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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NORMA ZUNIGA, individually, and as successor-in-interest to PEDRO ZUNIGA, Deceased,

Plaintiff,

vs.

SAFEWAY INC.; ALBERTSONS COMPANIES, INC.; and DOES 1 THROUGH 100, INCLUSIVE,

Defendants.

CASE NO. 4:20-cv-04440-YGR

NOTICE OF MOTION AND MOTION OF PLAINTIFF NORMA ZUNIGA TO REMAND ACTION TO STATE COURT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: December 29, 2020
Time: 2:00 p.m.
Courtroom: 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

FAC Filed: July 7, 2020

TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on December 29, 2020, at 2:00 p.m., or as soon thereafter as the matter may be heard in this Court located at Courtroom 1, 4th Floor, 1301 Clay

Street, Oakland, CA 94612, Plaintiff NORMA ZUNIGA, individually, and as successor-in-interest to PEDRO ZUNIGA, Deceased, moves the court under 28 U.S.C. sections 1441(c) and 1447, et seq. for an order remanding this case to State Court and granting Plaintiff's request for attorney's fees and costs on the following grounds:

(1) Plaintiff's operative First Amended Complaint does not raise a federal question;

(2) Defendants' anticipated or potential defenses based on the federal constitution, laws or treaties cannot support removal of an action; and

(3) Plaintiff's claims neither assert violations of a Collective Bargained Agreement ("CBA") nor are they dependent upon an analysis of the same.

The Motion will be based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, upon the materials contained in the file of the Court, upon any matter of which the Court takes judicial notice, and upon any further evidence submitted which shall be presented at the time of the hearing, as the Court permits.

DATED: November 20, 2020

THE MATIASIC FIRM, P.C.

By: /s/ Paul A. Matiasic
Paul A. Matiasic
Hannah E. Mohr
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff NORMA ZUNIGA, individually, and as successor-in-interest to PEDRO ZUNIGA, Deceased, (hereinafter "Plaintiff") submits this memorandum of points and authorities in support of Plaintiff's Motion to Remand Action to State Court.

PRELIMINARY STATEMENT AND RELEVANT FACTS

For approximately 22 years, Plaintiff's husband, Decedent Pedro Zuniga (hereinafter "Decedent") was employed by Safeway as a material handler in the produce department at the Safeway Northern California Distribution Center in Tracy, California. (*Plaintiff's Request for Judicial Notice in Support of Motion of Plaintiff Norma Zuniga to Remand Action to State Court ("RFJN"), Exhibit A,* ¶33.)

In March 2020, workers at the Distribution Center began to fall ill with COVID-19. These employees were mandated to continue working not only regular shifts, but also *additional shifts* (6 days per week, rather than 4 or 5) *with longer hours* (16 hours per day). (*RFJN, Exhibit A,* ¶26.) By mid-March 2020, employees at the Distribution Center, including Decedent, began complaining to their supervisors about the dangerous working conditions and their fears associated with the same. These complaints were met by superiors with threats of retaliatory disciplinary action, including the potential for accruing 'points' which could lead to termination. (*RFJN, Exhibit A,* ¶27.)

On April 1, 2020, after experiencing a fever and other symptoms, Decedent received a COVID-19 test, which came back positive a few days later. On April 13, 2020, Decedent died in the Intensive Care Unit at Memorial Medical Center in Modesto, California, of cardiopulmonary arrest and hypoxic respiratory failure caused by COVID-19. (*RFJN, Exhibit A,* ¶28.) Decedent's premature death resulted from Defendants' flagrant failure to follow state and local guidelines and

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willful failure to provide for the health and safety of workers at the Distribution Center. Defendants instead prioritized their own greed over the physical health and survival of Pedro and his coworkers.

