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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ROBERT BOXER, on Behalf of Himself and
All Others Similarly Situated,

Plaintiff,

vs.

ACCURAY INCORPORATED, et al.,

Defendants.

Case No: C 12-5722 SBA

ORDER REMANDING ACTION

The parties are presently before the Court on Plaintiff's Motion to Remand Pursuant to 28 U.S.C. § 1447(c). Dkt. 7. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the motion to remand, but DENIES Plaintiff's request for an award of fees and costs. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

I. BACKGROUND

On November 1, 2012, Plaintiff Robert Boxer filed a class action complaint in Santa Clara County Superior Court against Accuray Incorporated ("Accuray") and eight of its Board members ("Individual Defendants"). The first claim is for breach of fiduciary duty under Delaware law as to the Individual Defendants, while the second claim is against

1 Accuray for aiding and abetting the aforementioned alleged breach. Plaintiff seeks to
2 enjoin a vote on two shareholder proposals (referred to as “Proposal Two” and “Proposal
3 Three”) which are to be considered at the shareholder meeting scheduled for November 30,
4 2012, in Palo Alto, California. Proposal Two relates to executive compensation, while
5 Proposal Three seeks to increase the amount of Accuray’s total authorized shares of stock.
6 Notice of Removal, Ex. A (“Compl.”) ¶¶ 3-4, Dkt. 1. Plaintiffs alleges that neither
7 proposal was adequately described in Accuray’s Proxy Statement (“Proxy”) filed with the
8 Securities and Exchange Commission on October 19, 2012. Id. ¶ 2.

9 On November 7, 2012, Defendants removed the action to this Court under 28 U.S.C.
10 § 1441 on the grounds that the instant action “arises under” federal law. Notice of Removal
11 ¶ 3. In particular, Defendants contend that the challenges to the adequacy of the disclosures
12 in the Proxy regarding executive compensation are premised on the requirements of the
13 Dodd-Frank Wall Street Reform and Consumer Exchange Act of 2010 (“Dodd-Frank
14 Act”), which amended the Securities Exchange Act of 1934. Id. ¶ 4. Plaintiff counters that
15 removal jurisdiction is lacking, and has filed a motion to remand in which he seeks to
16 remand the action to state court, along with an award of attorney’s fees and costs pursuant
17 to 28 U.S.C. § 1447(c). The Court set an expedited briefing schedule and the matter is now
18 fully briefed.¹

19 **II. LEGAL STANDARD**

20 “A motion to remand is the proper procedure for challenging removal.” Moore-
21 Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009). Remand may be
22 ordered either for lack of subject matter jurisdiction or for any defect in the removal
23 procedure. 28 U.S.C. § 1447(c). “If a district court lacks subject matter jurisdiction over a
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25 ¹ On November 26, 2012, Plaintiff filed a motion for temporary restraining order to
26 enjoin the shareholder vote on Proposal Two and Proposal Three at the shareholder meeting
27 scheduled for November 30, 2012. Dkt. 17. Plaintiff also filed a separate motion for
28 expedited discovery. Dkt. 18. Because these motions address the merits of the instant
action, the Court must determine, as a threshold matter, whether it has subject matter
jurisdiction. See United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960, 965
(9th Cir. 2004). As will be set forth below, the Court finds that jurisdiction is lacking and
that remand is appropriate. Therefore, these particular motions are denied as moot.

1 removed action, it has the duty to remand it, for removal is permissible only where original
2 jurisdiction exists at the time of removal or at the time of the entry of final judgment[.]”
3 Sparta Surgical Corp. v. Nat’l Ass’n of Securities Dealers, 159 F.3d 1209, 1211 (9th Cir.
4 1998) (internal quotations omitted). “[R]emoval statutes are strictly construed against
5 removal.” Luther v. Countrywide Home Loans Servicing, LP, 533 F.3d 1031, 1034 (9th
6 Cir. 2008). “The presumption against removal means that the defendant always has the
7 burden of establishing that removal is proper.” Moore-Thomas, 553 F.3d at 1244. As such,
8 any doubts regarding the propriety of the removal favors remanding the case. See Gaus v.
9 Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

