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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAVID J. GALLO,
Plaintiff,
v.
UNKNOWN NUMBER OF IDENTITY
THIEVES, et al.,
Defendants.

Case No. 17-CV-01465-LHK

**ORDER GRANTING MOTION TO
REMAND**

Re: Dkt. No. 754

Plaintiff David Gallo (“Gallo”) brings this case against an “Unknown Number of Identity Thieves”; Anthem Blue Cross Life and Health Insurance Company (“Anthem Blue Cross”); Compass Bank; American Express Company; Paypal, Inc.; Powerpay, LLC; and Does 1–100 (collectively, “Defendants”). Before the Court is Plaintiff’s motion to remand the case to the Superior Court of California, County of San Diego (“San Diego County Superior Court”). ECF No. 754.

Having considered the submissions of the parties, the relevant law, and the record in this case, the Court GRANTS Plaintiff’s motion to remand the case to San Diego County Superior Court.

I. BACKGROUND

1 43. The attorney also stated that she believed that her personal information had been stolen during
 2 the hack of Anthem and Anthem affiliates. *Id.* Gallo alleges that this is the first time that he
 3 learned that Anthem or any of its affiliates had been hacked. *Id.* ¶ 44. Gallo alleges that this hack
 4 was the source of his personal information used by the identity thieves to open the fraudulent
 5 accounts. *Id.* ¶ 45.

6 **B. Procedural History**

7 Gallo filed the complaint in this case on January 23, 2017. ECF No. 1-2. The complaint
 8 asserts six causes of action under California law: (1) an injunction pursuant to California Business
 9 & Professions Code §§ 17200, *et seq.*, against the identity thieves; (2) a common law claim for
 10 invasion of privacy against the identity thieves; (3) a claim for common law negligence against
 11 Anthem Blue Cross; (4) a claim for violation of Civil Code §§ 1798.80 against Anthem Blue
 12 Cross; (5) a claim for declaratory relief against Compass Bank, American Express, Paypal, and
 13 Powerpay; and (6) a claim for common law negligence against Compass Bank, American Express,
 14 Paypal, and Powerpay. *Id.*

15 On February 21, 2017, Defendant Anthem Blue Cross removed this action to the United
 16 States District Court for the Southern District of California. ECF No. 1. In the notice of removal,
 17 Anthem Blue Cross proffered two bases for subject matter jurisdiction in federal court: (1) federal
 18 question jurisdiction under 28 U.S.C. § 1331 based on the fact that “Plaintiff’s state law claims
 19 implicate substantial federal interests” based on national security interests and the Health
 20 Insurance Portability and Accountability Act of 1996 (“HIPAA”); and (2) federal question
 21 jurisdiction under 28 U.S.C. § 1331 and the Employee Retirement Income Security Act
 22 (“ERISA”), 29 U.S.C. §§ 1001, *et seq.* *Id.* at 5–7.

23 On March 21, 2017, Gallo filed the instant motion to remand. ECF No. 24. On April 5,
 24 2017, Anthem Blue Cross filed an opposition to the motion to remand in the Multi-District
 25 Litigation, *In re Anthem, Inc. Data Breach Litigation*, Case No. 5:15-MD-02617-LHK, before the
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1 undersigned judge (“Anthem MDL”). ECF No. 774.¹ On April 12, 2017, Gallo filed a reply. ECF
2 No. 31.

3 **II. LEGAL STANDARD**

4 A suit may be removed from state court to federal court only if the federal court would
5 have had subject matter jurisdiction over the case in the first instance. 28 U.S.C. § 1441(a); *see*
6 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“Only state-court actions that originally
7 could have been filed in federal court may be removed to federal court by the defendant.”). “In
8 civil cases, subject matter jurisdiction is generally conferred upon federal district courts either
9 through diversity jurisdiction, 28 U.S.C. § 1332, or federal question jurisdiction, 28 U.S.C.
10 § 1331.” *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1068 (9th Cir. 2005). If it appears at any
11 time before final judgment that the federal court lacks subject matter jurisdiction, the federal court
12 must remand the action to state court. 28 U.S.C. § 1447(c).

