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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NOREEN CARDINALE,

Plaintiff/Judgment Creditor,

v.

DANIEL R MILLER JR, PATRICE MILLER,
his spouse, DANIEL R. MILLER, SR, KEITH
CHARLES KNAPP, et al

Defendants.

Case No. C-12-05076 RMW
Case No. C-12-05078 RMW

**AMENDED ORDER GRANTING
REMAND**

[Re Docket No. 15, 16, 20, 29]

This order is hereby amended to clarify that Cardinale's request for fees is denied.

Plaintiff Noreen Cardinale moves for: (1) an order of the court remanding this action to the Superior Court for the County of Contra Costa, California; and (2) sanctions on defendant, Charles Knapp, including awards of fees and costs incurred as a result of the removal. Having considered the papers submitted by the parties and the arguments of the counsel, and for the reasons set forth below, this court grants Cardinale's motion to remand and denies her motion for sanctions, fees, and costs.

1 **I. BACKGROUND**

2 On May 10, 2011, Cardinale obtained a money judgment against Knapp after a jury found
3 the defendant guilty of a conspiracy to engage in fraudulent transfers. Pl.'s Br. 2, Dkt. No. 15.¹
4 In the post-judgment proceedings, Cardinale, as a judgment creditor, sought to attach Knapp's
5 interest in the California Home Loans Plan ("Plan"). Pl.'s Br. 3. However, Knapp claims that the
6 Plan is an ERISA qualified retirement plan and is therefore exempt from execution and
7 attachment. Def.'s Br. 8, Dkt. No. 23. Cardinale disputes this assertion and alleges that Knapp is
8 retroactively adding his son and daughter as participants of the Plan in order to shield its assets
9 from execution by Cardinale. Pl.'s Br. 5.

11 Knapp filed a notice of removal in federal court on September 28, 2012, claiming that
12 conflict preemption of the adverse state court claims and actions related to the Plan conferred
13 federal court jurisdiction. Notice of Removal at ¶ 2, Dkt. No. 1. He claims that the state court's
14 August 27, 2012 Order, which he received on August 30, forms the basis for the removal, *Id.* ¶¶
15 17-20, and that in the order the state court ignored the fact that the Plan was an ERISA plan
16 exempt from execution and attachment and still permitted a levy on it. *Id.* at ¶ 17.

18 Cardinale on the other hand, disputes that the Plan is an ERISA plan and claims that the
19 removal is just a stalling tactic. *See* Mot. for Remand, Dkt. No. 15. She seeks a remand back to
20 state court and sanctions. *Id.*; Sanctions Motion, Dkt. No. 29.

22 **II. ANALYSIS**

23 In order to show that removal was proper, Knapp must show that complete preemption
24 applies under ERISA, which he fails to do under both prongs of the test articulated by the
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27 ¹ Unless otherwise indicated, docket entries in this order refer to C-12-05078-RMW.

1 Supreme Court. Furthermore, even if his claimed basis for removal had been proper, his removal
2 was untimely because the claimed basis existed long before he filed his notice of removal.

3 **A. Removal Based on Preemption of ERISA**

4 Under 28 U.S.C. § 1441(a), an action may be removed to the federal district court
5 "embracing the place where such action is pending" when "the district courts of the United States
6 have original jurisdiction." "A defendant seeking removal has the burden to establish that
7 removal is proper and any doubt is resolved against removability." *Luther v. Countrywide Home*
8 *Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008) (citation omitted); *see also Moore-*
9 *Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) ("[A]ny doubt about the
10 right of removal requires resolution in favor of remand.").

11 ERISA contains two separate provisions relevant to the preemption analysis: ERISA §
12 514(a), which expressly preempts state laws that "relate to" employment benefit plans, and §
13 502(a), which provides exclusive remedies to recover benefits that are due or to enforce or clarify
14 rights under an ERISA plan, thereby impliedly preempting state law remedies. *See* 29 U.S.C. §§
15 1144(a), 1132(a). The jurisdictional impact of these two sections is quite different.

16 "The general rule is that a defense of federal preemption of a state-law claim, even
17 conflict preemption under § 514(a) of ERISA, is an insufficient basis for original federal question
18 jurisdiction under § 1331(a) and removal jurisdiction under § 1441(a)." *Marin Gen. Hosp. v.*
19 *Modesto & Empire Traction Co.*, 581 F3d 941, 945 (9th Cir. 2009). Potential defenses, even
20 when anticipated in the complaint, are not relevant under the well-pleaded complaint rule in
21 determining whether a case is removable. *See Franchise Tax Bd. of Cal. v. Constr. Laborers*
22 *Vacation Trust for S. Cal.*, 463 U.S. 1, 10-12 (1983). Defensive preemption under ERISA §
23 514(a) has no impact on federal or state court jurisdiction. *See Toumajian v. Frailey*, 135 F.3d
24 648, 655 (9th Cir.1998). The only result is that federal law applies and state law claims are
25 subject to dismissal. *See Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F3d at 951.

26 But state law claims seeking relief available under ERISA § 502(a) are "completely
27 preempt[ed]" because § 502(a) provides the exclusive remedy for loss or denial of ERISA
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1 benefits. *See Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 63–64, 107 S.Ct. 1542, 1546
2 (1987). Complete preemption under § 502(a) has significant jurisdictional impact. It converts
3 "an ordinary state common law complaint into one stating a federal claim" notwithstanding the
4 absence of a federal cause of action in the complaint. *See id.* at 65-66. Such claims filed in state
5 court are subject to removal to federal court as claims "arising under" federal law. *Id.* at 63-64.

6 **1. The ERISA Preemption Claims**

7 Although the parties dispute whether the Plan actually qualifies as an ERISA plan, before
8 the court can reach that issue, it must first determine, assuming the plan is an ERISA plan,
9 whether it has jurisdiction. For reasons explained below, the court believes that removal was
10 improper.

11 Because conflict preemption under § 514(a) of ERISA does not confer federal jurisdiction,
12 the action may only be removed if the defendant shows that the state-law causes of action are
13 either completely preempted by § 502(a) of ERISA, or that some other basis exists for federal
14 question jurisdiction. Knapp claims jurisdiction based solely on ERISA, and thus the only
15 relevant inquiry is whether plaintiff's state law causes of action are completely preempted by §
16 502(a).

17 In order to determine whether an asserted state-law cause of action comes within the
18 scope of § 502(a)(1)(B), the Supreme Court has formulated a two-prong test. *See Aetna Health*
19 *Inc. v. Davila*, 542 U.S. 200, 210 (2004); *Marin Gen. Hosp.*, 581 F3d at 946. A state-law cause
20 of action is completely preempted if (1) "an individual, at some point in time, could have brought
21 [the] claim under ERISA § 502(a)(1)(B)," and (2) "there is no other independent legal duty that is
22 implicated by a defendant's actions." *Davila*, 542 U.S. at 210. As explained below, the court
23 finds that Knapp fails to meet either prong of the *Davila* and thus removal was improper.

24 (a) The First Prong of the *Davila* Test is not met because Cardinale
25 could not have brought her claims under ERISA

26 Under ERISA § 502(a)(1)(13), a civil action may be brought by a participant or
27 beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under
28 the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

1 Hence, the first question the court must address is whether Cardinale could have brought her
2 claims under ERISA § 502(a)(1)(13). The court finds that she could not have because she is
3 neither a "beneficiary" nor a "participant" of the plan and she is not bringing a claim under the
4 plan.

5 (i) Beneficiaries or participants

6 First, Knapp argues that Cardinale is a beneficiary or participant of the Plan because she
7 has "stepped into [his] shoes." It is true that the Ninth Circuit has held that a health care provider-
8 assignee can stand in the shoes of the beneficiary, such that a provider has standing to sue under §
9 502(a)(1)(B) to recover benefits due under the plan. *Misic v. Building Serv. Employees Health &*
10 *Welfare Trust*, 789 F.2d 1374 (9th Cir.1986). But *Misic* is a narrow holding that applies only to
11 health care providers who have been *assigned* a beneficiary's rights under an ERISA health care
12 plan because health care benefits, unlike pension benefits, can be assigned. See *Blue Cross of*
13 *California v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1051 (9th Cir.1999)
14 (citing ERISA § 206(d), 29 U.S.C. § 1056(d) (pension benefits cannot be assigned)). In *Blue*
15 *Cross*, the Ninth Circuit held that a health insurance providers' claims were not claims for benefits
16 subject to preemption under ERISA even when the beneficiaries had assigned their rights where
17 the basis of the claims was a separate contractual agreement. *Id.* at 1051-52.

