

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW D. PINNAVAIA,
Plaintiff,
v.
MARK MOODY-STUART, CYNTHIA CARROLL,
NICHOLAS F. OPPENHEIMER,
Defendants
and
ANGLO AMERICAN plc,
Nominal Defendant.

No. C 09-03803 CW
ORDER GRANTING
DEFENDANT'S MOTION
TO DISMISS AND
VACATING CASE
MANAGEMENT
CONFERENCE

_____ /
This action purports to be a derivative shareholder suit based on the premise that Nominal Defendant Anglo American plc has been damaged by individual Defendants because of a 2006 settlement of a number of antitrust class actions in which De Beers, a subsidiary of Anglo American, was a named defendant. Specially appearing Nominal Defendant Anglo American moves to dismiss the complaint pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(6) and 23.1 of the Federal Rules of Civil Procedure.¹ Plaintiff opposes the motion. The matter was taken under submission and decided on the papers. Having considered all of the papers filed by the parties, the Court grants the motion to dismiss. Dismissal is without prejudice.

¹Individual Defendants have not been served and do not join in this motion.

BACKGROUND

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2 On July 8, 2009, Plaintiff filed this action in state court;
3 on August 19, 2009, Anglo American removed it to federal court
4 based on diversity jurisdiction. Plaintiff's complaint alleges the
5 following. Anglo American is a mining and natural resources
6 company headquartered in London and organized under the laws of the
7 United Kingdom. Comp. at ¶¶ 6, 11. A major source of Anglo
8 American's revenue is its diamond subsidiaries, De Beers
9 Consolidated Mines Ltd. and De Beers Jewelers U.S., Inc., which
10 owns De Beers jewelry stores located throughout California
11 (together, De Beers). Comp. at ¶ 6. Beginning in 2001, lawsuits
12 were filed against De Beers alleging that it unlawfully monopolized
13 the supply of diamonds, conspired to fix, raise, and control
14 diamond prices and issued false and misleading advertising. Comp.
15 at ¶ 7. The named individual Defendants caused Anglo American to
16 suffer a financial loss of approximately \$295 million in the
17 settlement of those lawsuits, entitled "Diamond Class Action
18 Settlement." Comp. at ¶ 7. Anglo American also will suffer
19 financial damages in the future due to De Beers' assistance to
20 Adolph Hitler and the Third Reich during World War II. Comp. at ¶
21 8.

22 During the time at issue in this lawsuit, Plaintiff was an
23 owner of Anglo American common stock. Comp. at ¶ 10. Defendant
24 Mark Moody-Stuart, during the relevant time period, was non-
25 executive Chairman of the Board of Anglo American. Because of his
26 position, Mr. Moody-Stuart was aware of De Beers' unlawful activity
27 during World War II and thereafter. Comp. at ¶ 13. Defendant
28 Cynthia Carroll became Chief Executive and Executive Director of

1 Anglo American in 2007. She was and is aware of De Beers' illegal
2 activities. Comp. at ¶ 14. Defendant Nicholas F. Oppenheimer has
3 been Deputy Chairman of Anglo American since 1983, a non-executive
4 director since 1974 and is the grandson of Sir Ernest Oppenheimer,
5 the founding chairman of Anglo American. Comp. at ¶ 15. Mr.
6 Oppenheimer was aware of the illegal acts of De Beers. Comp. at
7 ¶ 15. Individual Defendants conspired to allow De Beers to engage
8 in the aforementioned illegal activities, to Anglo American's
9 financial detriment. Comp. at ¶ 23. Individual Defendants
10 concealed the fact that De Beers was engaged in violations of
11 federal and state laws and deceived the investing public about
12 Anglo American's financial health and future business projects.
13 Comp. at ¶ 26. Plaintiff has not made a demand on Anglo American's
14 Board of Directors to institute this action because such a demand
15 would be futile as a result of its relationship with individual
16 Defendants. Comp. at ¶ 36.

17 Based on these allegations, Plaintiff asserts the following
18 causes of action: (1) violation of California Corporations Code
19 §§ 202, 27101(a), 27101(c), 2207(i)(ii); breach of fiduciary duty;
20 abuse of control; gross mismanagement; waste of corporate assets;
21 and unjust enrichment. Plaintiff requests damages of \$295 million
22 in favor of Anglo American; an injunction requiring Anglo American
23 to divest itself of De Beers; an injunction requiring Anglo
24 American to enter into diplomatic negotiations with the Israeli
25 government and the United States government to create a special
26 financial fund to compensate the Israeli government for the death
27 and destruction of the European Jewish community during World War
28 II and the death of the American soldiers who died fighting Nazi-

1 Germany during World War II; an injunction removing individual
2 Defendants from their corporate positions with Anglo American; and
3 an injunction making Plaintiff and one other honest individual
4 directors of Anglo American.

5 Anglo American argues that this action must be dismissed on
6 the grounds that: Plaintiff cannot assert derivative claims pro se;
7 Plaintiff lacks standing to pursue claims derivatively; the Court
8 lacks personal jurisdiction over Anglo American; and the forum is
9 not convenient.