13 The party seeking removal bears the burden of establishing federal jurisdiction. *Provincial*
14 *Gov’t of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009). “The removal
15 statute is strictly construed, and any doubt about the right of removal requires resolution in favor
16 of remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) (citing
17 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

18 **III. DISCUSSION**

19 In their notice of removal, Anthem Blue Cross asserted two grounds for removal: (1)
20 federal question jurisdiction under 28 U.S.C. § 1331 based on the fact that “Plaintiff’s state law
21 claims implicate substantial federal interests” because the Anthem data breach implicates national
22 security interests and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”);
23 and (2) federal question jurisdiction under 28 U.S.C. § 1331 and the Employee Retirement Income
24 Security Act (“ERISA”), 29 U.S.C. §§ 1001, *et seq.* ECF No. 1, at 5–7. However, in their
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26 ¹ After removal, the instant case was transferred to the *Anthem MDL* on March 17, 2017. Anthem
27 Blue Cross filed their opposition to the motion to remand only in the *Anthem MDL* case and did
28 not file the opposition in the individual case, *Gallo v. Unknown Identity Thieves*, Case No. 17-CV-
01465-LHK.

1 opposition to the motion to remand, Anthem Blue Cross abandons its ERISA preemption
2 argument. The opposition also raises for the first time the argument that “it is only because
3 Plaintiff (either intentionally or inadvertently) named the wrong entity as a defendant that this
4 Court lacks diversity jurisdiction over Plaintiff’s claims.” ECF No. 774, at 3.

5 The Court first considers the issue of diversity jurisdiction. The Court then considers the
6 issues of national security interests, ERISA, and HIPAA in turn. Finally, the Court considers
7 Gallo’s argument that he is entitled to attorney’s fees under 28 U.S.C. § 1447(c) because Anthem
8 Blue Cross “lacked an objectively reasonable basis for seeking removal.” Mot. at 14.

9 **A. Diversity**

10 Under 28 U.S.C. § 1332(a)(1), federal courts have original jurisdiction over civil actions
11 “where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . .
12 citizens of different States.” 28 U.S.C. § 1332. A “core principle of federal removal jurisdiction on
13 the basis of diversity . . . is [that it is] determined (and must exist) as of the time the complaint is
14 filed and removal is effected.” *Strotek Corp. v. Air Transport Ass’n of Am.*, 300 F.3d 1129, 1131
15 (9th Cir. 2002). “28 U.S.C. § 1332 requires that the parties be in complete diversity and the
16 amount in controversy exceed \$75,000.” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d
17 1089, 1090 (9th Cir. 2003) (per curiam). However, fraudulently joined defendants who destroy
18 diversity do not defeat removal. *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.
19 1987).

20 Gallo is a citizen of California and has sued Anthem Blue Cross, which is a California
21 corporation. Compl. ¶ 5. However, Anthem Blue Cross argues that “it is only because Plaintiff
22 (either intentionally or inadvertently) named the wrong entity as a defendant that this Court lacks
23 diversity jurisdiction over Plaintiff’s claims.” Opp. at 3. Specifically, Anthem Blue Cross states
24 that “Plaintiff did not name Anthem, an Indiana corporation, as a defendant, even though the
25 Complaint itself alleges that Anthem was the entity that possessed Plaintiff’s personal information,
26 failed to take appropriate steps to protect that information, and suffered the data breach.” *Id.*

27 However, a close reading of Gallo’s complaint makes clear that the complaint never refers

1 to Anthem, Inc. Instead, in paragraph 5 of the complaint, Gallo names Anthem Blue Cross as a
2 defendant and then defines Anthem Blue Cross as “Anthem” for the purposes of the complaint.
3 Compl. ¶ 5 (“Anthem Blue Cross Life and Health Insurance Company (hereinafter, ‘Anthem’), is
4 a corporation organized and existing under the laws of the State of California.”). Thus, all
5 references to “Anthem” in the complaint are references to Anthem Blue Cross, a California
6 corporation.

