**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| TIMOTHY P. DEMARTINI, MARGIE DEMARTINI,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>MICHAEL DEMARTINI, RENATE DEMARTINI,<br><br>Defendants-Appellants. | Nos. 17-16400<br>18-15882<br><br>D.C. No.<br>2:14-cv-02722-JAM-CKD<br>Eastern District of California, Sacramento<br><br>ORDER<br>December 23, 2020 |

Before: O'SCANNLAIN and PAEZ, Circuit Judges, and SIMON,* District Judge.

The memorandum disposition filed in this case on July 6, 2020 is hereby amended. An amended memorandum disposition is filed concurrently with this order. With this amendment, the panel has voted unanimously to deny the petition for panel rehearing with respect to the July 6, 2020 memorandum disposition.

In addition, the panel has voted to deny the petition for panel rehearing and petition for rehearing en banc with respect to the panel's July 6, 2020 opinion. The panel has voted unanimously to deny the

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

petition for panel rehearing. Judge Paez has voted to deny the petition for rehearing en banc, and Judge O'Scannlain and Judge Simon have so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and the petition for rehearing en banc are DENIED. No subsequent petitions for rehearing or rehearing en banc may be filed.

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| TIMOTHY P. DEMARTINI; MARGIE DEMARTINI,<br>*Plaintiffs-Appellees*,<br>v.<br>MICHAEL J. DEMARTINI; RENATE DEMARTINI,<br>*Defendants-Appellants*. | Nos. 17-16400<br>18-15882<br><br>D.C. No.<br>2:14-cv-02722-JAM-CKD<br><br>OPINION |

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted December 11, 2019
Pasadena, California

Filed July 6, 2020

Before: Diarmuid F. O'Scannlain and Richard A. Paez, Circuit Judges, and Michael H. Simon,* District Judge

Opinion by Judge O'Scannlain

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* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

## COUNSEL

Kathryn M. Davis (argued), Law Office of Kathryn M. Davis, Pasadena, California, for Defendants-Appellants.

David B. Dimitruk (argued), Law Offices of David B. Dimitruk, Tustin, California, for Plaintiffs-Appellees

## OPINION

O'SCANNLAIN, Circuit Judge:

This case originated in state court, was removed to federal court, and subsequently was remanded back to state court. We are called upon to decide whether we have jurisdiction, nevertheless, to review the district court remand order that also amended the complaint to add a diversity-destroying defendant and severed the affected claim for disposition in state court.

### I

### A

Timothy and Michael DeMartini are brothers who, along with their wives, co-own adjacent commercial properties in Grass Valley, California. The first parcel, 12731 Loma Rica Drive ("the 12731 parcel"), is held by DeMartini & Sons, an oral partnership formed in the late 1970s by Timothy,

Michael, and their father, James Paul DeMartini. The nature of the brothers' joint ownership of the second parcel, 12759 Loma Rica Drive ("the 12759 parcel"), is contested. Michael and his wife Renate DeMartini claim that the parcel is also held by a partnership, but Timothy and his wife Margie DeMartini claim that the parcel is held by the couples as tenants in common.

Seeking to fund further development of the 12759 parcel, Timothy, Margie, Michael, and Renate took out a $250,000 loan from Westamerica Bank in 1998. When the loan came due in 2014, Michael and Renate wanted to extend the due date but Timothy and Margie did not. After a short extension, Timothy and Margie unilaterally paid the loan's $137,212.51 outstanding balance. Claiming that the couples had an agreement to share the burden of the loan fifty-fifty, Timothy and Margie demanded that Michael and Renate pay their share. Michael and Renate refused, asserting that the 12759 parcel was held by a partnership and that Timothy and Margie's unilateral action breached the partnership agreement. Michael and Renate also claimed that Timothy and Margie had closed a partnership bank account and diverted income from the 12759 parcel to their personal account. Hence, in Michael and Renate's view, Timothy and Margie were required to apply the diverted accrued income from the 12759 parcel to the outstanding debt before asking Michael and Renate to cover half of the remainder.

B

Timothy and Margie DeMartini filed this lawsuit against Michael and Renate in California Superior Court on September 15, 2014. Michael and Renate promptly removed the case to federal district court, citing diversity jurisdiction. *See* 28 U.S.C. §§ 1332, 1441(a). The parties are completely diverse. Timothy and Margie are citizens of California, which is also where the Loma Rica Drive parcels are located, while Michael and Renate are citizens of Nevada.

A year after this case was filed and removed, the district court granted Timothy and Margie leave to amend their original complaint. Timothy and Margie now assert three claims for relief: (1) dissolution of the partnership that owns the 12731 parcel, (2) partition of the 12759 parcel, which they alleged was owned by the couples as tenants in common rather than as partners, and (3) damages for Michael and Renate's alleged breach of the contract to share half the obligation of the Westamerica loan. In response, Michael and Renate amended their answer and counterclaim, asserting several affirmative defenses and seeking declaratory relief and damages.

C

The case proceeded to discovery. In late 2016, Timothy and Margie received a litigation guarantee report for the 12731 parcel that showed that the property was held by a partnership consisting of three titled partners: Timothy, Michael, and their deceased father, James Paul DeMartini. This revelation

contradicted the first amended and then-operative complaint, which had alleged that Timothy and Michael had succeeded to their father's one-third share of the partnership assets. After further research, Timothy and Margie's attorneys determined that the James Paul DeMartini testamentary trust retained an interest in the partnership. On February 17, 2017—less than a week before the discovery cut-off—Timothy and Margie moved further to amend their complaint to join the trustees of their father's estate as defendants to the partnership dissolution claim. One such trustee is Michael and Timothy's brother, James C. DeMartini, a citizen of Colorado and, thus, not a threat to the district court's diversity jurisdiction. The other trustee, however, is Timothy. Adding him as a defendant not only causes a curious scenario in which Timothy in his individual capacity is potentially adverse to himself in his capacity as trustee; it also destroys the previously complete diversity of the parties.

