

No.

23-5974

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

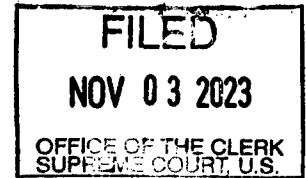
— PETITIONER

Timothy Kaler

vs.

— RESPONDENT(S)

ESA MANAGEMENT, LLC



ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Timothy Kaler

1295 Carlsbad Village Dr. STE. 100-TC

Carlsbad, CA. 92008

760-986-5674

QUESTION(S) PRESENTED - The issue here is jurisdictional and that the state matter should be heard in Federal court for the reasons detailed. The U.S. Court of Appeals for the Ninth Circuit recently addressed this second pathway for removal in **Deitrich v. Boeing**.

The very same 9th Circuit Court of Appeals decided the opposite in this dismissal decision, ruling against their own ruling precedent, and thus the Supreme Court must accept the case and overturn the dismissal, to secure uniformity of federal appellate decisions.

The Notice of Removal asserts the following case related federal violations, among others, by Plaintiff against Defendant: (1) Violations of the Federal CARES Act; and (2) Breach of Fiduciary Duty indicating potential fraud against the Defendant and the United States of America; and (3) Violation of Defendant's right for due process under the 14th amendment of the US Constitution; and (4) Violation of the 6th amendment under the US Constitution.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

REASONS FOR GRANTING THE WRIT

CONCLUSION

INDEX TO APPENDICES

APPENDIX A - 9th Circuit decision on 9/28/23

**APPENDIX B - Federal District Court of Southern California decision dated
8/2/2023**

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

☐ reported at ; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at ; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided this case was 9/28/2023.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: , and a copy of the order denying rehearing appears at Appendix .

☐ An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue here is jurisdictional and that the state matter should be heard in Federal court for the reasons detailed. The U.S. Court of Appeals for the Ninth Circuit recently addressed this second pathway for removal in **Deitrich v. Boeing**.

The very same 9th Circuit Court of Appeals decided the opposite in this dismissal decision, ruling against their own ruling precedent, and thus the Supreme Court must accept the case and overturn the dismissal, to secure uniformity of federal appellate decisions.

The Notice of Removal asserts the following case related federal violations, among others, by Plaintiff against Defendant: (1) Violations of the Federal CARES Act; and (2) Breach of Fiduciary Duty indicating potential fraud against the Defendant and

the United States of America; and (3) Violation of Defendant's right for due process under the 14th amendment of the US Constitution; and (4) Violation of the 6th amendment under the US Constitution.

FEDERAL QUESTION JURISDICTION

1. Federal courts have jurisdiction to hear, originally or by removal from state court, cases where federal law creates the cause of action being alleged or when a claimant's right to relief depends on the resolution of a substantial question of federal law. See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (explaining that "a case arises] under' federal law where the vindication of a right under state law necessarily turns on some construction of federal law).

2. This Court possesses federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the Complaint raises issues and claims under the laws of the United States. Specifically, the Defendant alleges a cognizable claim arising under, (1) Violations of the Federal CARES Act; and (2) Breach of Fiduciary Duty indicating potential fraud against Defendant and the United States of America; and (3) Violation of the 6th amendment under the US Constitution; and (4) Violation of Defendant's right for due process under the 14th amendment of the US Constitution.

3. Moreover, this Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. §g 1367 (a). The question under section 1367(a) is whether the supplemental claims are so related to the original claims that they form part of the same case or controversy, or in other words, that they "derive from a common nucleus of operative fact." *Mendoza v. Murphy*, 532 F.3d 342, 345-46 (5th Cir. 2008) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). See also *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir.2004). ("A state law claim is part of the same case or controversy when it shares a 'common nucleus of operative fact with the federal claims and the state and federal claims would normally be tried together.")

Here. Plaintiffs' state law claims for outstanding monies due share a common nucleus of operative fact with the Defendant's Federal CARES Act monies and other federal funding received but not applied claim; as they all involve Plaintiff's allegations about outstanding monies due and the Plaintiff's breach of fiduciary responsibility. Where are the substantial federal monies received? Why have they not been applied? Has Plaintiff committed money fraud against the United States of America? And many other discovery questions to be reviewed at trial.

Further cause for removal to federal court include: The following NEW recent (6/30/23 - 7/6/2023) filings against Defendant by Plaintiff and violations by a local unelected and unappointed but rather "chosen" only, state court Commissioner.