7 There is no reason to believe that Gallo improperly sued Anthem Blue Cross. Anthem Blue
8 Cross is the successor of the entity from which Gallo purchased his health insurance and to which
9 Gallo provided his personal information. Compl. ¶¶ 14–15. As such, Gallo alleges that Anthem
10 Blue Cross is liable for common law negligence and violation of California Civil Code §§
11 1798.80, *et seq.*, because Anthem Blue Cross failed to adequately protect Gallo’s personal
12 information from disclosure. Compl. ¶¶ 51–55. Anthem Blue Cross offers no reason to believe that
13 this claim is improper or that Anthem Blue Cross is fraudulently joined. Because Anthem Blue
14 Cross is a California corporation, as long as Anthem Blue Cross remains in the case there is no
15 diversity jurisdiction.

16 In short, Gallo is a citizen of California and has properly sued Anthem Blue Cross, a
17 California corporation. Thus, the Court does not have diversity jurisdiction over the instant case
18 and removal therefore is not justified under 28 U.S.C. § 1332.

19 **B. “Substantial Federal Interests” Based on National Security Concerns**

20 28 U.S.C. § 1331 provides that federal courts have original jurisdiction over civil actions
21 “arising under the Constitution, laws, or treaties of the United States.” Federal question
22 jurisdiction “is determined (and must exist) as of the time the complaint is filed and removal is
23 effected.” *Strotek*, 300 F.3d at 1131. Removal pursuant to § 1331 is governed by the “well-pleaded
24 complaint rule,” which provides that federal question jurisdiction exists only when “a federal
25 question is presented on the face of plaintiff’s properly pleaded complaint.” *Caterpillar*, 482 U.S.
26 at 392.

27 “[I]n certain cases,” the United States Supreme Court has explained, “federal-question
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1 jurisdiction will lie over state-law claims that implicate significant federal issues.” *Grable & Sons*
2 *Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005). Under *Grable*, a federal
3 court may exercise jurisdiction over a state-law claim only if (1) the action necessarily raises an
4 issue of federal law that is (2) disputed and (3) substantial, and if (4) the court may entertain the
5 case without disturbing the congressionally approved balance of federal and state judicial
6 responsibilities. *Id.* at 314.

7 In the instant case, Anthem Blue Cross argues that “[t]he cyberattack that forms the basis
8 of Plaintiff’s Complaint carries extraordinary national significance” and therefore “Plaintiff’s
9 Complaint is capable of and best suited for resolution in federal court” under 28 U.S.C. § 1331.
10 *Opp.* at 2, 10–11. Anthem Blue Cross claims that “[t]he cyberattack on Anthem was perpetrated
11 by a highly sophisticated Advanced Persistent Threat (“APT”) affiliated with the Chinese
12 government’s intelligence ministry.” *Opp.* at 7. Anthem Blue Cross then argues extensively that
13 cyberattacks by foreign state-affiliated actors constitute an “extraordinary threat” to the United
14 States’ national security. *Id.* at 11. Essentially, Anthem Blue Cross argues that the cybersecurity
15 threats from state actors constitute such an important “national emergency” that federal courts
16 have jurisdiction over state law claims related to data breaches by foreign state actors. *Id.*

17 However, under *Grable*, in order to fall under § 1331, a state law claim must necessarily
18 raise a disputed and substantial “issue[] of federal law.” *Grable*, 545 U.S. at 319 (emphasis
19 added). Although Anthem Blue Cross argues extensively that cybersecurity is an issue of national
20 scope and importance, Anthem Blue Cross does not identify any federal law that would be
21 implicated by the instant case. Instead, Anthem Blue Cross concedes that state common law and
22 statutory law governs each of Gallo’s claims.