10 **III. DISCUSSION**

11 **A. REMOVAL JURISDICTION**

12 Under 28 U.S.C. § 1441(a), district courts have removal jurisdiction over any claim
13 that could have been brought in federal court in the first instance. Hall v. N. Am. Van
14 Lines, Inc., 476 F.3d 683, 686-87 (9th Cir. 2007). Under 28 U.S.C. § 1331, federal courts
15 have original jurisdiction over “all civil actions arising under the Constitution, laws, or
16 treaties of the United States.” “[T]he presence or absence of federal-question jurisdiction is
17 governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction
18 exists only when a federal question is presented on the face of the plaintiff’s properly
19 pleaded complaint.” Provincial Gov’t of Marinduque v. Placer Dome, Inc., 582 F.3d 1083,
20 1091 (9th Cir. 2009) (citation and quotation marks omitted). “[T]he plaintiff is ‘master’ of
21 her case, and if she can maintain her claims on both state and federal grounds, she may
22 ignore the federal question, assert only state claims, and defeat removal.” Duncan v.
23 Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996).

24 A narrow corollary to the well-pleaded complaint rule is the “artful pleading”
25 doctrine, which provides that a plaintiff “may not avoid federal jurisdiction by omitting
26 from the complaint allegations of federal law that are essential to the establishment of the
27 claim.” Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033, 1041 (9th Cir. 2003)
28 (internal quotation marks omitted). The artful pleading doctrine allows courts to “delve

1 beyond the face of the state court complaint and find federal question jurisdiction by re-
2 characterizing a plaintiff's state law claim as a federal claim." Id. (internal quotation marks
3 and alterations omitted). The doctrine thus applies "(1) where federal law completely
4 preempts state law . . . ; (2) where the claim is necessarily federal in character . . . ; or
5 (3) where the right to relief depends on the resolution of a substantial, disputed federal
6 question[.]" ARCO Env'tl. Remediation, L.L. C. v. Dept. of Health and Env'tl. Quality, 213
7 F.3d 1108, 1114 (9th Cir. 2000) (citations omitted). The Ninth Circuit has cautioned,
8 however, that courts should "invoke the doctrine only in limited circumstances as it raises
9 difficult issues of state and federal relationships and often yields unsatisfactory results."
10 Lippit, 340 F.3d at 1041 (internal quotations omitted).

11 Here, Defendants point out that under § 951 of the Dodd-Frank Act, publicly-traded
12 companies are required to permit shareholders to render a non-binding vote on executive
13 compensation at least once every three years. See 15 U.S.C. § 78n-1. This provision,
14 known as "Say on Pay," is "a corporate mechanism for allowing shareholders to voice their
15 opinion on executive compensation." Weinberg ex rel. BioMed Realty Trust, Inc. v. Gold,
16 838 F. Supp. 2d 355, 356 n.1 (D. Md. 2012). According to Defendants, the requisite
17 disclosures pertaining to executive compensation are specifically controlled by the Say on
18 Pay provision, and as such, any inquiry into the adequacy of such disclosures necessarily
19 requires consideration of federal law. The Court disagrees.

20 Under Delaware law, a director may breach his or her fiduciary duties by failing to
21 disclose "material information" in connection with a request for shareholder action.
22 Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998). "An omitted fact is material if there is a
23 substantial likelihood that a reasonable shareholder would consider it important in deciding
24 how to vote." Seinfeld v. Bartz, 322 F.3d 693, 696-97 (9th Cir. 2003) (quoting TSC Indus.,
25 Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); accord Arnold v. Society for Sav.

1 Bancorp, Inc., 650 A.2d 1270, 1277 (Del. 1994).² Defendants, however, make no showing
2 that a violation of the Dodd-Frank Act with respect to disclosures in a proxy statement is a
3 necessary prerequisite to finding of materiality—or a Board member’s breach of fiduciary
4 duty. To the contrary, even if the information omitted from a proxy statement is not
5 required under the Say on Pay provisions, there certainly remains the possibility that such
6 information, if disclosed, could have an impact on a shareholder’s voting decision.