These include:

(1) Violation of Defendant's right for due process under the 14th amendment of the US Constitution; and (2) Violation of the 6th amendment under the US Constitution.

STATEMENT OF THE CASE

PLEASE TAKE NOTICE that Defendant Timothy Kaler ("Defendant"), hereby removed this above referenced action from the Superior Court of California, County of San Diego, to the United States District Court for the Southern District of California. Removal is based on 28 U.S.C. § 1331 and 28 U.S.C. § 1332 and is authorized by 28 U.S.C. § 1440, 28 U.S.C. § 1443, 28 U.S.C. § 1441 and 28 U.S.C. § 1446. As grounds for removal, Defendant stated as follows:

1. The Complaint was filed in the Superior Court of California, County of San Diego, on or about March 15, 2023, entitled ESA MANAGEMENT, LLC VS. Timothy Kaler Case No. 37-2023-00010833-CL-UD-CTL ("State CourtAction").

2. Defendant has not waived any jurisdictional issues in the State Court Action.

3. A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Requirements:

1. The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

2. When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action. Each defendant shall have 30 days after receipt by or service of that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal. If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

3. Except as provided in subsection (c), if the case stated by the initial pleading is not removed at that time, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Such is the case present here.

The procedures for removing a civil action are set out in **28 U.S.C. § 1443 Civil rights, 28 U.S.C. § 1440** and 28 U.S.C. § 1446. Under 28 U.S.C. § 1446(b)(1), a defendant seeking to remove a case from state court must file a notice of removal in the district court for the district and division where the case is pending. The notice, along with all “process, pleadings and orders” with which the defendant has been served, must be filed within 30 days after receipt of the initial pleading or within 30 days after service of the summons. BUT section 1446 recognizes that a basis for removal may not be readily evident in the initial pleading and provides a second 30-day period when the case can become removable after service of the initial pleading. Section 1446(b)(3) permits a defendant to file a notice of removal within “thirty days after receipt by the defendant, . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” **The U.S. Court of Appeals for the Ninth Circuit recently addressed this second pathway for removal in Deitrich v. Boeing. The very same 9th Circuit Court of Appeals decided the opposite in this dismissal and thus the Supreme Court must accept the case and overturn the dismissal.**

In this case, on June 30, 2023, the record reflects Plaintiff’s new filings in the case Complaint in the State Court Action. This Notice of Removal was filed within 30 days of supposed service of the State Court Action on Defendant. Removal is therefore timely in accordance with 28 U.S.C. § 1440, 28 U.S.C. § 1443 and 28 U.S.C. § 1446(b).

4. The Notice of Removal asserts the following case related federal violations, among others, by Plaintiff against Defendant: (1) Violations of the Federal CARES Act; and (2) Breach of Fiduciary Duty indicating potential fraud against the Defendant and the United States of America; and (3) Violation of Defendant's right for due process under the 14th amendment of the US Constitution; and (4) Violation of the 6th amendment under the US Constitution.

DIVERSITY JURISDICTION

1. 28 U.S.C. 1332 vests district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs and is between citizens of different states.

2. The Complaint states that Defendant Timothy Kaler has his primary residence in San Diego County, in the State of California. See *Lew v. Moss*, 797 F.2d 747, 749-750 (9th Cir. 1986) (a person is domiciled in a location where he or she has established a fixed habitation or abode in a particular place and intends to remain there permanently or indefinitely). Therefore, Defendant is a citizen of California for purposes of diversity.

3. Plaintiff - ESA Management, LLC is not a citizen of the State of California.

As to limited liability companies, "an LLC is a citizen of every state of which its owners/members are citizens." *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). As to corporations, pursuant to 28 U.S.C. § 1332(c), "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The United States Supreme Court has concluded that a corporation's "principal place of business" is "where a corporation's officers direct, control, and coordinate the corporation's activities," or its "nerve center." *Hertz Corp. V. Friend*, 130 S. Ct. 1181, 1192 (2010). «In practice," a corporation's "nerve center" should"normally be the place where the corporation maintains its headquarters." *Id.* «The public often (though not always) considers it the corporation's main place of business." *Id.* at 1193.

In Plaintiff's case, Plaintiff is a limited liability company with two owner-members, both of which are corporations with headquarters outside the state of California.

Therefore, Plaintiff has no citizenship in the State of California.

