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Attorneys for Defendant Mayer Brown LLP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

**DULCICH, INC. dba PACIFIC SEAFOOD
GROUP; DULCICH, INC.; FRANK
DULCICH; PACIFIC SEAFOOD GROUP
ACQUISITION COMPANY, INC.;
PACIFIC SEAFOOD WASHINGTON
ACQUISITION CO., INC.; BANDON
PACIFIC, INC.; BIO-OREGON
PROTEIN, INC.; PACIFIC CHOICE
SEAFOOD COMPANY; PACIFIC
COAST SEAFOODS COMPANY;
PACIFIC GARIBALDI, INC.; PACIFIC
GOLD SEAFOOD COMPANY; PACIFIC
PRIDE SEA FOOD COMPANY; PACIFIC
SEA FOOD CO.; PACIFIC SURIMI CO.,
INC.; PACIFIC TUNA COMPANY, LLC;
WASHINGTON CRAB PRODUCERS,
INC.; PACIFIC ALASKA SHELLFISH,
INC.; SEA LEVEL SEAFOODS, LLC;
ISLAND FISH CO., LLC; PACIFIC
RESURRECTION BAY; PACIFIC
CONQUEST, INC.; CALAMARI, LLC;
JO MARIE, LLC; LESLIE LEE, LLC;
MISS PACIFIC, LLC; PACIFIC
FUTURE, LLC; PACIFIC GRUMPY J,
LLC; PACIFIC HOOKER, LLC;
PACIFIC HORIZON, LLC; PACIFIC
KNIGHT, LLC; PRIVATEER, LLC; SEA
PRINCESS, LLC; TRIPLE STAR, LLC;**

No.: _____

NOTICE OF REMOVAL

**PACIFIC FISHING, LLC; PACIFIC SEA
FOOD OF ARIZONA, INC.; STARFISH
INVESTMENTS, INC.; DULCICH
SURIMI, LLC; BIO-OREGON
PROPERTIES, LLC; PACIFIC GROUP
TRANSPORT CO.; PACIFIC
MARKETING GROUP, INC.; PACIFIC
RUSSIA, INC.; PACIFIC RUSSIA
VENTURES, LLC; PACIFIC TUNA
HOLDING COMPANY, INC.; POWELL
STREET MARKET, LLC; PACIFIC
FRESH SEA FOOD COMPANY;
SEACLIFF SEAFOODS, INC.; COPPER
RIVER RESOURCE HOLDING CO.,
INC.; PACIFIC COPPER RIVER
ACQUISITION CO., INC.; SEA LEVEL
SEAFOODS ACQUISITION, INC.;
ISLAND COHO, LLC; S&S SEAFOOD
CO., INC.; PACIFIC SEAFOOD DISC.,
INC.; DULCICH REALTY, LLC;
DULCICH REALTY ACQUISITION,
LLC; and DULCICH JET, LLC,**

Plaintiffs,

vs.

MAYER BROWN LLP,

Defendant.

PLEASE TAKE NOTICE that defendant Mayer Brown LLP (“Mayer Brown”) hereby removes the above-captioned case, currently pending in the Circuit Court of Clackamas County, to the United States District Court for the District of Oregon, Portland Division. As grounds for removal, Mayer Brown states the following:

1. This is a breach of contract dispute (styled as a declaratory judgment action) involving Mayer Brown, a law firm, and Dulcich, Inc. d/b/a Pacific Seafood Group (“Pacific”), its former client. (*See generally* First Amended Compl.) Pacific retained lawyers in Mayer Brown’s Washington, D.C. office to provide antitrust advice and representation with respect to significant antitrust claims against Pacific, its owner, and various affiliated companies, including a federal class action (the “Whaley matter”) and a state government investigation. (*Id.* ¶ 6.)

Pursuant to the written agreement between the parties, Mayer Brown performed the requested services, and Pacific paid Mayer Brown in part. But Pacific failed to pay all of the outstanding charges for fees and expenses owed to Mayer Brown. (*Id.* ¶ 16.) Because of Pacific's non-payment, and for additional reasons, Mayer Brown withdrew from the representation in February 2012. (*Id.* ¶ 17.) Pacific's outstanding balance owed to Mayer Brown for fees and costs, plus interest thereon, is in excess of \$5,000,000. (*Id.* ¶ 22.) Nevertheless, through its complaint, Pacific seeks, among other things, a declaration that it owes nothing further to Mayer Brown.

2. Pacific first filed this declaratory judgment action on February 7, 2012, in Clackamas County Circuit Court, under Case No. CV12020221 ("State Court Action"). (Bomchill Decl. ¶ 12.¹) However, the initial complaint was never served on Mayer Brown. (*Id.*) Subsequently, on or about June 20, 2012, Pacific filed a First Amended Complaint. (*Id.* ¶ 10.) Mayer Brown first became aware of this lawsuit when it received a copy of the First Amended Complaint and summons on June 22, 2012. (*Id.* ¶¶ 10-11.)

3. Pacific's complaint listed 52 additional corporate entities, as well as Frank Dulcich, the owner of Pacific, as plaintiffs in the action (collectively the "extraneous plaintiffs"). Upon information and belief, each of the extraneous plaintiffs is wholly owned by Dulcich, Inc., either directly or indirectly. None of the extraneous plaintiffs was a party to the written agreement between Mayer Brown and Pacific. The complaint provided no information as to where the extraneous plaintiffs were incorporated or where their principal places of business were located. However, based upon the Answer that Pacific filed in the Whaley matter, Mayer Brown was able to determine that at least one of the extraneous plaintiffs was incorporated in the State of California, a state where several of Mayer Brown's partners reside. (*See* Answer and

¹ The referenced declaration of Fern Bomchill was submitted in support of Mayer Brown's ORCP 21 motions in the State Court Action. The declaration is attached to this notice as Exhibit 2, along with the other pleadings served in the State Court Action.

Aff. Def. of Pac. Seafood Defs. To Pls.' Fourth Am. Compl. ¶ 16, *Whaley v. Pacific Seafood Group*, Case No. 10-cv-03057-PAA (D. Or. Feb. 1, 2012) ("Seacliff Seafoods, Inc. is a California corporation.".) Accordingly, by including the extraneous plaintiffs in the First Amended Complaint, Pacific precluded the invocation of diversity jurisdiction in this action.

4. Because they were not parties to the contract at issue, Mayer Brown subsequently moved to dismiss the extraneous plaintiffs under Oregon Rule of Civil Procedure 21A(6) on the grounds that "the party asserting the claim is not the real party in interest," and under Oregon Rule of Civil Procedure 21A(8) on the grounds that Pacific had "fail[ed] state ultimate facts sufficient to constitute a claim [with respect to these plaintiffs]." On December 19, 2012, *pro tem* Judge Redman of the Circuit Court Of Clackamas County granted Mayer Brown's motion and dismissed the extraneous plaintiffs. That order is attached to this Notice as Exhibit 1.

DIVERSITY JURISDICTION

5. The United States District Court for the District of Oregon has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332, as an action between citizens of different states where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

A. Citizenship of the Plaintiffs

6. Pacific is and at all relevant times was a privately held holding corporation formed under the laws of the State of Oregon, with its principal place of business at 16797 Southeast 130th Avenue, Clackamas, Oregon 97015.

7. The extraneous plaintiffs must be ignored for purposes of determining diversity jurisdiction under the fraudulent joinder doctrine because, as recognized by the dismissal of the extraneous plaintiffs' claims by Judge Redman, they "fail[ed] to state a cause of action . . . , and the failure [was] obvious according to the settled rules of the state." *See Morris v. Princess*

Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001) (discussing the fraudulent joinder doctrine; internal quotations omitted).

B. Citizenship of the Defendant

8. Defendant Mayer Brown is an international law firm operating as a limited liability partnership duly formed and existing under the laws of the State of Illinois. Mayer Brown maintains offices in various jurisdictions. Most of the work related to the Whaley matter was performed in Mayer Brown's Washington, D.C. office, located at 1999 K Street, N.W., Washington, D.C. 20006. Mayer Brown does not maintain an office in Oregon.