7 But even if Plaintiff’s claim that the disclosures regarding *executive compensation*
8 were controlled *exclusively* by the Say on Pay provision, Defendants overlook that there is
9 another aspect to Plaintiff’s breach of fiduciary duty claim ostensibly unaffected by the Act.
10 As noted, Plaintiff also is alleging that the Individual Defendants breached their fiduciary
11 duty with respect to the disclosures pertaining to Proposal Three, which seeks to increase in
12 the number of authorized Accuray stock shares. See Compl. ¶ 25. Defendants do not
13 argue, let alone present any authority, demonstrating that the Dodd-Frank Act or any other
14 federal law controls Plaintiff’s challenge to the disclosures pertaining to Proposal Three.
15 Since Plaintiff’s breach of fiduciary duty claim may therefore be resolved without
16 involving “a substantial, disputed federal question,” ARCO, 213 F.3d at 1114, removal
17 jurisdiction is lacking, see Rains v. Criterion Sys., Inc., 80 F.3d 339, 345-46 (9th Cir. 1996)
18 (“When a claim can be supported by alternative and independent theories—one of which is
19 a state law theory and one of which is a federal law theory—federal question jurisdiction
20 does not attach because federal law is not a necessary element of the claim.”).

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24 ² In his Complaint, Plaintiff specifically identifies the “material” information that he
25 contends was omitted from the Proxy. Compl. ¶¶ 25, 28. For example, Plaintiff alleges,
26 inter alia, that with respect to Proposal Two, the Proxy failed to disclose the details
27 underlying compensation surveys, the nature of the advice provided by counsel or the
28 rationale underlying the compensation proposal. Id. ¶ 25. As to Proposal Three, Plaintiff
complains that the Proxy failed to disclose a fair summary of any expert’s analysis, the
dilutive impact of the additional share, or the methodology the Board applied to determine
the number of additional shares to be issued. Id. ¶ 28. Plaintiff does not allege that
Defendants’ purported non-disclosures are in violation of or controlled by the Dodd-Frank
Act.

1 **B. ATTORNEYS’ FEES AND COSTS**

2 At the conclusion of his motion to remand, Plaintiff makes a one-sentence request
3 for an award of fees and costs under 28 U.S.C. § 1447(c). Mot. at 11. Where a case is
4 improperly removed, the Court “may require payment of just costs and any actual expenses,
5 including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). The
6 Court has “wide discretion” under § 1447(c). Moore v. Permanente Medical Group, Inc.,
7 981 F.2d 443, 447 (9th Cir.1992). However, “[a]bsent unusual circumstances, courts may
8 award attorney’s fees under § 1447(c) only where the removing party lacked an objectively
9 reasonable basis for seeking removal.” Martin v. Franklin Capital Corp., 546 U.S. 132, 141
10 (2005). Here, Defendants had an objectively reasonable basis for removing the action
11 based on § 1331. That Defendants ultimately failed to carry their burden of establishing
12 removal jurisdiction does not render the removal objectively unreasonable. Plaintiff’s
13 request for fees and costs is therefore denied.

14 **IV. CONCLUSION**

15 For the reasons stated above,

16 **IT IS HEREBY ORDERED THAT Plaintiff’s Motion to Remand is GRANTED.**
17 Plaintiff’s request for an award of attorney’s fees and costs is **DENIED**. Pursuant to 28
18 U.S.C. § 1447(c), the instant action is **REMANDED** to the Superior Court of California,
19 County of Santa Clara. In light of the Court’s determination that removal jurisdiction is
20 lacking, Plaintiff’s motions for a temporary restraining order and expedited discovery are
21 **DENIED** as moot. The Clerk shall close the file and terminate all pending matters.

22 **IT IS SO ORDERED.**

23 Dated: November 28, 2012


SAUNDRA BROWN ARMSTRONG
United States District Judge

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