Point and  
25 G.C. Investments communicated their approval of the plan, and that Schwartz told his investors  
26 that Solar Notion could meet production expectations. (Compl ¶ 22.) On February 20, 2008 Solar  
27 Notion terminated its Chief Technology Officer, and Nikoonahad’s alternate plan was approved  
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1 by the board. (Compl. ¶ 23.) The termination of the Chief Technology Officer resulted in Solar  
2 Notion having a three-member board of directors consisting of Nikoonahad, Schwartz, and Lash.  
3 (Compl. ¶ 23.)

4 On March 12, 2008, Third Point and G.C. Investments exercised their redemption right  
5 pursuant to the Agreement. (Compl. ¶ 26.) Nikoonahad alleges that under the formula in the  
6 Agreement, the redemption price would have been approximately \$5.25 million. (Compl. ¶ 28.)  
7 After giving notice of redemption, Schwartz and Lash, in their capacity as directors of the  
8 company, proposed “Amendment No. 1 to Amended Restated Investors’ Rights Agreement” (the  
9 “Amendment”), whereby Solar Notion would purchase 93% of the Series A shares for \$13.8  
10 million instead of 100% of the shares for \$5.25 million as provided in the Agreement (Compl. ¶  
11 29.) Nikoonahad alleges that Schwartz and Lash threatened him with termination and legal action  
12 if he refused to approve the Amendment. (Compl. ¶ 30.) The Amendment thereafter was  
13 approved by all three directors. (Compl. ¶ 32.) The Amendment included new terms that  
14 prevented Solar Notion from receiving any debt or equity financing for six months after April 30,  
15 2008, and required Solar Notion to get approval from Third Point and G.C. Investments for any  
16 expenditure that had not been pre-cleared. (Compl. ¶ 34.) The Amendment also required Solar  
17 Notion to cease operations, terminate all of its employees, and appoint a person to wind-up the  
18 company’s corporate affairs by April 30, 2008. (Mot. to Remand 4:21-22, Apr. 24, 2010.) On  
19 December 19, 2008 the Santa Clara Superior Court issued an order to wind up and dissolve Solar  
20 Notion. (Compl. ¶ 1.)

21 On April 10, 2009, Nikoonahad filed a direct action against Greenspun Corporation; G.C.  
22 Investments, LLC; Third Point Partners L.P.; Third Point Partners Qualified L.P.; Third Point  
23 Offshore Fund, Ltd.; Third Point Ultra Ltd.; Third Point LLC; and Does 1 through 25 in the  
24 Santa Clara Superior Court. (Defs.’ Opp’n 3:23, May 28, 2010.) Defendants removed that action  
25 to this Court, where it was dismissed by Magistrate Judge Howard R. Lloyd. *See Nikoonahad v.*  
26 *Greenspun Corp.*, No. 09-02242, 2010 U.S. Dist. LEXIS 44150, at \*16 (N.D. Cal. Mar. 31,  
27 2010) (“*Nikoonahad I*”).

1 **B. Procedural History**

2 On January 27, 2010, Nikoonahad filed the instant derivative suit in the Santa Clara  
3 Superior Court on behalf of shareholders of Solar Notion against Robert Schwartz; Timothy  
4 Lash; Greenspun Corporation; G.C. Investments, LLC; Third Point Partners L.P.; Third Point  
5 Partners Qualified L.P.; Third Point Offshore Fund, Ltd.; Third Point Ultra Ltd.; Third Point  
6 LLC; and Does 1 through 25 (the “Defendants”). Nikoonahad asserted four claims for relief: (1)  
7 rescission of the Amendment and restitution, (2) breach of fiduciary duty, (3) breach of contract,  
8 and (4) negligence. On March 25, 2010, Defendants removed the action to this Court on the basis  
9 of diversity of citizenship. The instant motion to remand is based upon Nikoonahad’s assertion  
10 that complete diversity does not exist because Schwartz is a citizen of California.

