2013 WL 6151672 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Donald W. GRANT and Gigi Grant, Plaintiffs,

v.

THE STATE LIFE INSURANCE COMPANY, a corporation; Marilyn Rudy, an individual; and Does 1 through 100, inclusive, Defendants.

No. CV13-05987-PSG (JCx).
August 30, 2013.

Plaintiffs' Notice of Motion and Motion to Remand and for Attorneys' Fees; Memorandum of Points and Authorities

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Hon. Philip S. Gutierrez.

[Filed concurrently with 1) Declaration of Matthew B. O'Hanlon; and 2) Proposed Order]

Date: October 21, 2013

Time: 1:30 p.m.

Courtroom: 880 - Roybal

Assigned to Hon. Philip S. Gutierrez

Discovery Cut-Off: N/A

Trial Date: N/A

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 21, 2013, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 880 of the above-captioned Court, located at 255 East Temple Street, Los Angeles, California, 90012, Plaintiffs Donald W. Grant and Gigi Grant (collectively, "Plaintiffs" or "the Grants") will and hereby do move the Court to remand the instant action to the Los Angeles County Superior Court, pursuant to 28 U.S.C. § 1447, on the ground that the Notice of Removal filed by Defendants The State Life Insurance Company ("State Life") and Marilyn Rudy ("Rudy") (State Life and Rudy are sometimes hereinafter collectively referred to as "Defendants") is improper because diversity of citizenship between the parties does not

exist in that both Plaintiffs and Rudy are citizens of the State of California, and further for an award of attorneys' fees, under 28 U.S.C. Sections 1447(c) and 1927, to compensate Plaintiffs for the fees and expenses they have incurred, and will incur, as a result of Defendants' improper removal of this case. This motion is made following conference of counsel pursuant to Local Rule 7-3 on August 19, 2013.

The motion is based upon this Notice; the Memorandum of Points and Authorities attached hereto; the Declaration of Matthew B. O'Hanlon; all pleadings, papers and records on file with the Court in this action; and all other such argument and evidence as may be presented to the Court in connection with the motion.

K&L GATES LLP

Dated: August 30, 2013

By: */s/ Matthew B. O'Hanlon*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION*

Plaintiffs Donald W. Grant (“Don”) and Gigi Grant (“Gigi”) (collectively, “Plaintiffs” or “the Grants”) respectfully submit this memorandum of points and authorities in support of their motion to remand and for attorneys' fees in response to the Notice of Removal filed by Defendants The State Life Insurance Company (“State Life”) and Marilyn Rudy (“Rudy”) (State Life and Rudy are sometimes hereinafter collectively referred to as “Defendants”).

This is an action by policyholders (Grants) against their insurer (State Life) and its claims administrator (Rudy) stemming from State Life's bad faith refusal to pay policy benefits due and owing to vulnerable senior citizens and Rudy's active assistance and participation in such **elder abuse**. In 2001, the Grants--a married couple who are now respectively 88 and 87 years old--paid State Life the sum of $233,083.66 as a single premium in order to receive life time, unlimited long term care benefits under a Long Term Care Insurance Policy issued by State Life (the “Policy”). Complaint ¶¶ 1, 6. The Policy provides for, *inter alia*, daily benefits for qualified services such as home care by caregivers. Complaint ¶ 7.

By 2010, Gigi's health had deteriorated, and her physician determined that she needed full time assistance at home to ensure, *inter alia*, her safety, medication compliance and quality of life. Complaint ¶ 8. The Grants subsequently sought home care

benefits under the Policy for Gigi. *Id*. ¶ 9. Although State Life acknowledged that Gigi was eligible for Home Care Benefits under the Policy, State Life--by and through its claims administrator Rudy-- nonetheless embarked on a protracted, bad faith course of conduct in which it has engaged in intentional and unreasonable delays and has engaged in fraudulent, malicious and oppressive conduct in order to deprive the Grants of benefits owing under the Policy. Complaint ¶¶ 11-12.