The district court concluded that, due to the trust's interest in the 12731 parcel, it could not "in equity and good conscience" allow the partnership dissolution claim to proceed without joining the trustees as parties, thus destroying diversity. The other claims could proceed without joinder. Neither party claimed the trustees had an interest in the adjacent 12759 parcel, which was the subject of Timothy and Margie's partition action. Nor did they claim the trust to be a party to the alleged contract that formed the basis of Timothy and Margie's breach of contract claim or to the alleged broader partnership

that formed the basis of Michael and Renate's counterclaims.

Rather than dismiss the action or remand the entire case upon the joinder of the trustees, the district court decided on a third option. Noting that the case had been "vigorously litigated" and "a significant amount of judicial resources [had] been invested" during the two years before Timothy and Margie's attorneys received the litigation guarantee report, the district court determined that the "means best suited to accommodate the interests of all parties, and proposed parties," would be to sever the partnership dissolution claim from the rest of the case and to remand only that claim for resolution in state court.

Accordingly, in a single decree, the district court granted the motion to amend to add the trustees, severed the partnership dissolution claim, and remanded that claim to California Superior Court.

D

Michael and Renate appeal the order amending, severing, and remanding the partnership dissolution claim ("the Order") (No. 17-16400). On its own, of course, such an order is not immediately appealable as either a final decision within the meaning of 28 U.S.C. § 1291 or under the collateral order exception. *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 947–48 (9th Cir. 2004).

However, after the summary judgment on all three counterclaims had been entered and a jury verdict on the breach of contract claim rendered, the district court directed entry of a Rule 54(b) partial final judgment. Michael and Renate now also appeal from that judgment and from the denial of their post-trial motion for judgment as a matter of law or a new trial (No. 18-15882). This court then consolidated the appeal from the Order (No. 17-16400) with the subsequent appeal from the Rule 54(b) judgment and denial of the post-trial motion (No. 18-15882).

Before us, then, is the district court's order amending the complaint to add the trustees, severing the dissolution claim, and remanding it to state court. We address Michael and Renate's appeal from the entry of judgment on their three counterclaims and on Timothy and Margie's breach of contract claim in a memorandum disposition filed concurrently with this opinion. *See DeMartini v. DeMartini*, Nos. 17-16400 & 18-15882, —F. App'x —(9th Cir. 2020).

## II

The parties dispute whether we have jurisdiction to review the Order. Timothy and Margie assert that 28 U.S.C. § 1447(d) bars our review of the Order, while Michael and Renate contend that we have jurisdiction over it in its entirety.

### A

Section 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is

not reviewable on appeal or otherwise," with certain defined exceptions not relevant here. 28 U.S.C. § 1447(d).

In addition, § 1447, which governs procedure after removal, provides two separate authorizations for a district court's remand of a removed case. First, § 1447(c) stipulates that:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

*Id.* § 1447(c). In other words, the district court may remand to state court only upon timely motion, unless there appears to be a defect in subject-matter jurisdiction, in which case the court must remand no matter the stage of the proceedings.

Second, § 1447(e) provides:

> If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

*Id.* § 1447(e). Section 1447(e) addresses a lacuna in Federal Rule of Civil Procedure 19. When the joinder of a required party is not feasible because it would deprive the district court of subject-matter jurisdiction, Rule 19 directs the court to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Section 1447(e) allows a third option: remand back to state court. *See Yniques v. Cabral*, 985 F.2d 1031, 1034 (9th Cir. 1993) ("Section 1447(e) engineers a 'departure' from the analysis required by Fed. R. Civ. P. 19 in that it allows the joinder of a necessary non-diverse party and a subsequent remand to state court.").

This appeal concerns a remand order citing § 1447(e) as its basis. After concluding that, "in equity and good conscience," it could not allow the action to proceed without the trustees, the district court acknowledged that Rule 19 would ordinarily require it to dismiss the action. However, because the case had been removed from state court, the district court determined that § 1447(e) authorized the alternative of remand, an alternative which it welcomed.

B

Michael and Renate offer several options by which we could purportedly find an exception to § 1447(d)'s seeming prohibition on our review of the Order.

First, Michael and Renate urge that § 1447(d)'s limitation on the review of remand orders should be construed to apply only to remand orders issued pursuant to § 1447(c) and not, as here, § 1447(e). Although the Supreme Court once held that § 1447(d) must be read together with § 1447(c) such that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)," *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976), Congress has since amended the statute to broaden subsection (c) and to add subsection (e), *see* H.R. 4807, 100th Cong. § 1016 (1988). Accordingly, in *Stevens*, we concluded that § 1447(d) deprives us of jurisdiction to review remand orders that were issued pursuant to § 1447(e) and that invoke the grounds specified in that subsection. 378 F.3d at 948–49.[1] Every other circuit

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[1] In Stevens, our court decided that § 1447(d) is equally an impediment to review of remands under § 1447(e) as it is to review of remands under § 1447(c) without yet having had the benefit of the Supreme Court's discussion of the interrelationship between these three subsections in *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007). The discussion in Powerex provides another persuasive rationale for our holding in Stevens. As the Supreme Court made clear, Congress's addition of § 1447(e) was part and parcel of its broadening of the district court's authority to remand under § 1447(c). *See id.* at 231–32. Before 1988, § 1447(c) mandated remand to state court only for cases that had been improperly removed to federal court—i.e., cases in which there was a defect in subject-matter jurisdiction at the time of removal or in which

to consider the question agrees. *See, e.g., Fontenot v. Watson Pharm., Inc.*, 718 F.3d 518, 520–21 (5th Cir. 2013); *Blackburn v. Oaktree Capital Mgmt., LLC*, 511 F.3d 633, 636–37 (6th Cir. 2008); *Alvarez v. Uniroyal Tire Co.*, 508 F.3d 639, 641 (11th Cir. 2007); *In re Fla. Wire & Cable Co.*, 102 F.3d 866, 868–69 (7th Cir. 1996); *Washington Suburban Sanitary Comm'n v. CRS/Sirrine, Inc.*, 917 F.2d 834, 836 n.5 (4th Cir. 1990).

Michael and Renate assert that remands pursuant to § 1447(e) are discretionary and therefore reviewable, unlike remands pursuant to § 1447(c), which they say are mandatory and therefore unreviewable. Such argument confuses the nature of the district court's discretion under § 1447(e), and we rejected it in *Stevens*. 378 F.3d at 948–49.

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the removal was procedurally improper. *See id.* at 231; *Thermtron*, 423 U.S. at 342. When § 1447(c) was broadened to authorize remands for cases with apparent defects in subject-matter jurisdiction even if the cases were properly removed, § 1447(e) was added to extend such a rule expressly to the circumstance of required, diversity-destroying joinder. In the absence of § 1447(e), an arguably incoherent rule would govern. Namely: a case removed under federal diversity jurisdiction in which an indispensable party appeared to be nondiverse must be remanded, unless that indispensable party had yet to be joined as a party to the action, in which case the district court would be required to *dismiss* the action under Rule 19, even late in the course of litigation and after the statute of limitations had expired. *See Yniques*, 985 F.2d at 1034–35; 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3739.1 (Rev. 4th ed. 2020).

Section 1447(c) remands are mandatory because once it appears that the district court lacks subject-matter jurisdiction the court must remand. But those under § 1447(e) are also mandatory because, once the diversity-destroying defendant has been joined under that subsection, the district court's only option is to remand. Likewise, if the district court does not join the diversity-destroying defendant, § 1447(e) does not authorize remand. As we explained in *Stevens*, it is the joinder that is discretionary, not the remand. *Id.* at 949.

Michael and Renate respond that *Stevens* is no longer good law because it was sub silentio overruled by the more recent case of *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933 (9th Cir. 2006). *Lively* was as much bound by Stevens as we are bound by them both. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("[A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court.").

We again conclude that, no matter whether the district court issued the remand pursuant to § 1447(c) or, as here, pursuant to § 1447(e), § 1447(d)'s bar applies.

2

Second, Michael and Renate argue that § 1447(d) does not apply to review of this Order because, in

their view, the district court's conclusion that the joinder destroyed the parties' diversity was legal error. Although the caption of Timothy and Margie's proposed amended complaint listed Timothy, in his capacity as a trustee, as a defendant, Michael and Renate contend that the motion to join him as a party should have been read to add him as a plaintiff. They also contend that the district court failed to consider the full set of factors that govern the joinder of a diversity-destroying party.

It would negate § 1447(d) to hold (as Michael and Renate seem to propose) that a court may review the merits of a remand order when that court suspects any legal error. Nonetheless, appellate courts may peek at the remand order as part of our "jurisdiction to determine our own jurisdiction." *Lively*, 456 F.3d at 937 (quoting *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 992 (9th Cir. 2004)). Accordingly, we take note of the *grounds* upon which the district court professes to base its remand. When the district court characterizes its remand as "resting upon lack of subject-matter jurisdiction"—as all § 1447(e) remands must—the appellate court's review, "to the extent it is permissible at all, should be limited to confirming that that characterization was colorable." *Powerex*, 551 U.S. at 234. Once the appellate court determines that "the District Court relied upon a ground that is colorably characterized as subject-

matter jurisdiction, appellate review is barred by § 1447(d)." *Id.*[2]

It would appear that Michael and Renate conflate review of whether the grounds of the remand order were colorably based on lack of subject-matter jurisdiction, which is permitted, with review of whether the remand was an acceptable exercise of such authority, which is not. *See, e.g., Lively*, 456 F.3d at 938 ("[T]he question raised on appeal is not whether the district court's remand order was correct, but whether the district court exceeded the scope of its § 1447(c) authority by issuing the remand order in the first place."). As a result, Michael and Renate rely on precedents in which this court reviewed district court remand orders that were not even ostensibly grounded in lack of subject-matter jurisdiction. *E.g., Smith v. Mylan, Inc.*, 761 F.3d 1042, 1044 (9th Cir. 2014) (untimely removal); *Harmston v. City & County of San Francisco*, 627 F.3d 1273, 1277 (9th Cir. 2010) (discretionary refusal of supplemental jurisdiction); *Lively*, 456 F.3d at 942 (forum defendant rule); *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1193 (9th Cir. 2003) (defect in removal procedure); *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 352 (9th Cir. 1995) (*Burford* abstention).

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[2] *Powerex* raises the possibility that § 1447(d) would permit appellate review of a remand order that "dresses in jurisdictional clothing a patently nonjurisdictional ground," but holds off on deciding whether such review is permissible. *Powerex*, 551 U.S. at 234. We need not decide either, as it is not alleged here that the district court's concern for diversity jurisdiction was a façade.

Here, the Order was premised on the concern that the proposed joinder would "destroy diversity." There is no dispute here whether such grounds are colorably jurisdictional or are simply procedural as there was in, say, *Lively*. By definition, diversity confers subject-matter jurisdiction and so the addition of a diversity-destroying defendant would "destroy subject matter jurisdiction" in this case. 28 U.S.C. § 1447(e).

Because the district court characterized the remand as compelled by the grounds specified by § 1447(e), "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 641–42 (2006) (quotation marks omitted). The accusation of legal error does not permit this court to sidestep the command of § 1447(d).

3

Finally, Michael and Renate contend that § 1447(d) does not bar our review of this remand order because the district court remanded a single *claim* to state court, while § 1447(d) prevents the review of orders "remanding a *case*." 28 U.S.C. § 1447(d) (emphasis added). Such an argument ignores that the effect of the district court's severance of the dissolution claim from the other claims was to create a separate case—a case that it then remanded. *See Herklotz v. Parkinson*, 848 F.3d 894, 898 (9th Cir. 2017) ("When a claim is severed, it becomes an entirely new and independent case" with "an independent jurisdictional basis.").

We therefore conclude that § 1447(d)'s prohibition applies to this appeal.

III

Section § 1447(d)'s bar on our review of the remand does not end this case. Michael and Renate also assert that the joinder that occasioned the remand is separable from the remand. A reviewing court, they remind us, may look behind the unreviewable remand order and review the district court's antecedent determinations when such determinations are separable from the remand order. *See Stevens*, 378 F.3d at 946.

A

The separability doctrine originated in the Supreme Court's terse, cryptic, and now-controversial opinion in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934).[3] There, an individual, filing in state court, sued the City of Waco and its contractor for damages that he suffered in a collision with a street obstruction. *Id.* at 141. The City then brought a cross-complaint against the United States Fidelity & Guaranty Company ("USF&G"), an out-of-state surety. *Id.* USF&G

[3] *City of Waco* preceded the enactment of § 1447(d) and the Federal Rules of Civil Procedure, so the Supreme Court, while continuing to apply and interpret the precedent, has recently cast doubt on the "continued vitality" of the limited appellate review it allows. *Kircher*, 547 U.S. at 645 n.13; *see also In re C & M Props., L.L.C.*, 563 F.3d 1156, 1164 (10th Cir. 2010) (Gorsuch, J.).

removed the case to federal court, but, on motion from the plaintiff, the federal district court dismissed the cross-complaint and, finding the parties no longer diverse, remanded the case to state court. *Id.* at 141–42. The appellate court held that it did not have jurisdiction over the order dismissing the cross-claim, but the Supreme Court reversed. *Id.* at 142–43. The Court held that the dismissal of the cross-claim was reviewable because "in logic and in fact the decree of dismissal preceded that of remand" and, "if not reversed or set aside, is conclusive upon the petitioner." *Id.* at 143. Yet the Court took pains to make clear that the review of the dismissal would not be a back door through which the appellate court could review the remand of the rest of the case. *Id.* at 143–44.

B

In dicta, our court has distilled *City of Waco*'s criteria for a separable antecedent determination into a two-step test. An antecedent determination is separable from the remand order when it (1) "preceded the remand order in logic and fact" and (2) is "conclusive, i.e., functionally unreviewable in state courts." *Stevens*, 378 F.3d at 946 (quoting *Dahiya v. Talmidge Int'l, Ltd.*, 371 F.3d 207, 210 (5th Cir. 2004)). We have had very few occasions to employ and to develop the separability doctrine, so *City of Waco* remains the exemplar case of a separable order.

Let's begin with step one: whether the antecedent determination preceded the remand order "in logic and fact." Here the antecedent determination is not a *City of Waco*-type dismissal of all claims against the diverse party, but rather the joinder of a diversity-destroying party.

While the joinder of the trustees undoubtedly preceded the remand of the partnership dissolution claim *in logic*, it is not clear whether the joinder preceded the remand *in fact*. Recall that the remand was ordered pursuant to § 1447(e). Under that subsection, the district court has two options: either deny joinder or join-and-remand. Section 1447(e) does not permit separate consideration of joinder and remand; they are one and the same.

We are not persuaded that *City of Waco* attached such significance to its comment that "in logic and fact the decree of dismissal preceded that of remand" that we should read "logic" and "fact" as such separate, demanding requirements. *City of Waco*, 293 U.S. at 143. Indeed, the district court in *City of Waco* issued its dismissal and its remand in a "single decree," so even simultaneous orders in a single decree may be separable. *Id.* at 142. The orders before us were also issued simultaneously and in a single decree. We see nothing about their sequence that merits a different treatment than the orders in *City of Waco*.

We therefore proceed to step two.

The district court's joinder of the trustees clearly fails to meet the second requirement: that the antecedent order be "conclusive" on the issue it decided. A "conclusive" antecedent order is one that is "functionally unreviewable in state court." *Stevens*, 378 F.3d at 946. Put another way, a separable order "result[s] in substantive issues being later barred." *Washington Suburban Sanitary Comm'n*, 917 F.2d at 836 n.4. The order dismissing the cross-claim in *City of Waco* illustrates the point. There the City could not bring the same cross-claim in state court because the district court's dismissal had preclusive effect. *City of Waco*, 293 U.S. at 143.[4] The Court was therefore concerned that the City's cross-claim would be extinguished simply because it fell into a limbo in which the district court's dismissal was simultaneously unreviewable in federal court and preclusive in state court.

Here no such concern is warranted. No claims will be functionally extinguished by our inability to review the challenged amendment. Instead, the full and ultimate effect of the amendment is that one of the six claims pled in this case must now be resolved in a state forum instead of a federal one. Unlike *City of Waco*, the state court is not bound by the challenged amendment. If the trustees should not have been joined, the courts of the State of California are free to dismiss them. *See Kircher*, 547 U.S. at 646

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[4] It would have no such effect today. *See In re C & M Props.*, 563 F.3d at 1165.