11  
12 **II. MOTION TO REMAND**

13 **A. Legal Standard**

14 Federal courts are courts of limited jurisdiction. That jurisdiction includes civil actions  
15 between “citizens of different States” where the amount in controversy exceeds \$75,000. 28  
16 U.S.C. § 1332(a)(1) (2006). Any moving party asserting diversity jurisdiction bears the burden of  
17 showing that diversity exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377  
18 (1994). In this case, the Court has jurisdiction only if citizenship of all Defendants are diverse  
19 from the citizenship of Nikoonahad. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 88 (1996)  
20 (stating that diversity jurisdiction requires “complete diversity of citizenship”). Similarly, when  
21 an action has been removed from state court to federal court under 28 U.S.C. § 1441, there is an  
22 equally “strong presumption” against removal jurisdiction, unless the defendant can establish that  
23 removal was proper. *Gaus v. Miles*, 980 F.2d 564, 566 (1992). Any such doubt as to removability  
24 must be resolved in favor of remand. *Id.*

25 There is an exception to the requirement of complete diversity in cases of fraudulent  
26 joinder. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (citing  
27 *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)). A plaintiff cannot defeat  
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1 diversity jurisdiction simply by joining a nondiverse defendant. *MacCabe*, 811 F.2d at 1339  
2 (“fraudulent joinder is a term of art”). In order to prove fraudulent joinder, the defendant must  
3 prove that “the plaintiff fails to state a cause of action against a resident defendant, and the  
4 failure is obvious, according to the settled rules of the state....” *Mercado v. Allstate Ins. Co.*, 340  
5 F.3d 824, 826 (9th Cir. 2003) (citing *McCabe*, 811 F.2d at 1339); see *Kruso v. International*  
6 *Telephone & Telegraph Corp.*, 872 F.3d 1416, 1426 (9th Cir. 1989), *Maffei v. Allstate Cal. Ins.*  
7 *Co.*, 412 F. Supp. 2d 1049, 1053 (E.D. Cal 2006) (“Joinder of a defendant is fraudulent if the  
8 defendant cannot be liable to the plaintiff on *any* theory alleged in the complaint.”) (emphasis  
9 added). The court may go outside the pleadings, and the defendant may present facts showing the  
10 joinder is fraudulent. See *Ritchy v. Upjohn Drug. Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998).  
11 However, there is “a heavy burden on the defendant as fraudulent joinder must be proven by  
12 clear and convincing evidence and all disputed questions of fact and all ambiguities in the  
13 controlling law are to be resolved in the plaintiff’s favor.” *Leung v. Sumitomo Corp. of Am.*, No.  
14 09-5825 2010 U.S. Dist LEXIS 29039, at \*6 (N.D. Cal. Mar. 9, 2010).

## 15 16 **B. Discussion**

17 Defendants argue first that Nikoonahad is attempting to forum-shop and that the instant  
18 action is an “end-run around Judge Lloyd’s disposition” with respect to Nikoonahad’s earlier  
19 direct action. (Defs.’ Opp’n 4:22-25.) In *Nikoonahad I*, Nikoonahad sought to amend his  
20 complaint to add Lash and Schwartz, but Judge Lloyd concluded that Nikoonahad lacked  
21 standing to allege a claim for direct injuries. 2010 U.S. Dist. LEXIS 44150, at \*15.  
22 “Nikoonahad’s allegations properly are characterized as claims of corporate overpayment that  
23 must be treated as derivative under *Tooley*....[P]laintiff acknowledged that he could not identify  
24 any damage accrued to him specifically.” *Id.* at \*15-16. Judge Lloyd explicitly stated that he was  
25 dismissing Nikoonahad’s action for lack of standing. *Id.* at \*16.

26 Defendants’ claim of “forum shopping” is not entirely accurate. Unlike the plaintiffs in  
27 the cases upon which Defendants rely, Nikoonahad is not pursuing *duplicative claims* in federal  
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1 and state court. *E.g. Nazario v. Deere*, 295 F. Supp. 2d 360, 362-63 (S.D.N.Y. 2003). The instant  
2 derivative action obviously is distinct from Nikoonahad’s earlier and unsuccessful direct claim.