Among other things, State Life has refused to process home care reimbursement payments requested by the Grants, maintaining that Gigi did not have the capacity to claim Policy benefits on her own behalf and demanding that Don go to court to have a guardian, custodian or other representative appointed for Gigi before State Life would process any payments. Of course, as State Life was well aware, it could take substantial time for the court to appoint a representative--all while State Life refused to pay a dime--and no basis in the Policy or law existed for such demand. As its next delay tactic, State Life hired a lawyer who falsely accused Don and Gigi's caregiver of fraud with respect to the caregiver services provided, and reported the Grants to the California Department of Insurance. Then, State Life improperly accused Don of failing to return certain documents and purported to close the Grants' claim for policy benefits. Complaint ¶¶ 11-12. Based on these facts, among others, Plaintiffs allege causes of action against State Life for breach of contract, tortious breach of contract (i.e. bad faith), and **elder abuse**. The only cause of action that the Grants assert against Rudy is for **elder abuse**.

Defendants contend that the Grants' inclusion of Rudy as a defendant in this case in connection with the Grants' third cause of action for **elder abuse** is “fraudulent” because (1) **elder abuse** does not constitute an independent cause of action; (2) the Grants have failed to allege sufficient facts concerning the **elder abuse** committed by Rudy; and (3) Rudy is immune from liability for all acts performed in connection with her employment as a claims administrator for State Life. Defendants, however, cannot meet their heavy burden of establishing that Plaintiffs “fraudulently joined” Rudy in this action.

The law--including cases decided by this very Court--is clear that **elder abuse** constitutes an independent cause of action under California law. Further, the Grants will be able to establish their **elder abuse** claim against Rudy by and through her assistance in State Life's **elder abuse** against Plaintiffs. Also, Rudy is not immune from liability based on her own actionable misconduct.

Without any reasonable basis, however, Defendants have refused to stipulate to remand, forcing the Grants to bring the instant motion and incur substantial attorneys' fees. Accordingly, the Court should remand the case to the Superior Court and award the Grants the attorneys' fees they have incurred as a result of Defendants' frivolous removal of this case.

II. *PROCEDURAL HISTORY*

On July 19, 2013, Plaintiffs filed their complaint against State Life and Rudy in Los Angeles County Superior Court. On August 15, 2013, State Life removed the action to federal court on the purported basis of “fraudulent joinder.”

On August 16, 2013, counsel for Defendants contacted counsel for the Grants to meet and confer concerning Defendants' proposed motion to dismiss (the “Motion to Dismiss”). Declaration of Matthew B. O'Hanlon (“O'Hanlon Decl.”) ¶ 2, Ex. A. In response, counsel for the Grants advised counsel for Defendants that the Grants intended to file a motion to remand the case to Los Angeles County Superior Court (the “Motion to Remand”). O'Hanlon Decl. ¶ 3, Ex. A.

The parties subsequently met and conferred on August 19, 2013. O'Hanlon Decl. ¶ 4. As a follow up to the parties' meet and confer session, which did not resolve the parties' differences with respect to either motion, counsel for Plaintiffs sent an e-mail to counsel for Defendants detailing why Defendants' Notice of Removal on the ground of “fraudulent joinder” was frivolous:
As we discussed during our meet and confer teleconference this afternoon, the case of *Berkley v. Dowds* cited in State Life's removal papers has been superseded by the subsequent Second District Court of Appeal decision in *Perlin v. Fountain View Mgmt, Inc.*, 163 Cal. App. 4th 657 (2008). *Perlin* holds, contrary to *Berkley v. Dowds*, that violation of the **elder abuse** act at issue supports an independent cause of action. As you will see, the analysis in *Perlin* is detailed and persuasive, and as counsel for State Life you had an ethical obligation to advise the Court of such contrary authority in the notice of removal. Furthermore,

numerous federal district court cases have recognized that **elder abuse** under the statutory scheme at issue constitutes a distinct claim, including in two opinions authored by Judge Gutierrez. *See, e.g.*, *Diaz v. Bank of Am. Home Loan Servicing*, CV 09-9286 PSG MANX, 2010 WL 5313417 (C.D. Cal. Dec. 16, 2010); *Cosio v. Simental*, CV 08-6853PSGPLAX, 2009 WL 201827 (C.D. Cal. Jan. 27, 2009); *Fischer v. Aviva Life and Annuity Company et al.*, 2010 WL 3582669 (E.D. Cal. 2010).