9. The citizenship of a limited liability partnership such as Mayer Brown is determined by the citizenship of its partners. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (“[A] partnership is a citizen of all of the states of which its partners are citizens.”).

10. Mayer Brown's partners are citizens of several states, including Washington, D.C., New York, Illinois, California, Texas, and North Carolina, among others. None of Mayer Brown's partners is a citizen of Oregon. However, two Mayer Brown partners – one living in Hong Kong, and one living in the United Kingdom – are “stateless citizens” in that they are U.S. citizens, but not currently citizens of any U.S. state. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989).

C. The Effect of Mayer Brown's Stateless Citizen Partners on Mayer Brown's Citizenship

11. According to *Newman-Green*, “[i]n order to be a citizen of a State within the meaning of the diversity statute, a natural person must be both a citizen of the United States and be domiciled within the State.” 490 U.S. at 828. At the same time, however, the Supreme Court has “oft-repeated [the] rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all the members [of the entity.]’” *Carden*, 494 U.S. at 195-96. The D.C.

Circuit, together with the majority of the federal circuit courts, has not directly addressed the interaction between these rules. The two circuits that have – the Second and Third Circuits – have held that a partnership that includes one or more stateless citizens among its partners may not invoke federal diversity jurisdiction. *See Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 184 (3d Cir. 2008); *Herrick Co., Inc. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001). A court applying this reasoning would deem Mayer Brown, which has two U.S. citizen partners domiciled abroad, a stateless citizen precluded from invoking this Court's diversity jurisdiction.

12. Mayer Brown respectfully submits that *Swiger* and *Herrick* – neither of which is controlling authority on this Court – were wrongly decided and that this Court can and should exercise diversity jurisdiction over this case. As Chief Judge McKee stated in his concurrence, the rule announced in *Swiger* (and *Herrick*) “unnecessarily extends two conventions of diversity jurisprudence and thereby inappropriately circumscribes that jurisdiction”:

I think my colleagues would agree that it would be more logical to treat ‘stateless’ partners in situations like this as ‘jurisdictional zeroes,’ rather than as citizens of the plaintiff’s state; but we are not writing on a blank slate. . . . [A]pplying the *Carden* rule and ‘stateless person’ doctrine here results in a ruling that is inconsistent with both reality and common sense.

540 F. 3d at 186 (McKee, J., concurring).

13. Although we recognize that Chief Judge McKee declined to do so, this Court should nevertheless take the next step in his reasoning and hold that Mayer Brown’s two “stateless partners” constitute “jurisdictional zeroes” and exercise diversity jurisdiction over this case. As Chief Judge McKee noted, the alternative – a finding that diversity between Mayer Brown and an Oregon citizen is lacking despite the fact that Mayer Brown has no presence in Oregon and no Oregon citizens among its partners, solely because two Mayer Brown partners are domiciled in foreign countries – would be “inconsistent with both reality and common sense.”

14. Because Pacific is an Oregon citizen, and because Mayer Brown LLP does not have citizenship in Oregon based upon the residency of its partners, this is a suit between citizens of different states for purposes of 28 U.S.C. § 1332(a)(1) and (3).

AMOUNT IN CONTROVERSY

15. That the amount in controversy exceeds \$75,000, exclusive of interest and costs, is not in dispute. The Complaint acknowledges Mayer Brown's claim that Pacific owes the firm more than \$4,000,000 and is seeking, through this lawsuit, a declaration that it owes nothing further to Mayer Brown. (*See* Amended Compl. ¶ 22.)

TIMELINESS OF REMOVAL

16. Mayer Brown removed this action within 30 days of when this action became removable – the entry of the December 19, 2012 order dismissing the extraneous plaintiffs from this action.² *See* 28 U.S.C. § 1446(b)(3).