Requirements: Removal Based on Diversity of Citizenship

1. A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

2. If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) non-monetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

3. If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an “other paper” under subsection (b)(3).

If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal that finding shall be deemed bad faith under paragraph (1).

4. Although Plaintiff has also named fictitious Doe defendants, 28 U.S.C § 1441 (a) provides, “If]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.” See also *Fristos v.*

Reynolds Metals Co., 615 F.2d 1209, 1213 (9th Cir. 1980) (unnamed defendants are not required to join in a removal petition). Without conceding that Plaintiff is entitled to or could recover damages in any amount, the amount in controversy exceeds \$75,000, exclusive of interest and costs. See 28 U.S.C. § 1332. “[W]here it is

unclear or ambiguous from the face of a state-court complaint whether the requisite amount in controversy is pled," the Ninth Circuit "applies] a preponderance of the evidence standard." *Guglielmino v. McKee*

Foods Corp., 506 F.3d 696, 699 (9th Cir. 2007) (citation omitted). "Said burden is not 'daunting,' as courts recognize that under this standard, a removing defendant is not obligated to 'research, state, and prove the plaintiff's claims for damages.'" *Korn v. Polo Ralph Lauren Corp.*, 536 F.Supp2d 1199, 1202-05 (E.D. Cal. 2008) (quoting *McCraw v. Lyons*, 863 F. Supp. 430, 434 (W.D. Ky. 1994)).

The amount in controversy requirement of the diversity statute is easily met in this case as well in light of the NEW multiple references to additional monetary damages in each of the three Plaintiff's recent 6/30/2023 filings, which will be monies sought by the Plaintiff at trial.

There are also settlement demand letters and other relevant evidence of the amount in controversy that appears to reflect a reasonable estimate of the plaintiffs claim in excess of \$80,000.. This will be further explored at trial with witnesses. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002).

There is no reason to suspect that the settlement letters did not reflect a reasonable estimate of the Plaintiff's claim against Defendant in this matter. See also *Chase v. Shop N Save Warehouse Foods, Inc.*, 110 F.3d 424, 428-30 (7th Cir. 1997) (plaintiff's settlement offer is properly consulted in determining plaintiff's assessment of the value of her case"); *Wilson v. Belin*, 20 F.3d 644, 651 n. 8 (5th Cir. 1994)

In this case the record contains offers, which plaintiffs' counsel and representatives sent to defendants which will, when combined with requests at trial, will exceed \$80,000, it is apparent that removal is proper.

5. Accordingly, the Federal Court has jurisdiction over this action because all of the requirements of 28 U.S.C. § 1440, 28 U.S.C. § 1443 and 28 U.S.C. § 1332 are satisfied.

Any of the following civil actions or criminal prosecutions, commenced in State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such state a right under Any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2)

For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

(3)

There are other serious FEDERAL violations by Plaintiff in this action, which will result in significant liability exposure, which will be further documented at trial and in other federal filings. This is NOT an ordinary eviction case.

This case will expose FEDERAL violations, containing rampant fraud and discrimination, which will result in criminal charges, further civil actions, and civil class-actions against the Plaintiff.

REASONS FOR GRANTING THE PETITION

The 9th Circuit dismissal goes against its own ruling precedent. This should be heard by the United States Supreme Court and the dismissal from the 9th Circuit on jurisdiction should be reversed. The U.S. Court of Appeals for the Ninth Circuit recently addressed this second pathway for removal in Deitrich v. Boeing. The very same 9th Circuit Court of Appeals decided the opposite in this dismissal and thus the United States Supreme Court must accept the case and overturn the dismissal.

The petition for a writ of certiorari should be granted.

CONCLUSION

Defendant intends no admission of fact, law, or liability by this Notice and expressly reserves all defenses, motions and/or pleas.

WHEREFORE, Defendant requests that the State Court Action be removed to Federal Court, that all further proceedings in the State Court Action be stayed, and

that Defendant receive all additional relief to which it is entitled. The 9th Circuit dismissal goes against its own ruling precedent. This should be heard by the United States Supreme Court and the dismissal from the 9th Circuit on jurisdiction should be reversed. The U.S. Court of Appeals for the Ninth Circuit recently addressed this second pathway for removal in Deitrich v. Boeing. The very same 9th Circuit Court of Appeals decided the opposite in this dismissal and thus the United States Supreme Court must accept the case and overturn the dismissal.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TF/K

Timothy Kaler - Pro se

Date: 10/28/2023