In light of the fact that potential liability exists under the **elder abuse** act, State Life cannot meet the standard for fraudulent joinder. Indeed, as Judge Gutierrez has recognized when evaluating fraudulent joinder, if there is "any possibility" that the plaintiff will be able to establish liability against the party in question, then joinder is not fraudulent. *See Charles v. ADT Sec. Servs.*, CV 09-5025 PSG AJWX, 2009 WL 5184454 (CD. Cal. Dec. 21, 2009). As such, State Life's "demurrer"-like arguments that the Grants have not pleaded sufficient facts regarding the **elder abuse** committed by Rudy are irrelevant to fraudulent joinder analysis. As we further discussed, the Grants specifically pleaded that State Life engaged in **elder abuse** by and through Rudy. *See* Complaint ¶24. This more than suffices. Moreover, per the statutory scheme, Rudy's assistance in **elder abuse** renders her independently liable.

Please advise that State Life will stipulate to remand of the case back to Superior Court by the close of business tomorrow. Otherwise, the Grants will have no choice but to file a motion for remand and seek all appropriate relief, including sanctions, for State Life's frivolous removal of the case to federal court.

O'Hanlon Decl. ¶ 5, Ex. B. Counsel for Defendants, however, refused to stipulate to remand and purported to rely on an *unpublished* Northern District of California case for the proposition that **elder abuse** was not a cause of action despite--as discussed in detail below--the existence of two (2) decisions by this very Court recognizing financial **elder abuse** as an independent claim. O'Hanlon Decl. ¶ 6, Ex. C.

III. *THE COURT SHOULD REMAND THIS ACTION TO STATE COURT*

A. *General Standards Governing Removal and Remand*

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Under 28 U.S.C. § 1441, a defendant may remove a civil action from state court to federal district court only if the federal court has subject matter jurisdiction over the case. *See Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 679-80 (9th Cir.2006). An action filed in state court may be removed by the defendant to the federal District Court where the diversity of citizenship requirements of 28 U.S.C. § 1332 are satisfied. 28 U.S.C. § 1441(b). Under Section 1332, diversity jurisdiction lies where the amount in controversy exceeds $75,000 and the plaintiff and defendant are citizens of different states. 28 U.S.C. § 1332(a).

If the defendant fails to comply with the foregoing requirements, the plaintiff may bring a motion to remand the action to state court. *See* 28 U.S.C. § 1447(c); *see also* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial § 2:3687 (The Rutter Group 2013) ("Remand may be ordered either for lack of subject matter jurisdiction or for 'any defect in removal procedure.' ") (citing statute). The district court must remand a case where diversity jurisdiction is absent if the action does not also raise a federal question. *See* 28 U.S.C. § 1447(c).

There is a strong presumption against removal jurisdiction, and the defendant bears the burden of proving that removal is proper. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992). If there is any doubt regarding the existence of federal jurisdiction, the court must resolve those doubts in favor of remanding the action to state court. *Id.*

B. *Defendants Cannot Establish "Fraudulent Joinder" as to Rudy*

Joinder of a non-diverse defendant is only fraudulent where the plaintiff "fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826

(9th Cir. 2003). If there is "*any possibility* that plaintiff will be able to establish liability against the party in question," then joinder is not fraudulent. *See* Schwarzer, *surpa* § 2:2426 (The Rutter Group 2013) (emphasis in original); *see also Lighting Sci. Group Corp. v. Koninkliike Philips Elecs. N.V.*, 624 F. Supp. 2d 1174, 1179 (E.D. Cal. 2008) (a defendant asserting fraudulent joinder "carries the heavy burden of establishing the absence of any possibility of recovery"); *Levine v. Allmerica Fin. Life Ins. & Annuity Co.*, 41 F. Supp. 2d 1077, 1078 (CD. Cal. 1999) (remand must be granted unless the defendant establishes that there is no possibility that the plaintiff could prevail on any cause of action it asserted against the non-diverse defendant). Notably, "[t]here is a presumption against finding fraudulent joinder, and defendants who assert that plaintiff has fraudulently joined a party carry a heavy burden of persuasion." *Plute v. Roadway Package Sys.*, 141 F.Supp.2d 1005, 1007 (N.D. Cal. 2001). Any ambiguities and legal or factual questions must be resolved in the plaintiff's favor. *See* Schwarzer *et al*. § 2.2458.

