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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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6
7 MICHAEL DIVINCENT,
8 Plaintiff,

9 v.

10 ROBERT DIVINCENT, et al.,
11 Defendants.

NO. C13-3360 TEH

ORDER GRANTING LEAVE TO
AMEND AND DENYING
MOTION TO REMAND
WITHOUT PREJUDICE

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13 This matter is currently before the Court on four motions: a motion for leave to amend
14 and remand filed by Plaintiff Michael DiVincent; a motion to compel arbitration or to
15 dismiss filed by the E*Trade Defendants; and motions to dismiss and strike filed by
16 Defendant David P. Gardner and the DiVincent Defendants. On August 26, 2013, the Court
17 vacated the briefing and hearing schedules on all of Defendants' motions so that it could first
18 determine whether this matter should be remanded. The Court further ordered Defendants to
19 address in their oppositions to Plaintiff's motion whether Plaintiff has the right to amend his
20 complaint pursuant to Federal Rule of Civil Procedure 15(a)(1)(B) and whether federal
21 jurisdiction over the amended complaint would be proper.

22 Defendant Gardner did not file an opposition to Plaintiff's motion. Nor did he file a
23 statement of non-opposition, in violation of Civil Local Rule 7-3(b).

24 The DiVincent Defendants argued that more than 21 days have passed since the filing
25 of the first motion to dismiss on August 2, 2013, and that Plaintiff therefore no longer has the
26 right to amend his complaint under Rule 15(a)(1)(B). *See* Fed. R. Civ. P. 15(a)(1)(B), ("A
27 party may amend its pleading once as a matter of course within . . . 21 days after service of a
28 responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),

1 whichever is earlier.”). They further stated that they had no opposition to remanding the
2 entire action if the Court determined that Plaintiff’s claims against the E*Trade Defendants
3 did not raise a federal question.

4 The E*Trade Defendants argued that Plaintiff’s proposed amended complaint
5 continues to raise federal questions but that, in any event, a remand motion based on the
6 proposed amended complaint was premature because the Court had yet to grant leave to
7 amend. They asserted that “[t]he Court should deny remand on that basis alone, so that the
8 parties may properly consider and brief the Amended Complaint once it is at issue.”
9 E*Trade Defs.’ Opp’n at 13.

10 The first motion to dismiss was filed on August 2, 2013, and Plaintiff filed his motion
11 for leave to amend and remand on August 15, 2013, well within the 21-day period for
12 amendment as of right under Rule 15(a)(1)(B). It appears that Plaintiff’s counsel was
13 unaware of Plaintiff’s right to amend the complaint once as a matter of course, and the Court
14 therefore GRANTS Plaintiff leave to file an amended complaint. The Court also agrees with
15 the E*Trade Defendants that the amended complaint should be filed before the Court
16 considers whether, in light of the amended complaint, this case should be remanded.

17 Accordingly, IT IS HEREBY ORDERED that:

18 1. Plaintiff shall file an amended complaint on or before **October 21, 2013**. Prior to
19 filing the amended complaint, Plaintiff shall confer with all Defendants to attempt to avoid
20 unnecessary motion practice over the sufficiency of the allegations and whether they raise
21 federal questions. Failure to file a timely amended complaint will result in dismissal of this
22 case without prejudice.

23 2. If the parties can agree that the amended complaint should be remanded to state
24 court, then they shall file an appropriate stipulation and proposed order on or before
25 **October 28, 2013**. If they cannot agree, then Plaintiff shall file a motion to remand by the
26 same date. The Court reiterates that it is not inclined to maintain jurisdiction over a case that
27 includes no federal questions even if removal were initially proper based on the original
28 complaint.

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3. Defendants' pending motions are VACATED as moot given the Court's granting of leave to file an amended complaint.

4. The time to respond to the amended complaint shall be extended until after the Court has determined whether this matter should be remanded. If the Court denies remand, the deadline for responsive pleadings will be fourteen days after filing of the Court's order denying remand.

5. The October 28, 2013 case management conference is VACATED.

IT IS SO ORDERED.

Dated: 09/24/13



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT