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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GREG YOUNG, individually and on behalf
of all others similarly situated,

CASE NOS. 5:11-cv-05668 EJD;
5:11-cv-05669 EJD

Plaintiff(s),

**ORDER GRANTING PLAINTIFFS'
MOTIONS TO REMAND**

v.

PACIFIC BIOSCIENCES OF
CALIFORNIA, INC., et. al.,

Defendant(s).

[Docket Item Nos. 5, 17]

MATTHEW SANDNAS, individually and
on behalf of all others similarly situated,

Plaintiff(s),

v.

PACIFIC BIOSCIENCES OF
CALIFORNIA, INC., et. al.,

Defendant(s).

[Docket Item No. 4]

I. INTRODUCTION

In these related securities actions, Plaintiffs Greg Young and Matthew Sandnas allege claims for violations of §§ 11, 12(a)(2) and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77a et. seq. (the

1 “1933 Act”), individually and on behalf of a purported class, against Defendants Pacific Biosciences
2 of America (“Pacific”), its officers and board members, as well as certain underwriters of Pacific’s
3 initial public stock offering. Young and Sandnas originally filed their Complaints in San Mateo
4 County Superior Court. Pacific removed both actions to this court pursuant to 28 U.S.C. § 1441.

5 Presently before the court are the motions of both Young and Sandnas to remand their
6 respective cases to the superior court.¹ In response, Pacific argues the removals were proper because
7 the district court has original jurisdiction pursuant to 15 U.S.C. §§ 77v(a) and 77v(c). The court
8 found these matters suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b)
9 and therefore vacated the previously-scheduled hearing.

10 Having now carefully reviewed the moving, opposing and reply papers, the Motions to
11 Remand will be granted for the reasons stated below.

12 II. LEGAL STANDARD

13 Removal jurisdiction is a creation of statute. See Libhart v. Santa Monica Dairy Co., 592
14 F.2d 1062, 1064 (9th Cir. 1979) (“The removal jurisdiction of the federal courts is derived entirely
15 from the statutory authorization of Congress.”). Only those state court actions that could have been
16 originally filed in federal court may be removed. 28 U.S.C. § 1441(a) (“Except as otherwise
17 expressly provided by Act of Congress, any civil action brought in a State court of which the district
18 courts of the United States have original jurisdiction, may be removed by the defendant.”); see also,
19 e.g., Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (“Only state-court actions that originally
20 could have been filed in federal court may be removed to federal court by defendant.”).

21 Accordingly, the removal statute provides two basic ways in which a state court action may be
22 removed to federal court: (1) the case presents a federal question, or (2) the case is between citizens
23 of different states. 28 U.S.C. §§ 1441(a), (b).

24 The Notice of Removal filed in this action relies on the presence of a federal question. When
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26 ¹ Young’s motion appears as docket item number 5 in case number 5:11-cv-05668 EJD.
27 Sandnas’ motion appears as docket item number 4 in case number 5:11-cv-05669 EJD. The court
28 addresses these motions together as the papers filed in relation to each motion are seemingly
identical. The joinder in opposition filed by the Underwriter Defendants is GRANTED. See Docket
Item No. 17 in 5:11-cv-05668 EJD.

1 that is the case, the court looks to the face of a well-pleaded complaint to determine whether a cause
2 of action is created by federal law or whether the plaintiff’s right to relief necessarily depends on the
3 resolution of a substantial question of federal law. Christianson v. Colt Indus. Operating Corp., 486
4 U.S. 800, 808 (citing Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust, 463 U.S.
5 1, 27-28 (1983)). “[I]t must be clear from the face of the plaintiff’s well-pleaded complaint that
6 there is a federal question.” Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996). The complaint
7 as it existed at time of removal dictates whether removal jurisdiction is proper. Libhart, 592 F.2d at
8 1065.