3 Defendants also contend that Nikoonahad’s derivative claim is implausible because  
4 Nikoonahad has unclean hands. Defendants claim that Schwartz is fraudulently joined because  
5 (1) like Schwartz, Nikoonahad approved the Amendment and the repurchase transaction and (2)  
6 as CEO, Nikoonahad was complicit in winding up Solar Notion and firing employees pursuant  
7 to the very agreements he now alleges were not in the interest of Solar Notion’s shareholders.

8 The doctrine of unclean hands is derived from the maxim, “[H]e who comes into equity  
9 must come with clean hands.” *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985).  
10 The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. “He  
11 must come into court with clean hands, and keep them clean, or he will be denied relief,  
12 regardless of the merits of his claim.” *Kendall-Jackson Winery Ltd. v. Super. Ct.*, 90 Cal. Rptr.  
13 2d 743, 749 (Cal. Ct. App. 1990); see *Precision Instrument Mfg. Co. v. Automotive Maintenance*  
14 *Mach. Co.*, 324 U.S. 806, 814-15 (1945); *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 752 (9th  
15 Cir. 1991). Although it is available in legal as well as equitable actions, *Fibreboard Paper Prods.*  
16 *Corp. v. E. Bay Union of Machinists*, 39 Cal. Rptr. 64, 89 (Cal. Ct. App. 1964), the doctrine does  
17 not apply to all prior bad conduct, but instead is an affirmative defense available “only where  
18 some unconscionable act of one coming for relief has immediate and necessary relation to the  
19 equity that he seeks in respect of the matter in litigation.” *Keystone Driller Co. v. Gen. Excavator*  
20 *Co.*, 290 U.S. 240, 245 (1933).

21 While Nikoonahad’s claim of breach of fiduciary duty obviously implicates  
22 Nikoonahad’s own actions as a director, it does not follow that the claim necessarily lacks merit.  
23 Defendants’ assertion that “Nikoonahad cannot plausibly claim that Solar Notion’s purchase of  
24 Defendant’s shares was unfair given that Nikoonahad himself voted in favor of the repurchase,”  
25 (Defs.’ Opp’n 6:16-18) ignores Nikoonahad’s express allegations that the Amendment would  
26 have been passed with or without his vote and that Schwartz and Lash threatened him with  
27 termination and legal action against him prior to the vote. “Equity looks through forms to  
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1 substance.”*Tex. v. Hardenburg*, 77 U.S. 88, 89 (1869).

2 Defendants’ argument is even less persuasive in the context of a derivative action. In  
3 *Hawes v. Oakland*, 104 U.S. 450, 460 (1882) the Supreme Court explained that a derivative suit  
4 is one “founded on a right of action existing in the corporation itself, and in which the  
5 corporation itself is the appropriate plaintiff.” This is accomplished by allowing a shareholder “to  
6 step into the corporation’s shoes and to seek in its right the restitution he could not demand in his  
7 own.” *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949). Judge Lloyd already has  
8 determined that Nikoonahad lacks standing to bring a direct suit against Schwartz.

9 Because Nikoonahad conceivably could show that Schwartz breached his fiduciary duty  
10 as a Solar Notion director by putting his pecuniary interest above the interests of Solar Notion  
11 and its shareholders, the joinder of Schwartz as defendant is not fraudulent.

12  
13 **III. DISPOSITION**

14 Good cause therefor appearing:

15 Plaintiff’s motion for remand is GRANTED. The action is hereby REMANDED to the  
16 Santa Clara Superior Court. The Clerk shall transfer the file forthwith.

17 **IT IS SO ORDERED.**

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20 **DATED: 6/22/2010**

21   
22 **JEREMY FOGEL**  
23 **United States District Judge**