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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANE DOE, et al.,
Plaintiffs,
v.
WASHINGTON TOWNSHIP HEALTH
CARE DISTRICT, et al.,
Defendants.

Case No. [23-cv-05016-SI](#)

**ORDER GRANTING MOTION TO
REMAND AND REMANDING CASE
TO STATE COURT**

Re: Dkt. No. 12

Before the Court is plaintiffs’ motion to remand. Dkt. No. 12. Defendants oppose. Dkt. No. 15. Pursuant to Civil Local Rule 7-1(b), the Court determines that the motion is suitable for resolution without oral argument, and VACATES the December 8, 2023 hearing. For the reasons set forth below, the Court GRANTS the motion and REMANDS the case to the Superior Court of California, County of Alameda.

BACKGROUND

This class action lawsuit arises from defendants’ alleged violations of plaintiffs’ medical privacy rights. Plaintiffs (Jane Doe and Jan Doe), who along with putative class members are patients and users of defendants’ services, allege that defendants (collectively “Washington Healthcare”)¹ routinely disclose personal information to Facebook and other third parties without their knowledge, authorization, or consent, in violation of laws prohibiting unauthorized disclosure of patients’ personally identifiable information and protected health information. Dkt. No. 1-1 (“Compl.”) ¶¶ 1, 3, 7, 72.

¹ Named defendants include Washington Township Health Care District, Washington Hospital Healthcare System, Washington Hospital, Washington Hospital Healthcare Foundation, and Does 1 through 100. Defendants assert in their notice of removal and opposition to this motion that Washington Hospital Healthcare System and Washington Hospital are wrongly named parties. Dkt. No. 1 ¶¶ 1, 3; Dkt. No. 15 at 7.

1 Defendants operate websites for current and prospective patients that are “designed for
2 interactive communication with patients and users.” *Id.* ¶ 51-52. “Defendants also maintain a
3 patient portal, which allows patients to make appointments, access medical records, view lab results,
4 and exchange communications with health care providers.” *Id.* ¶ 53. Plaintiffs use defendants’
5 website and patient portal to search for Washington Healthcare doctors, medical treatment, and
6 information about their medical conditions, make appointments, review prescription information,
7 and communicate with health care providers. *Id.* ¶¶ 19, 39. Defendants encourage patients to use
8 digital tools on their websites to “seek and receive health care services.” *Id.* ¶ 50.

9 Defendants allegedly disclose patient information through their use of an undetectable
10 tracking pixel (Facebook’s “Meta Pixel” tool) embedded on their website and patient portal. *Id.*
11 ¶¶ 5, 41, 56. The tracking pixel automatically transmits personal and identifying information about
12 plaintiffs to Facebook and other third parties. *Id.* ¶¶ 6, 56-57. In addition to tracking pixels,
13 defendants allegedly installed and implemented Facebook’s Conversions Application Programming
14 Interface (“CAPI”) on their servers. *Id.* ¶ 61. CAPI tracks users’ website interactions, records and
15 stores that information on the website owner’s servers, and then transmits that data to Facebook. *Id.*
16 ¶ 62. Data received through the tracking pixel and CAPI is used for advertising and marketing
17 purposes. *Id.* ¶¶ 11, 13, 43-45, 63-65. Third parties, such as Facebook or Google, sell plaintiffs’
18 personal health and identifying information to third-party marketers. *Id.* ¶ 67. Plaintiffs allege that
19 defendants “chose to use the Pixel and CAPI data for marketing purposes in an effort to bolster their
20 profits.” *Id.* ¶ 64.

21 In their notice of removal, defendants assert that they have “dutifully assisted and followed
22 the federal government’s direction” in the government’s effort to direct and oversee “a public-
23 private initiative to develop a nationwide infrastructure for health information technology.” Dkt.
24 No. 1 (“Notice of Removal”) ¶¶ 17-18. According to defendants, the federal government “has
25 incentivized and directed providers who participate in the Medicare and Medicaid programs (like
26 Washington Healthcare) to offer patients online access to their medical records, and to optimize
27 patient engagement with their medical information.” *Id.* ¶ 17. Specifically, defendants argue in
28 their opposition to remand that “through the Meaningful Use program and regulations, the federal

1 government has incentivized and directed health care providers... to offer patients online access to
2 their records and to optimize patient engagement with their medical information, including through
3 the use of patient portals.” Dkt. No. 12 at 7.