Plaintiff filed her Complaint for Damages in Alameda County Superior Court on May 13, 2020, naming SAFEWAY INC.; ALBERTSONS COMPANIES, INC.; and DOES 1 THROUGH 100, INCLUSIVE (hereinafter collectively "Defendants") as Defendants. On July 7, 2020, Plaintiff filed her First Amended Complaint for Damages (hereafter "FAC") in Alameda County Superior Court. (*See RFJN, Exhibit A.*) Later on July 7, 2020 and subsequent to Plaintiff's filing of her FAC, Defendants filed their Notice of Removal in Alameda County Superior Court. (*See RFJN, Exhibit C.*)

As demonstrated herein, Defendants have not met their heavy burden of proving the existence of a "federal question" justifying removal of this action to federal court. Plaintiff moves the Court for an order remanding this case to State Court and granting Plaintiff's request for attorney's fees and costs on the following grounds: (1) Plaintiff's operative First Amended Complaint does not raise a federal question; (2) Defendants' anticipated or potential defenses based on the federal constitution, laws or treaties cannot support removal of an action; and (3) Plaintiff's claims neither assert violations of a Collective Bargained Agreement ("CBA") nor are they dependent upon an analysis of the same.

LAW AND ARGUMENT

I. Standard of Removal

It is well settled that removal jurisdiction is strongly disfavored, and the removal statutes are strictly construed against federal jurisdiction. (*See, e.g.*, *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th

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Cir. 2009); *Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." (*Gaus v. Miles, Inc.,* 980 F.2d at 566.) Equally well settled is the rule that a plaintiff is "the master of the complaint" and is entitled to choose to litigate in state court. (*See, e.g.*, *Holmes Grp, Inc. v. Vornado Air Circulation Sys, Inc*., 535 U.S. 826, 831-32(2002) (citation omitted); *see also Lively v. Wild Oats Mkts., Inc*., 456 F.3d 933, 940 (9th Cir. 2006). Consequently, the Court should presume that this action "lies outside the limited jurisdiction of the federal courts and the burden of establishing the contrary rests upon [Defendants]." (*Abrego Abrego v. Dow Chem. Co*., 443 F.3d676, 684 (9th Cir. 2006) (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)) (internal punctuation omitted); *see also Moore-Thomas*, 553 F.3d 1241 at 1244 ("The presumption against removal means that the defendant always has the burden of establishing that removal is proper.") (citation omitted); *Gaus*, 980 F.2d at 566.) Where there is "any doubt about the right of removal," remand is required. (*Moore-Thomas*, 553 F.3d at 1244.)

Challenges to removal raise significant federalism concerns because "the effect of removal is to deprive the state court of an action properly before it ..." (*County of Santa Clara ex rel. Marquez v. Bristol Myers Squibb Co.,* 2012 WL 4189126 (N.D.Cal.2012 – San Jose Division) (citing *Grable & Sons Metal Products, Inc. v. Darue Engr. & Mfg.,* 545 U.S. 308, 312, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005)). These federalism concerns include protecting against "a potentially enormous shift of state cases into federal court." *Id.* (quoting *Grable & Sons Metal Products, Inc.,* 545 U.S. at 312).

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II. Removal Is Not Proper Because Plaintiff Did Not Assert A Claim Involving a Federal Question in the Operative First Amended Complaint.

a. Removal Is Permitted Only If a Federal Question Appears on the Face of the Complaint.

In general, the basis for removal jurisdiction must appear on the face of a well-pleaded complaint. (*Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 10 (1983).) The federal issue "must be disclosed on the face of the complaint, unaided by the answer *or the petition for removal*." (*Gully v. First National Bank*, 299 U.S. 109, 113, 57 S. Ct. 96, 81 L. Ed. 70 (1936).) (emphasis added) "A defense is not part of a plaintiff's properly pleaded statement of his or her claim." (*Rivet v. Regions Bank*, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998).) "A defense that raises a federal question is inadequate to confer federal jurisdiction." (*Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986).) Under the "well-pleaded complaint" rule, the plaintiff's complaint controls and there can be no removal on the basis of federal question unless the federal law under which the claim arises is a direct and essential element of the plaintiff's case. (*In re Community Bank of Northern Virginia*, 418 F. 3d 277, 293-94 (3d Cir. 2005). A federal defense does not suffice to create a federal question of removal. The Supreme Court has held that merely asserting a defense that injects a federal question, such as preemption, does not transform what is plainly a state law claim, such as negligence and/or malpractice, into an action arising under federal law for purposes of removal jurisdiction. (*Caterpillar v. Williams*, 482 U.S. 386 (1987).)