23 Indeed, *New SD Inc. v. Rockwell Intl’s Corp.*, 79 F.3d 953 (9th Cir. 1996), which Anthem
24 Blue Cross cites in support of its argument, demonstrates precisely why federal jurisdiction does
25 not exist in the instant case. Anthem Blue Cross cites *New SD* for the proposition that “federal
26 jurisdiction over a state law breach of contract claim is appropriate where the claims impact
27 national security issues.” *Opp.* at 11. However, the dispute in *New SD* was based on a contract

1 with the United States Air Force for the development of military hardware. The Ninth Circuit held
2 that this dispute must be governed by federal law because of the essentially federal nature of the
3 contract, and therefore “state law [wa]s totally displaced by federal common law.” 79 F.3d at 955.
4 In other words, the dispute in *New SD* was not a “state law breach of contract claim” because
5 federal law preempted state law. Opp. at 11. Thus, in *New SD* jurisdiction existed under § 1331
6 because the claim arose under federal common law.

7 In the instant case, unlike *New SD*, Anthem Blue Cross does not argue that Gallo’s state
8 law claims are preempted by federal common law.² In fact, Anthem Blue Cross admits that Gallo
9 has “sued only under state statutes” and raised only “state law claims.” Opp. at 3. The Ninth
10 Circuit has held that there is no jurisdiction under § 1331 if federal law “is not a necessary element
11 of the state law claim and no preemption exists.” *Easton v. Crossland Mortgage Corp.*, 114 F.3d
12 979, 982 (9th Cir. 1997). In the instant case, Gallo’s claims are not preempted by federal law and
13 there is no “necessary element” of federal law. Therefore, the Court does not have federal
14 jurisdiction under 28 U.S.C. § 1331.

15 Indeed, the Court has already rejected a similar argument in this Multi-District Litigation,
16 *In re Anthem, Inc. Data Breach Litigation*, Case No. 5:15-MD-02617-LHK (“*Anthem MDL*”). In
17 removing the case *Sabatino et al. v. HMO Missouri, Inc., et al.*, 15-CV-02873-LHK, other
18 Anthem affiliates (represented by the same law firm that represents Anthem Blue Cross in the
19 instant case) argued that federal question jurisdiction was warranted because “how Anthem and
20 similarly situated companies respond to the threat of cyber attacks raises substantial federal
21 questions and implicates a compelling federal interest under *Grable* because cyber attacks are one
22 of the most serious national security challenges we must confront.” *Sabatino et al. v. HMO*
23 *Missouri, Inc., et al.*, 129 F. Supp. 3d 887, 897 (N.D. Cal. 2015) (internal quotation marks
24 omitted). However, the Court found that “[a]lthough this action resulted from a data breach that
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27 ² As discussed below, Anthem Blue Cross’s notice of removal mentioned ERISA preemption as a
28 ground for removal. However, Anthem Blue Cross abandoned this ground in its opposition to the
motion to remand. See ECF No. 1; Opp.

1 has had consequences nationwide, at bottom this particular lawsuit is between Missouri plaintiffs
2 and Missouri defendants based on alleged violations of Missouri law.” *Id.* Therefore, the Court
3 found that there was no federal question jurisdiction and remanded the case to state court.

4 Similarly, in the instant case, although the breach at issue had nationwide consequences,
5 and although the cause of the breach may implicate national security interests, the instant case is at
6 bottom a lawsuit between a California plaintiff and California defendants based on alleged
7 violations of California law.