9 **III. DISCUSSION**

10 There is no question that both the Young and Sandnas Complaints each raise a federal
11 question, considering *only* violations of federal securities laws are alleged. For this reason, the cases
12 are facially removable under the general removal statute, 28 U.S.C. § 1441. That determination,
13 however, does not end the analysis. These particular motions turn on the application of different and
14 more specific statutes applicable to securities actions.

15 The first relevant statute is 15 U.S.C. § 77v, which states in pertinent part:

16 The district courts of the United States and United States courts of any
17 Territory shall have jurisdiction of offenses and violations under [the
18 1933 Act] . . . and, concurrent with State and Territorial courts, except
19 as provided in . . . [15 U.S.C. § 77p] with respect to covered class
20 actions, of all suits in equity and actions at law brought to enforce any
21 liability or duty created by [the 1933 Act]. . . . *Except as provided in
22 section . . . [15 U.S.C. § 77p(c)], no case arising under [the 1933 Act]
23 and brought in any State court of competent jurisdiction shall be
24 removed to any court of the United States.*

21 15 U.S.C. § 77v(a) (emphasis added).

22 The second is 15 U.S.C. § 77p. Subsection (b), which the United States Supreme Court has
23 coined the “preclusion provision” of that statute, provides:

24 No covered class action based upon the statutory or common law of
25 any State or subdivision thereof may be maintained in any State or
26 Federal court by any private party alleging -

26 (1) an untrue statement or omission of a material fact in connection
27 with the purchase or sale of a covered security; or

28 (2) that the defendant used or employed any manipulative or deceptive
device or contrivance in connection with the purchase or sale of a

1 covered security.

2 15 U.S.C. § 77p(b); Kircher v. Putnam Funds Trust, 547 U.S. 633, 636 (2006) (“The Act has a
3 preclusion provision and a removal provision. . .”).

4 Subsection (c) of § 77p - the “removal provision” - states:

5 Any covered class action brought in any State court involving a
6 covered security, as set forth in subsection (b), shall be removable to
7 the Federal district court for the district in which the action is pending,
and shall be subject to subsection (b).

8 15 U.S.C. § 77p(c); Kircher, 547 U.S. at 636.

9 Young and Sandnas contend that actions such as theirs, which allege *only* claims under the
10 1933 Act, may not be removed from state court to federal court due to the express restriction on
11 removal contained in § 77v. For their part, Defendants argue that the language of § 77p(b) vests the
12 federal courts with exclusive jurisdiction over “covered class actions,” that the Young and Sandnas
13 cases are “covered class actions,” and that § 77p(c) allows for their removal accordingly. These
14 motions therefore present a question of statutory interaction, specifically the interplay between §§
15 77v and 77p.

16 This court is not the first to be faced with this exact question. But as the parties’ pleadings
17 make clear, the district courts have not harmonized the jurisdictional and removal provisions of §§
18 77v and 77p with the same effect. See, e.g., Unschuld v. Tri-S Sec. Corp., 1:06-CV-02931-JEC,
19 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007) (examining the history of §§ 77p and 77v and granting
20 motion to remand); West Palm Beach Police Pension Fund v. Cardionet, Inc., No. 10cv711-L(NLS),
21 2011 WL 1099815, 2011 U.S. Dist. LEXIS 30607, at *6 (S.D. Cal. Mar. 24, 2011) (granting motion
22 to remand); Knox v. Agria Corp., 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009) (denying motion to
23 remand); Rovner v. Vonage Holdings, Corp., No. 07-178 (FLW), 2007 WL 446658, 2007 U.S. Dist.
24 LEXIS 8656, at *14 (D.N.J. Feb. 5, 2007) (denying motion to remand). The result is a split of
25 authority.

26 Moreover, this issue has seemingly eluded definitive resolution by the appellate courts,
27 perhaps due to the review restrictions on remand orders. See 28 U.S.C. § 1447(d) (“An order
28 remanding a case to the State court from which it was removed is not reviewable on appeal or

1 otherwise”); see also Sheeran v. General Electric Co., 593 F.2d 93, 97 (9th Cir. 1979) (“Where
2 a motion to remand is denied, the propriety of removal is reviewable on appeal from the final
3 judgment or by interlocutory appeal if the refusal to remand is certified under 28 U.S.C. §
4 1292(b).”). But some guidance has nonetheless been provided. In Kircher v. Putnam Funds Trust,
5 the United States Supreme Court interpreted § 77p with a strict eye:

6 The funds argue that removal jurisdiction is broader by emphasizing
7 the adjective that introduces subsection (c): “Any” covered action. §
8 77p(c). But that suggestion would be persuasive only if we stopped
9 reading right there, and we do not stop there; we do not read statutes in
10 little bites. And, as just noted, if we did read the removal power that
11 broadly there would be no point to the phrase “as set forth in
12 subsection (b),” for subsection (b) cases would be removable anyway
13 as a subset of covered class actions. The funds purport to counter this
14 objection with their argument that on our reading the last phrase of
15 subsection (c) is redundant in providing that removed cases “shall be
16 subject to subsection (b),” since subsection (b) cases would in any
17 event be so subject. The funds are in fact right about that redundancy,
18 but the point does not count for their side, because the phrase is
19 redundant on their reading, too: any subsection (b) case removed as
20 falling within the broad category of covered class actions would be
21 treated in accordance with subsection (b) if the subsection applied to
22 that case. In sum, we see no reason to reject the straightforward
23 reading: removal and jurisdiction to deal with removed cases is limited
24 to those precluded by the terms of subsection (b).

25 Kircher, 547 U.S. at 643 (internal citations omitted). In addition, the Ninth Circuit took the
26 salient portion § 77v to mean exactly what it states in Luther v. Countrywide Home Loans
27 Servicing, LP, 533 F.3d 1031 (9th Cir. 2008): :

28 The Securities Act of 1933, which imposes liability for omissions and
misstatements in various securities-related communications, provides
concurrent jurisdiction in state and federal courts over alleged
violations of the Act. Pub.L. No. 73–22, ch. 38, § 22(a), 48 Stat. 74,
86–87 (codified at 15 U.S.C. § 77v(a)). However, § 22(a) strictly
forbids the removal of cases brought in state court and asserting claims
under the Act. Luther’s class action falls within § 22(a)’s removal bar
because it was brought in state court and asserts only claims arising
under the Securities Act of 1933.

533 F.3d at 1033. The Luther court held that because § 77v is statute of precise application not
submerged by a statute of more general application, the district court properly remanded a securities
action only alleging claims under the 1933 Act. See id. at 1034.

This court finds Kircher and Luther instructive, and also finds persuasive the determinations
in cases such as Unschuld and West Palm Beach Police Pension Fund. As such, the court interprets

1 § 77p(c) as the Supreme Court did in Kircher: only those “covered class actions” described in §
2 77p(b) alleging omission or deception based upon *state law* are removable. The court also interprets
3 § 77v as the Ninth Circuit did in Luther: cases alleging claims only under the 1933 Act cannot be
4 removed from state court. Since the Young and Sandnas actions do not rely on state law but allege
5 only claims under the 1933 Act, they are not the type of covered class actions capable of being
6 removed pursuant to § 77p, and indeed are prohibited from removal pursuant to § 77v. Because
7 Pacific removed these actions in contravention of these sections, the Motions to Remand must be
8 granted.


9 **IV. ORDER**

10 Based on the foregoing, the Motions to Remand filed by Young (Docket Item No. 5 in 5:11-
11 cv-05668 EJD) and Sandnas (Docket Item No. 4 in 5:11-cv-05669 EJD) are each GRANTED. The
12 clerk shall remand these actions to San Mateo County Superior Court and close these files.

13 The Case Management Conferences scheduled for March 16, 2012, are VACATED.

14 **IT IS SO ORDERED.**

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16 Dated: March 13, 2012

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18 EDWARD J. DAVILA
19 United States District Judge
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