("[W]hat a state court could do in the first place it may also do on remand.").

But Michael and Renate contend that the joinder is unreviewable in state court because the state court possesses "no power to reverse remand." However, the crucial "conclusive" result cannot be the remand itself; otherwise it would contradict the very premise of the separability doctrine, which is that some orders have effects that render such orders *separable* from the remand. Whether the joinder is conclusive therefore cannot depend on whether the state court may reverse the *remand*; it must depend on whether the state court may reverse the *joinder* and dismiss the trustees.

We conclude that, because the state court may dismiss the trustees, the joinder in this case is not conclusive and hence not reviewable.

3

Furthermore, we are reminded that *City of Waco* "repeatedly cautioned that the remand order itself could not be set aside" even when the antecedent determination is reviewable. *Powerex*, 551 U.S. at 236. Accordingly, when we have found antecedent determinations to be separable and reviewable, we do so without disturbing the remand order. *E.g., Sherwin v. Infinity Auto Ins. Co.*, 639 F. App'x. 466, 467 n.1 (9th Cir. 2016); *Nebraska ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986). The observation

suggests a formula for differentiating separable decisions from unreviewable ones. An antecedent ruling that could be reversed without disturbing the remand may, as in *City of Waco*, be separable. However, if the ruling can only be reversed by first undoing the remand, then it is not separable and we may not review it. *See Palmer v. City Nat'l Bank of W. Va.*, 498 F.3d 236, 242–43 (4th Cir. 2007) ("A district court decision that has a preclusive effect on the parties and that is logically and factually separable from the remand order is a decision that can be reviewed by this Court without affecting the remand order."); *accord Fontenot*, 718 F.3d at 522.

Because the trustees are not parties to the case currently in federal court, it is impossible to imagine how we could revisit their joinder without sticking our nose into state court proceedings. As a result, Michael and Renate's request to review the amendment order ultimately "amounts to a request for one of two impermissible outcomes: an advisory opinion . . . or a reversal of the remand order." *Powerex*, 551 U.S. at 236. Neither outcome is within our power; the joinder decision is unreviewable by this court.[5]

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[5] Michael and Renate request judicial notice of state-court filings in proceedings on the remanded claim. Such filings are relevant only for evaluating the appropriateness of the joinder, which this court may not review. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 594 n.5 (9th Cir. 2018). Consequently, the motion to take judicial notice is **DENIED**.

C

In holding that the joinder of a diversity-destroying party is not separable from a § 1447(e) remand order and is therefore unreviewable, we join the Fourth Circuit. *See Washington Suburban Sanitary Comm'n*, 917 F.2d at 836 n.4.

Two circuits, however, hold that an order amending a complaint to add a diversity-destroying party *is* separable from a remand order. *Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 489 (5th Cir. 2001); *Powers v. Southland Corp.*, 4 F.3d 223, 228 (3d Cir. 1993).[6] Respectfully, they do not dissuade us from our holding.

1

The Fifth Circuit's opinion in *Doleac* is notably equivocal; it forthrightly acknowledged that an amendment to join a diversity-destroying party "simply determined the forum in which the claims would be decided and that both parties would be subject to the same action. Therefore, it does not appear analogous to issues found separable." *Doleac*, 264 F.3d at 487–88 (citation omitted). However, the court believed itself bound by a precedent holding that an amendment joining an immune party was separable from the subsequent remand, even though

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[6] In neither case did the appellate court actually review the joinder, each holding that the joinder order was not immediately appealable as either a final decision or a collateral order. *Doleac*, 264 F.3d at 493; *Powers*, 4 F.3d at 237.

that precedent failed to consider the conclusiveness element of the *City of Waco* test. *Id.* at 486, 489 (citing *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023 (5th Cir. 1991)).

*Doleac* is also distinguishable because it concerns a joinder preceding a remand pursuant to § 1447(c), while our case (and the Fourth Circuit's) concerns a remand under § 1447(e). As explained above, joinder and remand under § 1447(e) is a single exercise. Hence, even as it held that joinder preceding a § 1447(c) remand was separable, the Fifth Circuit opined that joinder pursuant to § 1447(e) was very likely *not* separable from the remand. *Doleac*, 264 F.3d at 488–89. The panel went so far as to suggest that the circuit reconsider its holding en banc to bring the rule for § 1447(c) in line with the rule for § 1447(e). *Id.* at 488, 489.

2

The Third Circuit's holding in *Powers* hinged on a factor not found here: the district court determined that the amendment adding a diversity-destroying defendant would relate back to the date that the complaint was originally filed. As the court explained, the joinder at issue in the case "consisted of two separate steps or decisions." *Powers*, 4 F.3d at 230 n.8. The first such decision was whether the amendment would relate back, a decision that was separable because it "clearly affected significant substantive rights"—i.e., the joined defendant would lose the benefit of the expiration of the statute of limitations. *Id.* The second such decision was

whether joinder should be permitted. The court conceded that without the relation-back decision, joinder would have "no significant substantive effect on the rights of the parties beyond determining the forum." *Id.*

We are not persuaded that either *Doleac* or *Powers* constitute contrary authority. We are satisfied that the joinder is not separable.

IV

Although the district court's amendment of the complaint is not separable from the remand, severance of the partnership dissolution claim may well be. But we need not decide whether § 1447(d) bars our review of pre-remand decisions to sever claims because Michael and Renate expressly waived any objection on the merits to the district court's severance of the partnership dissolution claim.

V

Finally, Michael and Renate assert that this court should construe their appeal as a petition for writ of mandamus over which this court has jurisdiction under 28 U.S.C. § 1651(a).