In determining whether there exists a substantial federal question, "the question is, does a state-law claim [1] necessarily raise a stated federal issue, [2] actually disputed and [3] substantial, [4] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." (emphasis added). (*Grable v. & Sons Metal Products,*

1 *Inc. v Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).) Cases under the *Grable*
2 paradigm are a "special and narrow category." (*Empire Healthchoice Assur., Inc. v. McVeigh*, 547
3 U.S. 677, 699 (2006).) *Gunn v. Minton*, 133 S. Ct. 1059, 185 L.Ed. 2d 72 (2013), clarified that the
4 requirement of a "substantial" issue under *Grable* is not measured against the case at hand and its
5 significance to the particular parties, but "looks instead to the importance of the issue to the federal
6 system as a whole." Id. at 1066. Federal courts' greater expertise with federal issues is not enough.
7 Gunn, 133 S. Ct at 1068. "[T]he possibility that a state court will incorrectly resolve a state claim is
8 not, by itself enough to trigger the federal courts' [jurisdiction]…" Id.
9
10 Plaintiff's First Amended Complaint asserts causes of action against Defendants for: (1)
11 Negligence; (2) Gross Negligence; (3) Negligent Undertaking; (4) Violations of the California
12 Occupational Health and Safety Act of 1973 (Title 8, California Code of Regulations § 3203 and
13 California Labor Code § 6400 *et seq.*; (5) Fraudulent Concealment of Injury (California Labor
14 Code § 3602(b)(2)); (6) Public Nuisance; and (7) Wrongful Death. (*See RFJN, Exhibit A.*)
15 Nothing about any of these causes of action is facially or substantively federal. In fact, Plaintiff's
16 causes of action are plainly rooted in California law.
17
18 **b. Defendants Have the Burden of Demonstrating that Removal Is Proper.**
19 Defendants have the burden of establishing that Plaintiff's action is "founded on a claim or
20 right arising under the Constitution, treaties or laws of the United States." (28 U.S.C. § 1441(c);
21 Ethridge v. Harbor House Restaurant, 861 F.3d 1389, 1393 (9th Cir. 1988). This is a heavy burden
22 because the removal statute is strictly construed, and any doubt is to be resolved in favor of
23 remand. (*Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996).)
24
25 > Because of the "Congressional purpose to restrict the jurisdiction of the federal courts on
26 > removal," *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941), the statute is
> strictly construed, id. at 108-09, and federal jurisdiction "must be rejected if there is any
27 > doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564,
28 > 566 (9th Cir. 1992) (citation omitted). [The defendant] . . . has the burden of establishing

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> that removal was proper. *Harris v. Provident Life and Accident Ins. Co*., 26 F.3d 930, 932 (9th Cir. 1994) (quotations and citations omitted).

(*Duncan*, 76 F.3d at 1485.)

Defendants have failed to satisfy this burden. A mere reading of page 1 of Defendants' Notice of Removal makes this abundantly clear. Defendants' Removal was based on Plaintiff's initial complaint, not the operative First Amended Complaint. (*See RFJN, Exhibit C, p.1*.) Plaintiff's First Amended Complaint removed the federal cause of action and any federal law relied upon in her initial complaint, thus rendering Defendants Notice of Removal moot. Moreover, the panoply of purported defenses raised and self-serving Declaration of one of Defendants' employees to manufacture federal jurisdiction falls clear outside the face of the claims and runs afoul of the rule that the federal question must be apparent and "unaided by the answer or the petition for removal." (*See, Gully, supra,* 299 U.S. at113.)

c. None of Plaintiff's Claims Are Preempted by § 301 of the National Labor Relations Act, 29 U.S.C. § 185.