4 In 2011, the Centers for Medicare and Medicaid Services established Electronic Health
5 Record Incentive Programs to encourage eligible hospitals to “adopt, implement, upgrade, and
6 demonstrate meaningful use of certified electronic health record technology.” *Promoting*
7 *Interoperability Programs*, CENTERS FOR MEDICARE & MEDICAID SERVICES,
8 <https://www.cms.gov/medicare/regulations-guidance/promoting-interoperability-programs>.² This
9 incentive program is governed by extensive regulations. 42 C.F.R. § 495. “To qualify for incentive
10 payments... eligible providers and hospitals must demonstrate meaningful use of an electronic
11 health record.” THE OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH INFORMATION
12 TECHNOLOGY, *Meaningful Use*, <https://www.healthit.gov/faq/what-meaningful-use>. Governmental
13 agencies have indicated that institutions “will have better success meeting meaningful use
14 requirements... if [they] integrate a patient portal effectively into [their] practice operations.”
15 NATIONAL LEARNING CONSORTIUM, *How to Optimize Patient Portals for Patient Engagement and*
16 *Meet Meaningful Use Requirements* (May 2013),
17 [https://www.healthit.gov/sites/default/files/nlc_how_to_optimizepatientportals_for_patientengage](https://www.healthit.gov/sites/default/files/nlc_how_to_optimizepatientportals_for_patientengagement.pdf)
18 [ment.pdf](https://www.healthit.gov/sites/default/files/nlc_how_to_optimizepatientportals_for_patientengagement.pdf).

19 The meaningful use regulations require that health care providers attest to their compliance
20 with the program. *See* 42 C.F.R. § 495.40. According to an Application Analyst at Washington
21 Township Health Care District (“District”), since 2014, “Washington Healthcare has submitted
22 reports or attestations on its involvement in the Meaningful Use Program to [the Centers for
23 Medicare & Medicaid Services].” Dkt. No. 15-1, Jackson Decl. ¶ 10. Since 2016 these reports have
24 “included submissions regarding the District’s patient portal and patients’ use of that portal.” *Id.*
25 Since 2013, Washington Healthcare hospitals and eligible clinicians have received financial benefit

26
27 ² The Meaningful Use Program is now known as the Promoting Interoperability Program.
28 Dkt. No. 15 at 10 n.3.

1 from the Department of Health & Human Services (“DHHS”) in part “for the development and use
2 of the District’s patient portal... in accordance with the Meaningful Use Program’s criteria.” *Id.*
3 ¶ 5. “[F]ailure to meet those criteria would subject the District to financial penalties in the form of
4 reduced Medicare payments from DHHS.” *Id.* For the District to meet the Meaningful Use Program
5 requirements, patients allegedly must be aware of the patient portal and understand its benefits and
6 options, and “[o]ne of the ways the District raised awareness and increased usability of its public
7 website and patient portal was by using third-party technologies such as cookies and Facebook
8 pixels on the District’s public website.” *Id.* ¶¶ 7-9.

9 Plaintiffs bring California state law and common law claims against defendants and the
10 parties are not diverse.³ Plaintiffs filed their complaint in the Superior Court of California, County
11 of Alameda on August 18, 2023. *See* Dkt. No. 1-1. Defendants removed this case to federal court
12 pursuant to the federal officer removal statute, 28 U.S.C § 1442(a), arguing that the complaint
13 challenges the legitimacy of actions defendants have taken in connection with pursuing the directive
14 of the federal government to “build a nationwide health information technology infrastructure.”
15 Notice of Removal at 1. Plaintiffs move to remand, arguing defendants cannot, and have not, met
16 their burden in establishing federal officer jurisdiction. Dkt. No. 12 at 2.

17
18 **LEGAL STANDARD**

19 The federal officer removal statute permits a defendant to remove to federal court a state-
20 court action brought against “any officer (or any person acting under that officer) of the United
21 States or any agency thereof, in an official or individual capacity, for or relating to any act under
22

23 ³ Plaintiffs allege violations of the California Invasion of Privacy Act (Cal. Penal Code §§
24 630, *et seq.*); the Confidentiality of Medical Information Act (Cal. Civ. Code §§ 56.10, 56.101); the
25 Comprehensive Computer Data Access and Fraud Act (Cal. Penal Code § 502); Quasi-
26 Contract/Restitution/Unjust Enrichment; the California Unfair Competition Law (Cal. Bus. & Prof.
27 Code §§ 17200 *et seq.*); California Civil Code § 1798.82; Common Law Invasion of Privacy –
28 Intrusion Upon Seclusion; the Information Practices Act of 1977 (Cal. Civ. Code § 1798.1 *et seq.*),
and a violation of the California Constitutional Invasion of Privacy (Art. I, sec. I of the California
Constitution). *Id.* ¶¶ 14, 391-530. They seek an order enjoining defendants from further
unauthorized disclosures of personal information, statutory damages, and attorneys’ fees and costs.
Id. ¶ 16.

1 color of such office.” 28 U.S.C. § 1442(a). “A party seeking removal under section 1442 must
2 demonstrate that (a) it is a ‘person’ within the meaning of the statute; (b) there is a causal nexus
3 between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims, and (c) it
4 can assert a ‘colorable federal defense.’” *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251
5 (9th Cir. 2006) (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)).⁴

6 The words “acting under” in the statute are broad, and the Supreme Court “has made clear
7 that the statute must be liberally construed.” *Watson v. Philip Morris Companies, Inc.*, 551 U.S.
8 142, 147 (2007). However, the Supreme Court has also indicated that “broad language is not
9 limitless” and “precedent and statutory purpose make clear that the private person’s ‘acting under’
10 must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.” *Id.*
11 at 147, 152 (emphasis in original). A private person’s “compliance (or noncompliance) with federal
12 laws, rules, and regulations does not by itself fall within the scope of the statutory phrase ‘acting
13 under’ a federal official... even if the regulation is highly detailed” and the private person’s activities
14 “highly supervised and monitored.” *Id.* at 153.

15 In determining whether a private person is “acting under” a federal officer for purposes of
16 § 1442(a)(1), courts should consider: (1) “whether the person is acting on behalf of the officer in a
17 manner akin to an agency relationship,” (2) “whether the person is subject to the officer's close
18 direction, such as acting under the subjection, guidance, or control of the officer, or in a relationship
19 which is an unusually close one involving detailed regulation, monitoring, or supervision,” (3)
20 “whether the private person is assisting the federal officer in fulfilling basic governmental tasks that
21 the Government itself would have had to perform if it had not contracted with a private firm,” and
22 (4) “whether the private person's activity is so closely related to the government's implementation
23 of its federal duties that the private person faces a significant risk of state-court prejudice, just as a
24 government employee would in similar circumstances, and may have difficulty in raising an
25 immunity defense in state court.” *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 756-757 (9th
26

27 ⁴ Plaintiffs do not dispute that Washington Healthcare is a “person” within the meaning of
28 the statute.

1 Cir. 2022) (internal quotation marks and citations omitted). The Court considers each factor in turn.

2
3 **DISCUSSION**

4 **I. Acting on Behalf of Federal Officer in Manner Akin to Agency Relationship**

5 Plaintiffs argue that defendants’ participation in the Meaningful Use Program (“Program”) was based on independent business considerations and strategy, and while defendants received incentives for their voluntary participation, there “was no contractual or legal obligation to participate nor to act on behalf of the federal government.” Dkt. No. 12 at 4-5. Plaintiffs further argue that there is “no evidence that the federal government ordered or directed Washington Healthcare to place [] tracking technologies on its websites [and] patient portal.” *Id.* at 5. Defendants argue that by providing a “financial benefit” to providers like Washington Healthcare for their compliance with the Program, the federal government used such private healthcare providers “to fulfill a federal goal, not merely to regulate” them. Dkt. No. 15 at 12. Defendants further argue that the Program “provides a specific framework and guidelines for providers to follow, and the federal government monitors compliance with the program.” *Id.* at 13.

16 Defendants point the Court to two out-of-circuit cases with nearly identical facts, which the Court addresses under the second factor below. Although defendants’ development of their website and patient portal may have furthered the government’s health information technology implementation goals, the Court agrees with plaintiffs that defendants were not acting on behalf of a federal officer in a manner akin to an agency relationship in developing their website and patient portal, much less by implementing the specific tracking technologies at issue. This factor does not weigh in favor of removal.

23
24 **II. Close Direction or Relationship**

25 Plaintiffs argue that the Meaningful Use Program does not subject defendants to government control, rather, defendants choose to comply with its guidance. Dkt. No. 12 at 6. Plaintiffs contend that the Meaningful Use regulations do not contain “highly detailed specifications for websites or patient portals.” *Id.* Plaintiffs further argue that the Program “provides criteria that health care

1 providers must meet if they are seeking monetary incentives. And the federal government provides
2 resources and guidance to encourage healthcare providers... to comply with those regulations
3 through incentive payments.” *Id.* at 7.

4 Defendants argue that plaintiffs mischaracterize the requirements of this factor, which only
5 requires that defendants be engaged in efforts to assist or help carry out the government’s duties or
6 tasks. Dkt. No. 15 at 16. Defendants further argue that the federal government provided a “specific
7 framework and guidelines” for healthcare providers to follow through the Meaningful Use Program
8 and monitored defendants’ compliance with the program through the reports or attestations they
9 submitted. *Id.*

10 Defendants urge the Court follow *Doe I v. UPMC*, No. 2:20 CV 359, 2020 WL 4381675
11 (W.D. Pa. July 31, 2020) and *Doe v. ProMedica Health Sys., Inc.*, No. 3:20 CV 1581, 2020 WL
12 7705627 (N.D. Ohio Oct. 30, 2020) to find that participation in the Meaningful Use Program is
13 sufficient to satisfy the “acting under” requirement of the statute. *See id.* at 16. Both cases have
14 nearly identical facts to the present case. *UPMC*, WL 4381675, at *6 held participation in the
15 Meaningful Use Program constitutes “acting under” a federal superior because the relationship is
16 more like a government contractor relationship and less like a regulator-regulated relationship.
17 *ProMedica*, 2020 WL 7705627, at *3 followed *UPMC* and similarly held that because the
18 defendant’s participation in the Meaningful Use Program assisted the federal government in
19 achieving its goal of creating a unified system of patient electronic health records, the defendant
20 satisfied the “acting under” prong of the statute.

21 Judges in this District have declined to follow *UPMC* and *ProMedica* in nearly factually
22 identical cases. In *Quinto v. Regents of Univ. of California*, No. 3:22 CV 04429, 2023 WL 1448050,
23 at * 1 (N.D. Cal. Feb. 1, 2023), the plaintiff, like plaintiffs here, brought an action against their
24 healthcare provider, arguing her privacy rights were violated by the defendant’s unlawful disclosure
25 of her personally identifiable information and protected health information. There, like here,
26 defendants used the “Facebook Tracking Pixel” as a component of its “website analytics practices.”
27 *Id.* at *1. Like here, the defendant sought to remove the case pursuant to the federal officer removal
28 statute, arguing they acted under a federal officer by participating in the Meaningful Use Program.