1. *As This Court Has Already Recognized, Elder Abuse Constitutes an Independent Cause of Action*

In the Notice of Removal--in violation of counsel for Defendants' ethical duty to advise the Court of all relevant case law on an issue--Defendants cited only *Berkley v. Dowds*, 152 Cal. App. 4th 518 (2007), for the proposition "Plaintiffs' third cause of action for **elder abuse** fails because there is no separate cause of action or claim for financial **abuse** under the **Elder Abuse** Act.... This Act merely creates an additional remedy under certain, specifically delineated, circumstances." Notice of Removal ¶ 14. Defendants intentionally and misleadingly omitted any reference to the majority of other cases holding that a cause of action does exist under the **Elder Abuse** Act.

In fact, in a decision ***subsequent*** to *Berkley*, the Second District of the California Court of Appeal in *Perlin v. Fountain View Mgmt.*, 163 Cal. App. 4th 657 (2008), specifically determined--after careful analysis--that the **elder abuse** act "constitute[s] an independent cause of action." *Id*. at 666. In carefully considering the issue, Justice Mosk, in *Perlin*, rejected the Court of Appeal's prior decision in *Berkley* stating:

The court in *Berkley v. Dowds, supra*, 152 Cal.App.4th 518, cited by plaintiffs, does state that "[t]he Act does not create a cause of action as such, but provides for attorney fees, costs, and punitive damages under certain conditions." (*Id*. at p. 529, citing *ARA Living Centers-Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563-1564 [23 Cal.Rptr.2d 224] and § 15657.) But that position is inconsistent with the California Supreme Court's dicta. In *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101 [83 Cal.Rptr.2d 145, 972 P.2d 966], the Supreme Court described its then recent decision in *Delaney v. Baker* (1999) 20 Cal.4th 23, 40 [82 Cal.Rptr.2d 610, 971 P.2d 986] as "concluding that a *cause of action* for 'reckless neglect' under the ... Act... is distinct from a cause of action 'based on professional negligence' within the meaning of section 15657.2." (*Barris*, at p. 116, italics added, citation omitted.)

More recently, in *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 [11 Cal.Rptr.3d 222, 86 P.3d 290], the Supreme Court considered "whether the procedural prerequisites to seeking punitive damages in an action for damages arising out of the professional negligence of a health care provider, codified at Code of Civil Procedure section 425.13, subdivision (a) (section 425.13(a)), apply to punitive damage claims in actions alleging **elder abuse** subject to heightened civil remedies under" the Act. (*Covenant Care*, at p. 776.) Plaintiffs point to the court's statement that section 425.13 did not apply "to causes of action seeking heightened remedies under the **Elder Abuse** Act...." (*Covenant Care*, at p. 785, fn. 8.) But the court, citing section 15657, then said, "regardless of its language, *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181 [10 Cal.Rptr.2d 208, 832 P.2d 924]] affords no basis for concluding the Legislature intended its reference in section 425.13(a) to 'professional negligence' to encompass **elder abuse**, let alone as yet uncreated *statutory causes of action for **elder abuse*** committed with recklessness, oppression, fraud, or malice [citation]." (*Covenant Care, Inc. v. Superior Court*, *supra*, at p. 786, italics added.) The court also specifically referred to "**Elder Abuse** Act causes of action" (*id*. at p. 788), to "an **Elder Abuse** Act action" (*id*. at p. 789), to "**Elder Abuse** Act claims" (*id*. at p. 790), and to "an action under the **Elder Abuse** Act" (*ibid*.).

The Supreme Court's language in *Barris v. County of Los Angeles, supra*, 20 Cal.4th 101 and *Covenant Care, Inc. v. Superior Court, supra*, 32 Cal.4th 771 is authority for the proposition that the Act creates an independent cause of action. (See *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82 [12 Cal.Rptr.3d 97] ["The elements of a cause of action under the **Elder Abuse** Act are statutory...."]; *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 119 [20 Cal.Rptr.3d 26] [recognizing "causes of

action against health care providers for 'custodial **elder** **abuse**' under the **Elder** **Abuse** Act"]; *Wolk v. Green* (N.D.Cal. 2007) 516 F.Supp.2d 1121, 1133 ["A civil cause of action under the **Elder** **Abuse** statute is governed by the California Welfare and Institutions Code section 15657 ..."].) It is noteworthy that when the Legislature added article 8.5 to the Act, of which article section 15657 is a part, it labeled the article, "Civil Actions for **Abuse** of **Elderly** or Dependent Adults." (Stats. 1991, ch. 774, § 3, p. 3477; see also Directions for Use for CACI No. 3100 (2008), p. 284 ["The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the **Elder** **Abuse** and Dependent Adult Civil Protection Act."].)