Defendants' removal is also based on a flawed argument that Plaintiff's claims are preempted by § 301 of the National Labor Relations Act, 29 U.S.C. § 185. Such an assertion is misplaced.

Importantly, Decedent's labor union is not a party to this action. None of the named Defendants in this action are labor organizations, nor does any portion of Plaintiff's First Amended Complaint reference the same. Neither Decedent's collective bargaining agreement ("CBA") nor any of the terms therein, are referenced or relied in on Plaintiff First Amended Complaint.

State law claims "with no other relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by a CBA are not preempted by Section 301." Partida, 2019 WL 351874, at *3 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*

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for So. Cal., 463 U.S. 1, 25 (1983)). If state law rights can be enforced without interpreting the terms of the CBA, a claim based on those rights is not preempted by Section 301. (*See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391 (1987).)

Plaintiff's claims do not involve the interpretation of a CBA, nor are they dependent upon an analysis of the same. (*See Burnside v. Kiewit Pac. Corp.,* 491 F.3d 1053, 1059 (9th Cir. 2007) Indeed, Plaintiff does not assert any violation of the CBA in her First Amended Complaint. Moreover, posited rhetorical questions by Defendants involving theoretical *defenses* that a Defendant may raise based upon a CBA—regardless of how far-fetched and detached from the CBA they may actually be—does not a confer federal jurisdiction. Indeed, Plaintiff's claims and the state law rights asserted exist and are enforceable irrespective of any CBA.

Defendants' use of this NLRA argument in support of their removal efforts is clearly born out of Defendants' recognition of the unviability of a federal question as a basis for removal. Defendants do not have a right to remove this matter in accordance with § 301 of the National Labor Relations Act, 29 U.S.C. § 185. Under Defendants' strained analysis, virtually any lawsuit by an employee where a CBA exists would support federal court jurisdiction, a proposition clearly antagonistic to the axiom of where there is any doubt as to the propriety of removal, remand is required and the presumption must be that the action lies outside the limited jurisdiction of the federal courts. (*See Abrego Abrego, supra,* 443 F.3d at 684.)

d. Defendants Have Engaged and Continue to Engage in Forum Shopping.

In Plaintiff's view, this removal to federal court is a thinly veiled exercise in forum shopping. Defendants argue that the case necessarily calls for a determination of federal laws and regulations, thereby triggering subject matter jurisdiction, and cite a federal OSHA regulation violation styled as a cause of action in Plaintiff's original complaint. There are a number of

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problems with such an argument, the most prominent among them being: 1) Defendants predicated removal upon the wrong complaint; and 2) there is no discrete actionable legal theory or private right of action based upon federal OSHA regulations.

All parties have stipulated that Plaintiff's First Amended Complaint, which is devoid of any causes of action containing federal questions or rooted in federal law, is the operative complaint for purposes of the Court's removal analysis here and for all purposes going forward. (*See RFJN, Exhibit B.*) The First Amended Complaint excises the cause of action previously styled as a violation of federal OSHA regulation. The excision of that particular cause of action was a reflection of the fact that California State OSHA regulations control and that the original reference to the federal OSHA regulation was meant for illustration and background purposes into the history of workplace protections regulations. No federal right is implicated nor requires substantive consideration or adjudication by the court. Indeed, there is no discrete cause of action for a violation of a federal OSHA regulation; at most, it serves as background or context for the controlling, California OSHA regulations which, in part, inform the duty analysis in the context of Plaintiff's negligence-based causes of action.

Taking a page from the U.S. Chamber of Commerce's playbook on how to defend COVID-related suits, Defendants removed this case to federal court. Notably, the removal was not effectuated until after Defendants filed a Section 170.6 peremptory challenge against the Honorable Brad Seligman in the complex department of the Alameda County Superior Court. On July 10, 2020, Judge Seligman denied Defendants' challenge as untimely and noted that neither a general assignment, nor any hearing on the merits, had been scheduled. Now, after that unsuccessful forum shopping effort, Defendants seek to transfer the venue of this action to the United States District Court for the Eastern District of California. (*See* Dkt. 14, p.3.)

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III. The Absence of Any Valid Basis for Defendants' Motion to Remove Warrants Awarding Plaintiff Attorney's Fees and Costs.

Where a case is remanded following a failed attempt at removal, the district court may impose attorneys' fees and costs incurred by the party who successfully opposed removal. Pursuant to 28 U.S.C. § 1447(c), "[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." The statute does not require the Court to make a finding of bad faith prior to awarding fees. A district court has wide discretion in assessing fees pursuant to Section 1447(c). (*Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000).)

Defendants did not have a reasonable basis for removing the case based on a federal question issue under 28 U.S.C. 1441(c). Accordingly, the Court should assess an award of attorneys' fees and costs incurred by Plaintiff in bringing this Motion.

IV. Conclusion

As demonstrated above, this Court lacks removal jurisdiction over this action. Plaintiff's operative complaint seeks relief exclusively under California state law. For the foregoing reasons, Plaintiff respectfully requests this Court grant this Motion to Remand this action to state court and award Plaintiff her just costs and fees incurred in bringing this Motion.

Respectfully Submitted,

DATED: November 20, 2020 THE MATIASIC FIRM, P.C.

By: /s/ Paul A. Matiasic
Paul A. Matiasic
Hannah E. Mohr
Attorneys for Plaintiff

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 44 Montgomery Street, Suite 3850, San Francisco, California, 94104.

On November 20, 2020, I served the following document described as:

NOTICE OF MOTION AND MOTION OF PLAINTIFF NORMA ZUNIGA TO REMAND ACTION TO STATE COURT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION OF PLAINTIFF NORMA ZUNIGA TO REMAND ACTION TO STATE COURT

[PROPOSED] ORDER GRANTING MOTION OF PLAINTIFF NORMA ZUNIGA TO REMAND ACTION TO STATE COURT

on all interested parties in this action by placing [X] a true copy [ ] the original thereof enclosed in sealed envelopes addressed as follows:

William J. Dritsas, Esq. (wdritsas@seyfarth.com)
Michael W. Kopp, Esq. (mkopp@seyfarth.com)
SEYFARTH SHAW LLP
560 Mission Street, 31st Floor
San Francisco, CA 94105-2930
Telephone: (415) 397-2823
Facsimile: (415) 397-8549
(Counsel for Defendants Safeway Inc. and Albertsons Companies, Inc.)

[ ] (BY FACSIMILE) The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a record of the transmission.

[ ] (BY MAIL, 1013a, 2015.5 C.C.P.)

[ ] I deposited such envelope in the mail at San Francisco, California. The envelope was mailed with postage thereon fully prepaid.

[ ] I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (BY E-MAIL or ELECTRONIC TRANSMISSION) Due to the shelter-in-place order as a result of the ongoing Coronavirus (COVID-19) pandemic, this office is working remotely and unable to send physical mail as usual. As a result, I caused the document to be sent to the persons at the e-mail addresses listed above.

[ ] (BY OVERNIGHT DELIVERY/COURIER)

[ ] I delivered such envelope to an authorized courier or driver authorized by the express service carrier to receive documents in an envelope or package designated by the express service carrier with delivery fees provided for.

[ ] I deposited such envelope in a box or facility regularly maintained by the express service carrier in an envelope or package designated by the express service carrier with delivery fees provided for.

[ ] (BY MESSENGER) I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a messenger for personal service. (A proof of service executed by the messenger will be filed in compliance with the *Code of Civil Procedure*.)

[ ] (BY PERSONAL SERVICE) I delivered the foregoing envelope by hand to the following individual:

[ ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 20, 2020, at San Francisco, California.

Hannah E. Mohr

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