1 *See Id.* at *2. Like here, the defendant argued it was “subject to the close direction of a federal
2 officer or agency by virtue of the ‘specific framework and guidelines’ that the Meaningful Use
3 program sets out for healthcare providers to follow.” *Id.* at *3. Judge Donato rejected defendant’s
4 arguments, reasoning that “merely being subject to a regulatory scheme is not the same as acting
5 under a federal agency’s close direction.” *Id.* The Court further indicated that the defendant’s
6 “heavy reliance” on *UPMC* and *ProMedica* was misplaced and that “these cases entailed an overly
7 broad interpretation of what it means to assist a federal superior with its tasks or duties.” *Id.*

8 The reasoning in *Quinto* was recently followed in *Gibson v. Stanford Health Care*, No. 23-
9 CV-02320, 2023 WL 7413337 (N.D. Cal. Nov. 9, 2023). *Gibson* again found that *UPMC* and
10 *ProMedica* applied an “overly broad interpretation of the ‘acting under’ requirements.” *Id.* at *5.
11 The facts of *Gibson* are also nearly identical to the facts of this case. There, like here, the plaintiff
12 asserted state law privacy claims on behalf of California residents who had used their healthcare
13 provider’s online patient portal, alleging the defendant violated their privacy rights when it
14 integrated the “Facebook Tracking Pixel” into its website. *Id.* at *1. The defendant likewise
15 removed the case pursuant to the federal officer removal statute, arguing it “acted under” the federal
16 government by participating in the Meaningful Use Program. *Id.* at *2. Judge Freeman followed
17 *Quinto* in concluding that the defendant’s “voluntary participation in the Meaningful Use Program
18 is insufficient to establish that it was ‘acting under’ a federal officer when creating and implementing
19 its online portal, and in particular when choosing to integrate the Facebook Tracking Pixel into the
20 portal.” *Id.* at 5. The Court further noted that “[e]very other district court in this circuit to consider
21 this issue has reached the same result.” *Id.* at *4 (citations omitted).

22 This Court finds the reasoning of *Quinto* and *Gibson* persuasive and follows them in
23 concluding that defendants’ voluntary participation in the Meaningful Use Program is insufficient
24 to establish that they were “acting under” a federal officer when creating and implementing their
25 website and online portal, and in particular when choosing to integrate the tracking pixel and
26 Facebook’s CAPI into their website and patient portal.⁵ This Court agrees with the courts in *Quinto*

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28 ⁵ This ruling is also consistent with the decisions of numerous other district courts in this
circuit. *See., e.g., Crouch v. Saint Agnes Med. Ctr.*, No. 1:22-cv-01527, 2023 WL 6940170, *2

1 and *Gibson* that the out-of-circuit *UPMC* and *ProMedica* decisions applied an “overly broad
2 interpretation” of the “acting under” requirement and likewise declines to follow them. “[M]ere
3 compliance with federal directives does not satisfy the ‘acting under’ requirement of § 1442(a)(1),
4 even if the actions are ‘highly supervised and monitored.’” *Riggs v. Airbus Helicopters, Inc.*, 939
5 F.3d 981, 989 (9th Cir. 2019) (quoting *Watson*, 551 U.S. at 153); *see also Quinto*, 2013 WL
6 1448050, at *3 (“being subject to a regulatory scheme is not the same as acting under a federal
7 agency’s close direction”). The close direction or relationship factor thus weighs strongly against
8 removal.

9
10 **III. Assistance in Basic Governmental Tasks the Government Would Otherwise Have to**
11 **Perform**

12 Plaintiffs argue creating a patient portal page for a private health care provider is not a
13 government task, and although defendants’ creation of a patient portal aligns with the government’s
14 mission to promote use of health information technology, defendants are not “tasked or mandated
15 by the federal government to achieve that goal.” Dkt. No. 12 at 9. Defendants respond that without
16 their and other private medical providers’ actions, the government “would be left alone to complete
17 its federal mission of digitizing health information and increasing engagement with Medicare
18 beneficiaries.” Dkt. No. 15 at 16.

19 Defendants point to President Bush’s Executive Order 13335 to support their argument that
20 without the use of private entities, the federal government would be responsible for building the
21 electronic records system itself. *See* Dkt. No. 15 at 17-18.⁶ This Executive Order orders the

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23 (E.D. Cal. Oct. 20, 2023) (finding that the defendant’s compliance with the requirements of the
24 Meaningful Use Program does not show the defendant was “acting under” a federal officer);
25 *Valladolid v. Mem’l Health Servs.*, No. CV 23-3007, 2023 WL 4236179, *5 (C.D. Cal. June 27,
26 2023) (“this Court joins the majority of district courts and concludes that implementing the
27 Meaningful Use Program is insufficient to establish that Defendant was ‘acting under’ a federal
28 agency”); *Davis v. Hoag Mem’l Hosp. Presbyterian*, No. SACV2300772CJCADSX, 2023 WL
4147192, *3 (C.D. Cal. June 23, 2023) (“while the Meaningful Use program may subject private
entities like Hoag to some degree of government control, simply complying with a law or regulation
is not enough to bring a private person within the scope of the statute” (internal quotation marks and
citations omitted)).