Congress undertook to exclude remand orders from our review and anticipated that litigants might adopt an unusual posture in order to raise their grievance before the courts of appeals. For that reason, § 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is

not reviewable on appeal *or otherwise*." 28 U.S.C. § 1447(d) (emphasis added). Review through a writ of mandamus is one such alternative specifically prohibited by § 1447(d). *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723–24 (1977); *see also In re Blatter*, 241 F. App'x 371, 373 (9th Cir. 2007). What § 1447(d) prohibits on appeal, it also prohibits on petition for mandamus. Mandamus is an "extraordinary remedy" and it is neither warranted nor permissible here. *Special Invs.*, 360 F.3d at 993.

VI

Michael and Renate cannot overcome the familiar bar to appellate review of remand orders in cases removed from state court.

**APPEAL DISMISSED.**

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF CALIFORNIA**

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|---|---|
| TIMOTHY P. DEMARTINI and MARGIE DEMARTINI,<br>Plaintiffs,<br>v.<br>MICHAEL J. DEMARTINI, RENATE DEMARTINI aka RENATE B. DEMARTINI, and DOES 1 through 15, inclusive,<br>Defendants.<br>---<br>MICHAEL DEMARTINI and RENATE DEMARTINI,<br>Counter Claimants,<br>v.<br>TIMOTHY B. DEMARTINI and MARGIE DEMARTINI,<br>Counter Defendants. | Case No. 2:14-cv-02722 JAM-CKD)<br><br>**AMENDED PARTIAL JUDGMENT UNDER FRCP 54(B) UPON PLAINTIFFS' SECOND CLAIM FOR BREACH OF CONTRACT AND DEFENDANTS' CONTERCLAIMS FOR DECLARATORY RELIEF, BREACH OF PARTNERSHIP AGREEMENT, DEFAMATION AND DEFAMATION PER SE**<br><br>(Filed May 4, 2018) |

Following a jury verdict on Plaintiffs' claim for breach of contract, Plaintiffs submitted a proposed judgment order. ECF No. 341. The Court issued a Partial Judgment Order on April 30, 2018, adopting Plaintiffs' proposed order. ECF No. 345. On May 2, 2018, Defendants objected to the proposed order on

several grounds. ECF No. 346. The Court finds Defendants' first objection meritorious, in part, and accordingly amends the partial judgment order as set forth below. Defendants' second, third, and fourth objections lack merit and are overruled.

## I. JURY TRIAL ON PLAINTIFFS' CAUSE OF ACTION FOR BREACH OF CONTRACT

Plaintiffs Timothy and Margie DeMartini's cause of action for breach of contract came on regularly for trial on April 16, 2018 in Courtroom 6 of the above entitled court, with the Honorable John A. Mendez presiding. The Plaintiffs, Timothy and Margie DeMartini, appeared by and through attorneys Kirk S. Rimmer and Christian F. Kemos and Defendants, Michael and Renate DeMartini, proceeded pro se.

A jury of 8 persons was regularly impaneled and sworn to the cause. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict.

The jury deliberated and thereafter returned into the court with its verdict consisting of the issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to wit:

> A COPY OF PLAINTIFFS' SPECIAL VERDICT IS ATTACHED HERETO AS EXHIBIT A, INCORPORATED

> HEREIN AND MADE A PART HEREOF BY REFERENCE AS THOUGH FULLY SET FORTH HEREIN.

Plaintiffs, Timothy and Margie DeMartini, by said verdict, are entitled to judgment against Defendants, Michael and Renate DeMartini, in the amount of $68,606.25 along with interest of ten (10) percent per annum after breach as set by California Civil Code § 3289(b).

## II. SUMMARY JUDGMENT

On July 18, 2016, Defendants, Michael and Renate DeMartini, brought counterclaims against Timothy and Margie DeMartini for Declaratory Relief, Breach of the Partnership Agreement, Defamation and Defamation Per Se. Plaintiffs, Timothy and Margie DeMartini, filed a motion for summary judgment against Defendants' Michael and Renate DeMartini's counterclaims. ECF No. 202. On December 20, 2017, the Court granted Plaintiffs' motion for summary judgment on Defendants' counterclaims for Declaratory Relief, Breach of the Partnership Agreement, Defamation and Defamation Per Se.

The record in this case establishes that Plaintiffs filed their Second Amended Complaint on June 6, 2017. The matter was referred to the Honorable Carolyn K. Delaney, pursuant to Local Rule 302(c).

At a May 31, 2017 hearing on the motion, Plaintiffs were represented by counsel Kirk Rimmer and Christian Kemos, and Defendants proceeded prose. After their arguments, the court took the matter under submission.

On June 14, 2017, the Hon. Carolyn K. Delaney filed findings and recommendations which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within fourteen days.

Per an extension of the deadline, Defendants filed objections on August 29, 2017. See ECF No. 255. Plaintiffs filed a response to those objections on September 7, 2017. See ECF No. 263.

On December 20, 2017, the Court filed an Order adopting in full the findings and recommendations filed June 14, 2017 and granting Plaintiffs' motion for summary judgment. See ECF No. 267.

> A COPY OF THE MAGISTRATE'S JUNE 14, 2017 FINDINGS AND RECOMMENDATIONS IS ATTACHED HERETO AS EXHIBIT B, INCORPORATED HEREIN AND MADE A PART HEREOF BY REFERENCE AS THOUGH FULLY SET FORTH HEREIN.

IT IS HEREBY ORDERED, the findings and recommendations filed June 14, 2017 are adopted in full with the following modifications:

Page 4, Footnote 1 is amended as follows:

> 12757, 12759 and 12761 Loma Rica Drive are acknowledged to be co-owned by the parties and are subject to Plaintiffs' cause of action for partition. 12731 Loma Rica Drive is acknowledged to be held in partnership, and plaintiffs' claim for dissolution of this partnership has been remanded to state court. ECF No. 224.