We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action.

Perlin, supra at 665-66 (emphasis added). The Grants have not found any reported California appellate court decision since *Perlin* was decided in 2008 disagreeing with the decision in *Perlin* that an independent cause of action exists under the **Elder** **Abuse** Act or criticizing the decision in *Perlin*.

Likewise, courts in the Central District of California, ***including this Court***, have treated **elder** **abuse** as an independent cause of action. *See Chavers v. GMAC Mortgage, LLC*, CV 11-01097 ODW SSX, 2012 WL 10344 at *5 (C.D. Cal. Jan. 3, 2012) ("Because it appears that the Supreme Court would conclude that the **Elder** **Abuse** Act confers an independent cause of action upon a private plaintiff, the Court DENIES Defendants' Motion to Dismiss Plaintiff's **elder** **abuse** claim"); *Diaz v. Bank of Am. Home Loan Servicing*, CV 09-9286 PSG MANX, 2010 WL 5313417 at *9 (C.D. Cal. Dec. 16, 2010) (denying motion to dismiss **elder** **abuse** claim); *Cosio v. Simental*, CV 08-6853 PSG PLAX, 2009 WL 201827 at *5 (C.D. Cal. Jan. 27, 2009) (recognizing **elder** **abuse** as a claim); *Negrete v. Fid. & Guar. Life Ins. Co.*, 444 F. Supp. 2d 998, 1003 (C.D. Cal. 2006) ("defendant's motion to dismiss plaintiff's second claim for **elder** **abuse** on the basis of failure to state a claim is hereby DENIED").

As such, the weight of authority recognizes that **elder** **abuse** constitutes an independent cause of action.

C. *Although Not Necessary to Remand Analysis, The Grants Have Pleaded Facts Demonstrating that Rudy Engaged in **Elder** **Abuse***

Defendants next maintain that the Grants' Complaint fails to state a cause of action against Rudy for **elder** **abuse** because it supposedly does not contain facts evidencing that Rudy engaged in financial "**elder** **abuse**" under the meaning of California Welfare and Institutions Code Section 15610.30 by taking, appropriating, obtaining, or retaining personal property in the form of policy benefits owing to Plaintiffs. Notice of Removal ¶¶ 15-16. This argument is irrelevant, inaccurate, and misstates the allegations of Plaintiffs' Complaint.

As a preliminary matter, for purposes of remand analysis, the Grants have no obligation to plead any level of facts, let alone facts with specificity. Instead, courts focus on whether there is ***any possibility*** of recovery. *See* Schwarzer *et al*., *supra*, § 2:2426; *see also Lighting Sci. Group*, *supra* at 1179; *and Levine*, *supra* at 1078. To that end, "the test is whether Plaintiff can state a claim in state court," and courts apply a "no set of facts" standard. *Wong v. Michaels Stores. Inc.*, 2012 WL 718646, at *5 (E.D. Cal. Mar. 5, 2012). Under this standard, a plaintiff fails to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (overruled with respect to normal non-fraudulent joinder pleading standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Accordingly, Defendants' argument that the Grants' Complaint is deficient with respect to the facts pleaded is legally irrelevant since the Grants could prove a set of facts that would entitle them to recover against Rudy under an **elder** **abuse** theory.

Second, Defendants are simply wrong that the Grants have not stated an **elder** **abuse** cause of action against Rudy. The California Legislature enacted the **Elder** **Abuse** Act in order to "protect **elders** by providing enhanced remedies which encourage private, civil enforcement of laws against **elder** **abuse** and neglect." *Negrete supra*, at 1001. A person is considered an "**elder**" under the **Elder** **Abuse** Act if the person is sixty-five years of age or older. Cal. Welf. & Inst. Code § 15610.27. Section 15610.30 of

the **Elder** **Abuse** Act provides that financial **abuse** of an **elder** occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both." Cal. Welf. & Inst. Code § 15610.30(a)(1). [1] Under the same section, ***a person who assists in the foregoing conduct is also liable***. *Id*. at § 15610.30(a)(2); *see also Wood v. Jamison*, 167 Cal.App.4th 156, 165 (2008) (affirming liability based on person's assistance in **elder** **abuse**). Accordingly, contrary to Defendants' inaccurate assertions, the Grants need not allege that Rudy herself took, appropriated, obtained, or retained personal property in the form of policy benefits owing to Plaintiffs; instead, her assistance in such misconduct suffices for liability.