⁶ Defendants’ Request for Judicial Notice at Dkt. No. 16 is GRANTED.

1 National Health Information Technology Coordinator to “develop, maintain, and direct the
2 implementation of a strategic plan to guide the nationwide implementation of interoperable health
3 information technology.” *Id.* at 703. As district courts in this circuit have explained, this “imposes
4 a duty on the National Coordinator to create a plan—a duty that was carried out by creating a plan
5 that incentivized private firms... to implement such technology voluntarily.” *Crouch*, 2023 WL
6 6940170, at * 3. The financial incentives these private entities receive “are a means of encouraging
7 innovation and adoption of technology, not compensation for carrying out tasks and services for the
8 Government that it would otherwise be charged with doing.” *Valladolid*, 2023 WL 4236179, at
9 *12; *see also Quinto*, 2023 WL 1448050, at *2 (“receiving incentive payments for acting in a way
10 that promotes a broad federal interest... is not the same as being contracted to carry out, or assist
11 with, a basic governmental duty”). Defendants have failed to demonstrate they are carrying out
12 governmental tasks the National Coordinator would otherwise do itself by embedding tracking
13 pixels and Facebook’s CAPI into their website and patient portal.⁷ This factor also weighs against
14 removal.

15
16 **IV. Prejudice in State Court**

17 Plaintiffs contend defendants would not face prejudice in state court because defendants did
18 not act under a governmental obligation or duty when implementing the patient portal page and
19 utilizing online tracking tools. Dkt. No. 12 at 10. Defendants argue they “face a significant risk of
20 prejudice because this case falls squarely in the essential purpose of the federal officer removal
21 statute—protecting federal operations and programs from interference through state-court
22 litigation.” Dkt. No. 15 at 18.

23 The basic purpose of the federal officer removal statute is to protect the federal government
24 from state interference with its operations that would ensue if, for example, a state court could bring
25 officers and agents of the federal government acting within the scope of their authority to trial in

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27
28 ⁷ The Court disagrees with defendants that that their participation in the Meaningful Use Program is akin to the government enlisting private contractors to build military equipment or enlisting private carriers to administer federal health benefit plans. *See* Dkt. No. 15 at 17-18.

1 state court. *Watson*, 551 U.S. at 150. The statute also addresses concerns that state-court
2 proceedings may reflect prejudice against unpopular federal laws or federal officials, and that states
3 may deprive federal officials of a federal forum in which to assert federal immunity defenses. *Id.*
4 The Court does not find any of the concerns underlying the statute about state-court prejudice at
5 issue here. When a private entity subject to a regulatory order complies with that order, it does not
6 necessarily create a risk of state-court prejudice, nor is a state-court lawsuit here likely to hinder
7 government employees in taking necessary action to enforce federal law. This factor also weighs
8 against removal.


9
10 None of the “acting under” factors favor removal. This Court follows numerous courts in
11 this circuit and district in concluding that defendants are not “acting under” a federal officer by
12 participating in the Meaningful Use Program. Because the Court concludes that the “acting under”
13 requirement of the federal officer removal statute is not met, the Court need not reach the causal
14 nexus and colorable federal defense requirements of § 1442 removal.

15
16 **CONCLUSION**

17 For the foregoing reasons and for good cause shown, the Court GRANTS plaintiffs’ motion.
18 This action is REMANDED to the Superior Court of California, County of Alameda.

19
20 **IT IS SO ORDERED.**

21 Dated: December 5, 2023

22 
23 _____
24 SUSAN ILLSTON
25 United States District Judge
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