Page 7: line 10 – 12 is amended as follows:

> Plaintiffs contend that any documents indicating a partnership on their face "relate to the DeMartini and Sons Partnership at Loma Rica Drive," and refer to the dissolution of the acknowledged partnership related to 12731 Loma Rica Drive, an issue which has been removed to state court. ECF No. 218, Plff's Reply, at 8.

Page 8: line 22-24:

> Assuming the report is admissible, however, it shows little except the parties' joint management of 12757, 12759, and 12761 Loma Rica Drive.[4]

Page 8, Footnote 4:

> Similarly, at the hearing, Michael DeMartini cited his design of five units of major buildings, worth "hundreds of thousands of dollars," and his generation of "millions" in shared income. These statements also concerned the Loma Rica buildings, part of which are the subject of a partnership remanded to state court.

Page 11, line 24 – 26:

> While the parties were in an acknowledged partnership concerning the 12731 Loma Rica Drive property, the scope, terms, and duration of any further partnership seem to be drawn from Michael's own assumptions and little else.

IT IS FURTHER ORDERED, that Judgment is hereby entered in favor of Plaintiffs Timothy and Margie DeMartini against Defendants Michael and Renate DeMartini, jointly and severally upon Defendants' counterclaims for Declaratory Relief, Breach of Contract, and Defamation.

## III. FINAL JUDGMENT

The Court finds that final judgment on Plaintiffs' breach of contract claim and all of Defendants' counterclaims proper at this time. The issues

determined on summary judgment and by jury verdict at trial are separable from the material issues in Plaintiffs' claim for partition, the only claim remaining in the case. See Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 717 (1980) (outlining factors the district court may consider in deciding whether to certify a judgment under Rule 54(b)).

Although the actions involve the same property, the appellate court will not be called upon to determine any legal or factual issues that would alter resolution of the partition action. Future judgment on the partition action would not moot the need for appellate review of the claims already adjudicated. The Court thus finds there is no just reason to delay entry of partial judgment in this action.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That Plaintiffs Timothy and Margie DeMartini have judgment against Defendants Michael and Renate DeMartini as follows:

1. Plaintiffs, Timothy and Margie DeMartini, have and recover from Defendants, Michael and Renate DeMartini, jointly and severally, damages in the sum of $68,606.25 plus prejudgment interest of $26,996.80, with interest thereon from the date of the judgment until paid together with costs and disbursements. Prejudgment interest from May 23, 2014 to April 27, 2018 is calculated based on a rate of $18.80 per day.

2. Cross-Complainants, Michael and Renate DeMartini, have and recover nothing by reason of their counterclaims for Declaratory Relief, Breach of Contract, and Defamation against Cross-Defendants, Timothy and Margie DeMartini, and that Cross-Defendants, Timothy and Margie DeMartini, shall have and recover from Cross-Complainants, Michael and Renate DeMartini, jointly and severally, costs and disbursements.

Dated: May 4, 2018

/s/ John A. Mendez
John A. Mendez
United States District Judge

[Exhibits omitted.]

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| TIMOTHY P. DEMARTINI, et al.,<br>Plaintiffs,<br>v.<br>MICHAEL J. DEMARTINI, et al.,<br>Defendant. | No. 2:14-cv-02722 JAM CKD PS<br>**ORDER**<br>(Filed May 1, 2017) |

Plaintiff filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c).

On May 1, 2017, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within fourteen days. None of the parties have filed objections to the findings and recommendations; however, defendants have filed a response.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 1, 2017, are adopted in full;

2. The motion to amend the complaint (ECF No. 195) is granted;

3. The Clerk of Court is directed to separately file and docket the proposed second amended complaint (ECF No. 195-1 at pp. 8-16, Declaration of Peter Kleinbrodt, Exh. B);

4. The third cause of action for dissolution of partnership in the second amended complaint is severed from the remaining claims; and

5. The severed claim for dissolution of partnership is remanded to the Superior Court of the State of California, in and for the County of Nevada (case no. 80744).

DATED: May 4, 2018 /s/ John A. Mendez
HON. JOHN A. MENDEZ
United States District Judge

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| TIMOTHY P. DEMARTINI, et al.,<br>Plaintiffs,<br>v.<br>MICHAEL J. DEMARTINI, et al.,<br>Defendants. | No. 2:14-cv-02722 JAM CKD PS<br><br>**FINDINGS AND RECOMMENDATIONS**<br><br>(Filed June 1, 2017) |

Pending before the court is plaintiffs' motion to amend the complaint. This matter was submitted on the briefs. E.D. Cal. L.R. 230(g); ECF No. 212. Upon review of the documents in support and opposition, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

Plaintiffs move to amend the complaint to add as parties defendants Timothy DeMartini and James C. DeMartini in their capacities as trustees for the James Paul DeMartini testamentary trust. The first amended complaint (filed October 15, 2015) alleged three causes of action: (1) partition of real property (for assessor's parcel number 06-370-64, which is alleged to be jointly owned by Michael DeMartini and Renate DeMartini, as owners of an undivided one-half interest, and Timothy DeMartini and Margie DeMartini, as owners of an undivided one-half interest); (2) breach of contract (for failure to pay half of a loan amount); and (3) dissolution of partnership

and accounting (with respect to the alleged partnership between Timothy and Michael DeMartini). Plaintiffs now seek to amend the complaint at this late stage of the litigation because plaintiffs' counsel recently obtained a litigation guarantee[1] allegedly showing that a partnership asset, real property located at 12731 Loma Rica Drive in Grass Valley (assessor's parcel number 06-370-63-000), has title vested in "De Martini and Sons, a General Partnership, Composed of James P. De Martini, Timothy P. De Martini and Michael J. De Martini." ECF No. 199-1 at p. 15. Plaintiffs allege (in the proposed second amended complaint, ECF No. 195-1 at p. 12, ¶ 19) that upon the demise of James P. De Martini, his partnership interest became an asset of the testamentary trust.[2] Plaintiffs have provided only the first page of the litigation guarantee (ECF No. 195-2 at p. 5, Exh. A); plaintiffs' exhibit does not include the legal description of the land referenced in the guarantee. Defendants have provided what appears to be a complete copy of the guarantee that plaintiffs are relying on for their motion to amend.