Third, Defendants are likewise wrong that the Grants have not pleaded misconduct on the part of Rudy. As the Complaint makes clear, the Grants allege that "State Life, ***by and through Defendant Rudy*** and others (State Life and Rudy [are] sometimes hereinafter collectively referred to as 'Defendants'), by the conduct hereinabove alleged has engaged in 'Financial **abuse**,' as defined by California Welfare and Institutions Code Section 15610.30, of the Grants, as **elders**, by, among other things, taking, appropriating, obtaining and/or retaining personal property in the form of benefits owing to the Grants under the Policy for a wrongful use and/or with intent to defraud." Complaint ¶ 24 (emphasis added). By pleading that State Life engaged in specific acts of **elder** **abuse** by and through Rudy, the Grants have sufficiently alleged their **elder** **abuse** claim against Rudy.

D. ***Rudy's Status as a State Life Claims Administrator Does Not Immunize Her From Liability for Elder Abuse***

Finally, Defendants take the incredible position in the Notice of Removal that Rudy's status as a claims administrator automatically immunizes her from all liability as a result of her misconduct. Notice of Removal ¶¶ 17-18. California law is clear, however, that "[o]ne who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: ... 3. ***When his acts are wrongful in their nature***." Cal. Civ. Code § 2343 (emphasis added). It is hornbook law that employees are personally liable to third parties for torts committed while acting in their capacity as an employee. Witkin has succinctly stated the rule as follows: "An agent or employee is always liable for his own torts, whether or not his principal is liable." 5 Witkin, Summary of Cal. Law, Torts, § 32, p. 93 (9th ed. 1988); *see also Holt v. Booth*, 1 Cal. App. 4th 1074, 1080 n.5 (citing Witkin); *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1379 (2000)(corporate employees had a statutory obligation to refrain from a tortious invasion of competitor's proprietary rights, and could be held personally liable if they used, through their corporation, competitor's trade secrets, while they knew or had reason to know that knowledge had been improperly acquired); *Holman v. State*, 53 Cal. App. 3d 317, 335 (1975) (an agent or employee is always liable for his own tort irrespective of whether principal is liable and regardless of whether agent acts according to his principal's directions) (overruled on other grounds in *Camargo v. Tjaarda Dairy*, 25 Cal.4th 1235, 1242 (2001)); *Bayuk v. Edson*, 236 Cal. App. 2d 309, 320 (1965) (agent who has committed a tortious act while acting under authority of his principal is not exonerated from liability because principal becomes liable). [2]

In their Notice of Removal, Defendants also cite *Macey v. Allstate Property and Casualty Insurance Company et al.*, 220 F. Supp. 2d 1116 (N.D. Cal. 2002), for the proposition that "[p]ursuant to California law, RUDY, as an employee of insurance company STATE LIFE, is not personally liable for acts that are fully within the scope of her employment" and that, therefore, Rudy's joinder as a defendant was fraudulent. In fact, the *Macey* case stands for the opposite proposition. In *Macey*, the district court found that an agent of an insurer could be individually liable in tort to a policyholder while acting in his capacity as an agent of the insurer, and the court granted the plaintiff's motion to remand rejecting the insurer's fraudulent joinder argument. In determining whether the agents could be personally liable for purposes of evaluating fraudulent joinder, the district court noted that the *Lippert* opinion cited by Defendants in the Notice of Removal herein was antiquated, stating that "there are post-*Lippert* California cases that have endorsed the idea that courts should draw on general principles of tort law to inform their thinking about whether to recognize a personal duty running from an agent to an insured-thus undercutting, at least indirectly the notion that may be implicit in *Lippert* that there is something unique about the insurance context that justifies insulating carrier's agents from tort liability rules that would apply to agents for other kinds of principals." *Id*. at 1122. The district court ultimately held that "it is not at all clear that California courts would refuse to recognize a cause of action against the agents in this case under the factual allegations presented by plaintiff." *Id*. at 1128. [3]

As such, Rudy is not immune from liability for her clear violation of California law whether acting as an employee or not.