18 Knapp's reliance on *IRS v. Snyder*, 343 F.3d 1171 (9th Cir. 2003) and *City of Torrance v.*
19 *Castner*, 46 Cal. App. 3d 76, is misplaced. Def.'s Br. 6, 14. In *Snyder*, the Ninth Circuit held that
20 a debtor's interest in an ERISA-qualified pension plan was not property of the bankruptcy estate
21 and, thus, it could not be used to secure the IRS's claim for delinquent taxes. *IRS v. Snyder*, 343
22 F.3d 1171 (9th Cir. 2003). By noting that IRS "stepp[ed] into the shoes of the taxpayer" the court
23 was merely explaining that IRS could not enjoy greater rights than the taxpayer himself enjoyed,
24 that is, IRS could not enforce its liens on taxpayer's interest in the ERISA plan "until the plan
25 enter[ed] pay-out status." *Id.* at 1175. Similarly, *City of Torrance* was not about ERISA plans at
26 all. 46 Cal. App. 3d at 80. And in it, the court held that a judgment creditor stands in the shoes of
27 the debtor only to the extent that the creditor is limited to only an "interest in the property which
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1 the judgment debtor actually possesses." *Id.* The issue of complete preemption under §
2 502(a)(1)(13) was not before either court, and they never suggested that a creditor stepped into
3 the shoes of a debtor as a "participant" or "beneficiary" of the Plan. Therefore, the cases are
4 inapplicable to the facts here.

5 In a case similar to this one, a judgment creditor brought an action against a pension fund
6 seeking garnishment of the debtor's pension benefits. *Nat'l Bank of North America v. Local 553*
7 *Pension Fund of Int'l Bhd. of Teamsters and Chauffeurs*, 463 F. Supp. 636 (E.D.N.Y. 1978). The
8 court of the Eastern District of New York found that ERISA did not preempt the creditor's claim.
9 *Id.* The court rejected the "stands in the shoes" argument, finding that the "pension benefits
10 [were] subject to levy and attachment" notwithstanding ERISA's anti-alienation provisions. *Id.* at
11 638, 640.

12 Here, as Cardinale rightly argues, Knapp has not assigned his interest in the Plan to
13 Cardinale and thus she does not stand in his shoes as a beneficiary. On the contrary, he contests
14 her attempt to attach that interest by execution and is statutorily barred from being able to assign
15 ERISA pension benefits. Pl.'s Reply 5, Dkt. No. 26; ERISA § 206(d). Therefore, Cardinale
16 cannot sue Knapp in her capacity as the assignee of an ERISA plan participant or beneficiary
17 under § 502(a)(1)(B). *Id.* Rather, her claims are based on a monetary judgment from the state
18 court arising out of separate causes of action. Pl.'s Br. 3.

19 (ii) Claims under the plan

20 Second, Knapp argues that Cardinale's is making claims under the plan. However,
21 Cardinale's claims arise independently. The Ninth Circuit's decision is *Marin General*, is
22 instructive. 581 F.3d 941. In that case, before providing medical services to a prospective
23 patient, Marin General Hospital received oral verification from the medical benefits
24 administrators to confirm that the patient had health insurance through an ERISA plan provided
25 by his employer. *Id.* at 943. When the medical benefits administrators refused to make the
26 agreed payments, the hospital sued for breach of contract. *Id.* at 944. The defendants removed
27 the suit to federal district court on the ground that the hospital's claims were completely
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1 preempted under ERISA § 502(a). *Id.* The district court concluded that ERISA completely
2 preempted the hospital's claims, but the Ninth Circuit reversed. *Id.* at 943, 944. Applying the
3 first prong of *Davila*, the court concluded that the hospital could not have brought its state-law
4 claims under § 502(a)(1)(B). *Id.* at 947. The court noted that the hospital had not contended that
5 it was owed the amount under the patient's ERISA Plan. *Id.* Instead, the hospital's claims were
6 based on a separate cause of action involving alleged breach of oral contract. *Id.* As in *Marin*
7 *General*, Cardinale is asserting her claims arising out of a distinct state court judgment rather than
8 claiming payments conditioned upon the satisfaction of the terms of the Plan.

9 For these reasons, the court finds that Cardinale's claims against the Plan could not have
10 been brought under ERISA § 502(a)(1)(B) and therefore Knapp fails to meet the first prong of the
11 *Davila* test. In order for removal to be proper, Knapp must meet both prongs of the *Davila* test
12 and therefore his failure here means that Cardinale's claims are not completely preempted and the
13 case should be remanded. Nevertheless, in the interest of completeness, the court will discuss the
14 second prong of the *Davila* test below.

15 (b) The Second Prong of the *Davila* test is not met because Cardinale's
16 claim arises out of independent legal duties

17 The second prong of *Davila*'s § 502(a) complete preemption test requires the court to
18 determine whether the state-law claims "arise independently of ERISA or the plan terms." *Davila*,
19 542 U.S. at 212. In other words, we must ask whether or not an "independent legal duty . . . is
20 implicated by [the] defendant's actions." *Id.* at 210. ERISA preempts state-law causes of action
21 that merely duplicate rights and remedies available under ERISA. *See id.* at 214.

22 Knapp fails on this prong as well, and *Marin General* is once again instructive. 581 F.3d
23 941. In that case, the hospital sought recovery from an insurance company contending that an
24 oral contract was formed during a phone call made to confirm the patient's health insurance
25 coverage. *Id.* at 943. The court reasoned that since the "state-law claims asserted in this case are
26 in no way based on an obligation under an ERISA plan, and since they would exist whether or not
27 an ERISA plan existed, they are based on 'other independent legal duties.'" *Id.* at 950. Similarly,
28 in the instant case, Cardinale's claim is not based on an obligation under the Plan and would exist

1 whether or not the Plan existed. Because Cardinale's claim is based on other independent legal
2 duties, the second prong of the *Davila* test is not met.

3 (c) Removal was improper

4 Because neither prong of the *Davila* test was met, Cardinale's state law claims are not
5 completely preempted, and consequently there is no federal question jurisdiction. See *Marin*
6 *General*, 581 F.3d at 943. Because this court lacks subject-matter jurisdiction, the removal was
7 improper and the case must be remanded. The court does not reach the dispute between the
8 parties as to whether the Plan is a qualified ERISA Plan and if § 514(a) applies. Those issues are
9 left to the discretion of the state court.

10 **B. Timeliness of Defendants' Removal Notice**

11 A defendant must normally seek removal within 30 days of the initial pleading, or, if the
12 initial pleading does not establish a basis for removal, within 30 days of receipt of "a copy of an
13 amended pleading, motion, order or other paper from which it may first be ascertained that the
14 case is one which is or has become removable." 28 U.S.C. § 1446(b)(1), (3). A defendant loses
15 its opportunity to remove a case when it fails to file the petition for removal within 30 days of
16 being put on notice that the case is removable. *Cantrell v. Great Republic Ins. Co.*, 873 F.2d
17 1249, 1256 (9th Cir. 1989). A party is on notice when it receives "an amended pleading, motion,
18 order or other paper' from which it can be ascertained from the face of the document that removal
19 is proper." *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005) (quoting §
20 1446(b)). As explained above, an ERISA action is under the exclusive jurisdiction of the federal
21 courts if the claim is (1) brought by a participant or beneficiary (2) to recover benefits due to him
22 under the terms of the plan or enforce his rights under the plan. ERISA § 502(a). A removed
23 ERISA claim must, nevertheless, be remanded if the removal is filed more than 30 days after
24 notice. See *Johnson v. Trans World Airlines, Inc.*, 660 F. Supp. 914, 917 (C.D. Cal. 1987).
25 Therefore, the timeliness inquiry must examine when Knapp received a document from which he
26 could ascertain that the two elements necessary to bring an § 502(a) ERISA claim existed.

1 On the other hand, the purpose of Knapp's entire removal appears to have been to
2 impermissibly avoid adverse rulings in state court. When a party files a document with the court,
3 it is representing that it is not being used for "any improper purpose, such as to harass, cause
4 unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. Proc. 11. As
5 explained in its analysis above, the court did not find that Knapp had a legal basis for filing for
6 removal. However, ERISA preemption is difficult and Knapp at least subjectively believed he
7 had a colorable basis for his attempt to remove.

8 **B. Other Motions**

9 Knapp filed a couple administrative motions, which are denied as moot. First, he filed a
10 motion for an extension of time with respect to the remand motion, which Cardinale did not
11 oppose. Dkt. Nos. 15, 16. Although parties later disputed whether Knapp's opposition was
12 timely, the court considered his opposition and considers it timely.

13 Knapp also filed a motion for leave to file a reply, Dkt. No. 20, after Cardinale filed her
14 first reply and prior to Knapp filing his opposition to the motion to remand. As the court
15 considered Knapp's opposition, which addressed Cardinale's first reply, and considers it timely,
16 the motion is moot.

17 **IV. ORDER**

18 For the foregoing reasons, the court ORDERS as follows:

- 19 1. Plaintiff's Motion for Remand to the Superior Court for the County of Contra Costa is
20 GRANTED.
- 21 2. Plaintiff's Motion for Rule 11 Sanctions is DENIED.
- 22 3. Plaintiff's request for fees and costs is DENIED.
- 23 4. A case management conference for the related case, 12-05076, is set for March 15,
24 2013. The parties will file a brief by March 1, 2013, on the procedure that the court should
25 follow with respect to the case in light of the remand. The court would prefer the parties file a
26 single brief jointly, but if they cannot agree, each party will independently file a brief of no more
27 than 7 pages.
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Dated: February 22, 2013


Ronald M. Whyte
United States District Court Judge