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[1] Plaintiffs' counsel contends the motion was brought at this late juncture in the litigation because although the guarantee was provided to counsel on November 30, 2016, counsel had since then been conferring with the estate attorney to try to determine whether the property had devolved to the remaining partners. That question at present is apparently unresolved.

[2] Contrary to the allegations in the proposed second amended complaint, in the first amended complaint, plaintiffs alleged that plaintiff Timothy DeMartini and defendant Michael DeMartini succeeded to the ownership of James DeMartini's partnership assets. ECF No. 75 at p. 4, ¶ 17.

See ECF No. 199-1 at pp. 14-21, Exh. 1. Defendants have also submitted their own litigation guarantee, which shows the property at issue being vested in "De Martini and Sons, a general partnership." ECF No. 199-1 at p. 26.

Plaintiffs' proposed second amended complaint will add as parties defendant Timothy DeMartini and James C. DeMartini in their capacities as trustees for the James Paul DeMartini testamentary trust. ECF No. 195-2 at pp. 7-15. This action was originally removed from state court on the basis of diversity. ECF Nos. 1, 69. Joining Timothy DeMartini as a party defendant will destroy diversity because a party cannot be diverse to himself. See Emerald Investors Trust v. Gaunt Parsippany Partners, 492 F.3d 192 (3rd Cir. 2007) (in suit against individuals trustee of a trust, where trustees possess certain customary powers to hold, manage and dispose of assets, citizenship of trustee is controlling for diversity of citizenship purposes.) Under Federal Rule of Civil Procedure 19(a), joinder of the trustees is therefore not feasible because joinder will deprive the court of subject-matter jurisdiction. See generally Faunce B. Bird, 210 F.R.D. 725 (D. Oregon 2002) (joinder of trust co-beneficiary not feasible because it would destroy diversity).

The court therefore turns to the question of whether, in equity and good conscience, this action should proceed among the existing parties. See Fed. R. Civ. P. 19(b); see also EEOC v. Peabody Western Coal Co., 610 F.3d 1070, 1083 (9th Cir. 2010) (factors to be considered include "(1) the extent to which a

judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by shaping the judgment or the relief; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed"). On the record presently before the court, it appears that the testamentary trust may have an interest in a partnership asset. Although the proposed second amended complaint does not specifically ask for partition of partnership real property assets, as a general rule, after dissolution of a partnership and accounting, all partnership assets must either be equitably divided among the partners or sold, with the net proceeds distributed to the partners. See Swarthout v. Gentry, 62 Cal. App. 2d 68, 83 (1943) (court, after taking accounting, should require the partnership property to be sold); Steinberg v. Goldstein, 145 Cal. App. 2d 692, 700 (1956) (in action seeking dissolution of partnership and accounting, as general rule, partnership assets liquidated prior to final judgment). Because the testamentary trust may have an interest in a partnership real property asset, disposition of this asset cannot proceed fairly in the absence of the trust. See Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975) (all co-owners of property should be joined as parties). Because of this interest, the court upon considering the Rule 19(b) factors, concludes that the claim for dissolution cannot in equity and good conscience proceed in this forum and the claim would need to be dismissed under Federal Rule of Civil Procedure 19(b).

However, this action was removed from state court. Under 28 U.S.C. § 1447(e), if after removal plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may permit joinder and remand the action to state court. This action has been pending in this court since November 20, 2014. ECF No. 27. The case has been vigorously litigated by both sides and a significant amount of judicial resources have been invested in this action. There is a pending motion for summary judgment brought by plaintiffs against defendants' counterclaims and the final pretrial conference is set for August 25, 2017 with trial on October 23, 2017. ECF Nos. 146, 202. In light of the court's familiarity with the claims in this action and the late stage of the litigation, the court finds severance of the dissolution claim and remand of that claim to state court is the means best suited to accommodate the interests of all parties, and proposed parties, to this litigation.[3]

Accordingly, IT IS HEREBY RECOMMENDED that:

1. The motion to amend the complaint (ECF No. 195) be granted;

2. The Clerk of Court be directed to separately file and docket the proposed second amended

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[3] The court does not reach plaintiffs' request for further modification of the scheduling order to depose trustee James C. DeMartini. Deposition of this deponent is relevant only to the dissolution claim, which the undersigned will recommend be remanded to state court. Whether this discovery should be allowed will be left to the discretion of the Superior Court judge.

complaint (ECF No. 195-1 at pp.8-16, Declaration of Peter Kleinbrodt, Exh. B);

3. The third cause of action for dissolution of partnership in the second amended complaint be severed from the remaining claims; and

4. The severed claim for dissolution of partnership be remanded to the Superior Court of the State of California, in and for the County of Nevada (case no. 80744).

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: May 1, 2017

/s/ Carolyn K. Delaney
CAROLYN K. DELANEY
UNITED STATES
MAGISTRATE JUDGE

## 28 U.S.C. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.