IV. *THE COURT SHOULD AWARD ATTORNEYS' FEES TO PLAINTIFFS*

Based on multiple grounds, the Court should award Plaintiffs their attorneys' fees and expenses incurred over the course of this motion to remand.

Section 1447 provides, in pertinent part, "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c); *see also Padilla v. AT&T Corp.*, 697 F. Supp. 2d 1156, 1160 (C.D. Cal. 2009) ("The decision to award attorney fees lies within the trial court's discretion, and does not require a showing that removal was in bad faith"); *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir. 2003) ("A court may award attorney fees when removal is wrong as a matter of law").

Moreover, 28 U.S.C. § 1927 furnishes a wholly separate and independent basis upon which fees may be awarded. That section provides, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. In addition to Section 1447(c), courts have also found Section 1927 to be an appropriate basis for awarding attorney's fees when faced with plainly inappropriate removal efforts. *See, e.g., Doe v. Martinez*, 674 F. Supp. 2d 1282, 1285-86 (D. N.M. 2009) ("Attorney Montoya's refusal to dismiss this case after the improper removal was brought to Attorney Montoya's attention first by Attorney Mark's letter and second by Plaintiff's Motion to Remand, is the type of **abusive** litigation practice Section 1927 is designed to deter. Therefore, 28 U.S.C. § 1927 provides an additional basis for awarding Plaintiffs attorney's fees, expenses and costs.").

In the course of bringing this motion to remand, responding to Defendants' anticipated opposition, and attending the hearing, Plaintiffs expect to incur a total of no less than $8,475 in attorney's fees. *See* O'Hanlon Decl. ¶¶ 7-9.

As detailed in the foregoing sections, Defendants' removal of this action to federal court on the ground of "fraudulent joinder" lacks any merit whatsoever. Accordingly, in the absence of an objectively reasonable basis for (1) Defendants' removal of this case or (2) Defendants' refusal to stipulate to remand of the case when confronted with legal authorities that eviscerated Defendants' legal position during the parties' meet-and-confer, the Court should order that Defendants and/or their counsel bear the significant cost of their frivolous conduct to Plaintiffs.

V. *CONCLUSION*

Defendants bear a heavy burden to establish "fraudulent joinder," one which they simply cannot meet. Case law is clear that **elder abuse** constitutes an independent cause of action under California law. Further, the Grants will be able to establish their **elder abuse** claim against Rudy by and through her assistance in State Life's financial **elder abuse** against them. Also, Rudy is not immune from liability based on her own actionable misconduct. Without any reasonable basis, Defendants have refused to stipulate to remand, forcing the Grants to bring the instant motion. For each of these reasons, the Court should remand the case to the Superior Court and award the Grants attorneys' fees of $8,475, jointly and severally payable by Defendants and their counsel.

K&L GATES LLP

Dated: August 30, 2013

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Footnotes

1 A person or entity is "deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult." *Id.* at § 15610.30(b).

2 In their Notice of Removal, Defendants assert that "RUDY is not a party to the insurance contract between Plaintiffs and STATE LIFE, and cannot be held personally liable for damages resulting from acts related to the contract committed in the course and scope of her employment." Defendants are correct that Rudy cannot be liable for breach of contract (i.e., breach of the State Life insurance policy) or breach of the implied covenant of good faith and fair dealing in the State Life insurance policy because Rudy, individually, is not a party to the insurance contract. *See Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 824 (1979) (cited by State Life and holding: "Segal and McEachen acted as Mutual's agents. As such, they are not parties to the insurance contract and not subject to the implied covenant. Because the only ground for imposing liability on either Segal or McEachen is breach of that promise, the judgments against them as individuals cannot stand.") In fact, for that reason, the Grants have not named Rudy as a defendant in their first and second causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing in the contract. However, the fact that Rudy, as a non-party to the insurance policy, cannot be sued for breach of the insurance contract does not insulate her from tort liability based on her conduct as an employee.

3 In their Notice of Removal, Defendants also cite *Gasnik v. State Farm Ins. Co. et al.*, 825 F. Supp. 245, 249 (E.D. Cal. 1992) and *Lippert v. Bailey*, 241 Cal. App. 2d 376, 383-84 (1966). However, those cases deal only with liability of an agent for negligently failing to insure a policyholder and have no application to the Grants or this case. Moreover, the court in *Macey*, as discussed in the text above, rejected *Lippert* as a basis for finding an insurance agent immune from tort liability.