THE WASHINGTON D.C. ACTION

17. On July 18, 2012, Mayer Brown filed a separate lawsuit against Dulcich, Inc. as Case No. 0005830-12 in the Washington D.C. Superior Court (the "Washington D.C. Action"), bringing claims for breach of contract and *quantum meruit* arising from Pacific's failure to pay for the legal services it received from Mayer Brown. (Dupré Decl. ¶ 5(a).³)

² Because the extraneous plaintiffs were fraudulently joined, "the time limit for removal would not affect a defendant's ability to have the [j]oinder issue resolved in state court first." *See Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 n.10 (E.D. Cal. 2004) (discussing misjoinder); *see also Geffen v. Gen. Elec. Co.*, 575 F. Supp. 2d 865, 871 (N.D. Ohio 2008).

³ The referenced declaration of Phillip Dupré was submitted in support of Mayer Brown's ORCP 21 motions in the State Court Action. The declaration is attached to this notice as Exhibit 2, along with the other pleadings served in the State Court Action

18. On August 8, 2012, Pacific removed the Washington D.C. Action to the U.S. District Court for the District of Columbia, stating in the notice of removal that diversity of citizenship existed between the parties. (*Id.*, at (c).)

19. On August 28, 2012, Mayer Brown filed a motion to remand the D.C. Action to the D.C. Superior Court in order to bring to the court's attention the Second and Third Circuit's decisions in *Herrick* and *Swiger*.⁴ (*Id.*, at (d).) In that motion, Mayer Brown took precisely the same position that it takes in this Notice – that the holdings of *Herrick* and *Swiger* should be rejected. However, Mayer Brown believed that it had an obligation to bring the relevant jurisdictional facts and existing law to the D.C. federal court's attention and to prevent any waste of the parties' and the court's time and resources. Mayer Brown requested that the D.C. federal court "either remand this case to the D.C. Superior Court or find that diversity jurisdiction is appropriate notwithstanding the foreign domicile of two Mayer Brown partners who are U.S. citizens." (Motion to Remand at 6, *Mayer Brown LLP v. Dulcich, Inc.*, Case No. 12-cv-01318 (RWR) (D.D.C. Aug. 28, 2012).⁵) The D.C. federal court has not yet ruled on Mayer Brown's Motion to Remand.

OTHER PROCEDURAL REQUIREMENTS

20. Removal to Proper Court. This Court is part of the "district and division" embracing the place where the State Court Action was filed – Clackamas County, Oregon – and so is the proper venue for removal. 28 U.S.C. § 1446(a).

⁴ Mayer Brown also brought to the D.C. federal court's attention that Pacific had failed to meet its burden to prove that jurisdiction existed because "an allegation of *residence* alone is insufficient to establish the *citizenship* necessary for diversity jurisdiction." See *Novak v. Capital Mgmt. and Dev. Corp.*, 452 F.3d 902, 906 (D.C. Cir. 2006) (internal quotations omitted; emphasis in original).

⁵ The parties' briefings on Mayer Brown's motion to remand have been filed under seal. Mayer Brown will seek to file those briefings under seal in this case following removal.

21. Pleadings and Process. As required by 28 U.S.C. § 1446(a), attached hereto as Exhibit 2 is a set of all process, pleadings, and orders that Mayer Brown has received in the State Court Action.

22. Notice. As required by 28 U.S.C. § 1446(d), a copy of this notice will be timely filed with the clerk of the Clackamas County Circuit Court and served on Pacific's counsel.

23. Rule 11 Requirements. Mayer Brown files this notice in accordance with Fed. R. Civ. P. 11.

24. Reservation of Rights. Mayer Brown intends no admission of liability by this Notice and expressly reserves all defenses, motions and pleas, including without limitation defenses based upon jurisdiction, venue and insufficiency of service of process.

25. Based upon the foregoing, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, and the claims may be removed to this Court under 28 U.S.C. §§ 1441 and 1446.

26. In the event that Pacific seeks to remand this case, or the Court considers remand *sua sponte*, Mayer Brown respectfully requests the opportunity to submit such additional argument or evidence in support of removal as may be necessary.

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WHEREFORE, Mayer Brown respectfully requests that this case proceed in this Court as properly removed.

DATED this 2nd day of January, 2013.

MARKOWITZ, HERBOLD, GLADE
& MEHLHAF, P.C.

By:



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