UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DONALD J. TORMEY, on behalf of himself, and all others similarly situated, and on behalf of the general public,

Plaintiffs,

vs.

THE VONS COMPANIES, INC., a Michigan Corporation; SAFEWAY, INC., a Delaware Corporation and DOES 1 through 100,

Defendants.

CASE NO. 07cv1587-LAB (RBB)

ORDER TO SHOW CAUSE RE: JURISDICTION AND POSSIBLE REMAND

Plaintiff, a resident of this District, filed his complaint as a class action in San Diego County Superior Court on June 29, 2007. He relies on California Labor Code §§ 226.7 and 512, California Business and Professions Code §§ 17200–17208, and California Code of Regulations, Title 8, § 11040. He seeks unpaid rest and meal period compensation, penalties, disgorgement, restitution, and injunctive relief on behalf of himself and all others similarly situated.

On August 10, 2007, Defendants removed this action to this Court, contending Plaintiff's claims arise under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("Section 301"). Defendants contend Section 301 "preempts and replaces all state-law causes of action that . . . require the court to interpret or apply the provisions of a

collective bargaining agreement." (Notice of Removal at 4:19–26.) In support of this, they cite *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) and *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 622 (1989) and other precedents showing that, where resolution of a claim requires interpretation of a collective bargaining agreement ("CBA"), Section 301 completely preempts state law. (*See generally* Notice of Removal at 4:19–8:13.)

The parties agree Plaintiff was employed as a pharmacist for Defendant Vons Companies. Defendants contend that during this time, Plaintiff's employment was governed by a CBA between his union and Vons Companies. (Notice of Removal at 9:18–10:2.) They contend the CBA specifically addresses the issue of meal periods. (*Id.* at 10:4–22.) Defendants also contend the CBA addresses issues of rest periods and wage claims. (*Id.* at 14:4–24.)

Defendants agree Plaintiff made claims under state law only, but contend adjudication of his claims "will require interpretation of a collective bargaining agreement which governed Plaintiff's employment, his meal and rest periods, and his compensation for hours worked." (Notice of Removal at 8:20–23.) Because Plaintiff does not rely on the CBA in his complaint, the well-pleaded complaint rule would prevent removal based on a federal question. Defendants tacitly acknowledge this and rely on a corollary to the well-pleaded complaint rule, the complete preemption doctrine. "[T]o remove a state law claim to federal court under the complete preemption doctrine, federal law must both completely preempt the state law claim and supplant it with a federal claim." *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987).

Complete preemption is a doctrine of limited applicability, and includes "claims under the Labor Management Relations Act by a labor union against an employer under a collective bargaining agreement, but not claims arising from individual employment contracts." *In re NOS Communications*, MDL No. 1357, ___ F.3d ____, 2007 WL 1977139, slip op. at *4 (9th Cir. 2007) (quoting *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998)).

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In this case, it appears Defendants are arguing that Plaintiff should have relied on the CBA instead of relying solely on state law, because the CBA alters the employer-employee relationship that would have otherwise existed under state law. Defendants also appear to argue that the CBA waives Plaintiff's pre-existing rights under state law. The Ninth Circuit has recently dealt with what appears to be an analogous situation. In *Dall v. Albertson's, Inc.*, 2007 WL 1423727 (9th Cir. 2007), individual employee plaintiffs appealed the trial court's ruling, following removal, that their state statutory claims were completely preempted by Section 301. The Ninth Circuit relied on the Supreme Court's ruling in *Caterpillar Inc. v. Williams*:

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule-that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

482 U.S. 386, 398–99 (1987). On this basis, the Ninth Circuit held that the action had been improperly removed, and directed that the case be remanded to state court. *Dall*, slip op. at *3.

When faced with state-law claims that may be preempted by Section 301 because of an existing CBA, it appears the proper procedure is to raise this issue in state court. *Caterpillar*, 482 U.S. at 397 ("[I]f an employer wishes to dispute the continued legality or viability of a pre-existing individual employment contract because an employee has taken a position covered by a collective agreement, it may raise this question in state court.")

Even though Plaintiff has filed no motion for remand, the Court has an independent obligation to examine whether removal jurisdiction exists. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004) (further citations omitted). "The removal statute is strictly

construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citation omitted). Pursuant to 28 U.S.C. § 1447(c), the Court must remand the case to state court if at any time before final judgment it appears the Court lacks subject matter jurisdiction.

In light of the authorities cited above, Defendants are therefore **ORDERED TO SHOW CAUSE** why this action should not be remanded. Defendants may do so by filing a memorandum of points and authorities no longer than five pages in length, not counting any appended or lodged materials, no later than five court days from the day this order is entered. Plaintiff may, if he wishes, file a response subject to the same length restrictions no longer than ten court days from the day this order is entered. If Defendants agree that remand is proper, they shall file a notice so stating, and need not file a memorandum of points and authorities. Should Defendants fail to show cause as ordered, this case will be remanded.

IT IS SO ORDERED.

DATED: August 15, 2007

HONORABLE LARRY ALAN BURNS
United States District Judge