10 DISCUSSION

11 As an initial matter, the Court addresses federal jurisdiction
12 because Plaintiff's response to all of Anglo American's arguments
13 is that this case was removed improperly from California state
14 court and that this Court lacks subject matter jurisdiction.

15 I. Federal Jurisdiction

16 A defendant may remove a civil action filed in state court to
17 federal district court so long as the district court could have
18 exercised original jurisdiction over the matter. 28 U.S.C.
19 § 1441(a). Title 28 U.S.C. § 1447 provides that if at any time
20 before judgment it appears that the district court lacks subject
21 matter jurisdiction over a case previously removed from State
22 court, the case must be remanded. 28 U.S.C. § 1447(c). The scope
23 of the removal statute must be strictly construed. Gaus v. Miles,
24 Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong presumption'
25 against removal jurisdiction means that the defendant always has
26 the burden of establishing that removal is proper." Id.

27 District courts have original jurisdiction over all civil
28 actions "where the matter in controversy exceeds the sum or value

1 of \$75,000, exclusive of interest and costs, and is between . . .
2 citizens of different States." 28 U.S.C. § 1332(a). When federal
3 subject matter jurisdiction is predicated on diversity of
4 citizenship, complete diversity must exist between the opposing
5 parties. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-
6 74 (1978). According to 28 U.S.C. § 1332(c), a corporation "shall
7 be deemed to be a citizen of any State by which it has been
8 incorporated and of the State where it has its principal place of
9 business" 28 U.S.C. § 1332(c).

10 Plaintiff is a citizen of California. See Docket, page 1.
11 Because it is undisputed that Anglo American is not incorporated in
12 California nor does it have its principal place of business in
13 California, it is not a citizen of California for purposes of
14 diversity jurisdiction.

15 Nevertheless, Plaintiff argues that there is not complete
16 diversity of citizenship because Anglo American owns forty-five
17 percent, and Defendant Oppenheimer and the Oppenheimer family own
18 forty percent, of De Beers, a California corporation. Plaintiff
19 reasons that, because Anglo American and the Oppenheimer family
20 together own eighty-five percent of De Beers, Anglo American is a
21 California citizen.

22 In Danjaq, S.A. v. Pathe Communications Corp., 979 F.2d 772,
23 775 (9th Cir. 1992), the court held that the citizenship of a
24 parent is distinct from its subsidiary and a subsidiary's activity
25 has no bearing on the citizenship of its parent company for
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1 purposes of diversity jurisdiction. Id.² Thus, Anglo American's
2 ownership of De Beers does not bestow California citizenship upon
3 Anglo American.

4 Plaintiff does not argue that any individual Defendant is a
5 California citizen or that the amount in controversy is less than
6 \$75,000. All requirements for diversity jurisdiction are met.
7 Therefore, this Court has diversity jurisdiction over this case and
8 the removal was proper.

9 II. Pro Se Derivative Suit

10 Anglo American argues that Plaintiff may not bring a
11 derivative action pro se. Plaintiff argues that he has a
12 constitutional due process right to pursue his claims in court.

13 The rule establishing an individual's right to represent
14 himself or herself is provided in 28 U.S.C. § 1654. Simon v.
15 Hartford Life, Inc., 546 F.3d 661, 664 (9th Cir. 2008). However,
16 the privilege to represent oneself is personal to the litigant and
17 does not extend to other parties or entities. Id. Thus, pro se
18 plaintiffs are generally prohibited from pursuing claims on behalf
19 of others in a representative capacity. Id. (citing many cases for
20 this proposition). Furthermore, the substantive right to bring a
21 shareholder's derivative suit is that of the corporation. Phillips
22 v. Tobin, 548 F.2d 408, 411 (9th Cir. 1976). Because a corporation
23 may not appear in court except through an attorney, likewise a
24 representative shareholder may not appear without an attorney. Id.

25 Thus, Plaintiff may not bring this derivative action in a pro

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27 ²Anglo American indicates that neither of the De Beers
28 entities to which Plaintiff refers in his complaint is incorporated
in California or has its principal place of business in California.

1 se capacity. Plaintiff's constitutional rights are not at issue
2 because this suit is purportedly brought on behalf of Anglo
3 American. Therefore, Plaintiff's constitutional argument is
4 without merit and the case must be dismissed. However, the
5 dismissal is without prejudice to re-filing if Plaintiff obtains
6 the services of an attorney. Because the complaint must be
7 dismissed on this ground, the Court does not address Anglo
8 American's other grounds for dismissal.

9 CONCLUSION

10 Based on the foregoing, this case is dismissed. Dismissal is
11 without prejudice to re-filing if Plaintiff obtains representation
12 by an attorney. The case management conference scheduled for
13 December 17, 2009 is vacated.

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16 IT IS SO ORDERED.

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18 Dated: December 11, 2009



19 _____
20 CLAUDIA WILKEN
21 United States District Judge
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