8 Indeed, even for claims arising from the September 11 attacks, which had obvious and far-
9 reaching national security implications, Congress felt compelled to enact a specific statute
10 providing for federal jurisdiction. *See* Air Transportation Safety and System Stabilization Act of
11 2001, Pub. L. No. 107-42, § 408 (“There shall exist a Federal cause of action [for claims related to
12 the September 11 attacks.” . . . The United States District Court for the Southern District of New
13 York shall have original and exclusive jurisdiction over all actions brought for any claim
14 (including any claim for loss of property, personal injury, or death) resulting from or relating to
15 the terrorist-related aircraft crashes of September 11, 2001.”). In other words, “if Congress deems
16 it appropriate for federal courts to exercise jurisdiction over a certain type of case, it knows how to
17 do ensure that this occurs.” *Magdaleno v. S. California Reg’l Rail Auth.*, 2009 WL 56773, at *3
18 (C.D. Cal. Jan. 8, 2009) (discussing the Air Transportation Safety and System Stabilization Act of
19 2001). Congress has not so provided in the instant case.

20 For these reasons, the Court finds that national security interests do not justify jurisdiction
21 under § 1331.

22 **C. ERISA Preemption**

23 As discussed above, Anthem Blue Cross’s notice of removal asserted that federal
24 jurisdiction exists because “the Complaint asserts claims . . . that are completely preempted by”
25 ERISA. ECF No. 1, at 7. Anthem Blue Cross abandoned this argument in its opposition to Gallo’s
26 motion to remand. Nevertheless, the Court considers this argument for the sake of completeness.

27 As the U.S. Supreme Court has explained, “Section 514(a) [of ERISA] provides that

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1 ERISA ‘shall supersede any and all State laws insofar as they . . . relate to any employee benefit
2 plan’ covered by the statute.” *N.Y. State Conference of Blue Cross & Blue Shield Plans v.*
3 *Travelers Ins. Co.*, 514 U.S. 645, 651 (1995) (citing 29 U.S.C. § 1144(a)). An “employee benefit
4 plan” is a plan “established or maintained by an employer or by an employee organization.” 29
5 U.S.C. § 1002(3). An “employee” is defined as “any individual employed by an employer.” *Id.* §
6 1002(6).

7 However, according to the allegations in Gallo’s complaint and Gallo’s declaration in
8 support of his motion to remand, Gallo has practiced law as a sole proprietorship “[f]rom
9 approximately 1993 to present,” including all times relevant to the complaint. Compl. ¶ 11; ECF
10 No. 3-2 (“Gallo Decl.”), ¶ 4. Thus, when Gallo purchased the insurance plans at issue in the
11 instant case, Gallo was self-employed. As Gallo points out in his motion, self-employed persons
12 are beyond the scope of ERISA. *See In re Watson*, 161 F.3d 593, 596-599 (9th Cir. 1998) (holding
13 that an individual “was the sole participant in his own pension plan” and therefore was properly
14 “not considered an ‘employee’ for purposes of ERISA.”); *see also Matinchek v. John Alden Life*
15 *Ins. Co.*, 93 F.3d 96, 101 (3rd Cir. 1996) (“At least five courts of appeal have similarly recognized
16 that ERISA does not govern a ‘plan’ that is merely an insurance policy under which the only
17 beneficiaries are the company’s owners.”) (citing *Peterson v. American Life & Health Ins. Co.*, 48
18 F.3d 404, 407 (9th Cir. 1995)). Thus, because Gallo’s insurance plan was not governed by ERISA,
19 ERISA does not preempt Gallo’s claims.

20 In its opposition, Anthem Blue Cross abandons its ERISA preemption argument and does
21 not challenge Gallo’s assertion that Gallo was self-employed and purchased insurance for himself
22 alone as sole proprietor of his law practice. Therefore, the Court concludes that Anthem Blue
23 Cross has not met its burden to establish that removal is proper on the basis of ERISA preemption.

24 **D. HIPAA**

25 Anthem Blue Cross also asserts that removal is proper because “Plaintiff’s state law and
26 statutory causes of action are predicated on alleged violations of [HIPAA] and therefore raise
27 important questions of federal law.” Opp. at 13. Specifically, Anthem Blue Cross states that

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1 Gallo’s allegation that Anthem Blue Cross “failed to implement and maintain reasonable security
2 procedures and practices . . . to protect [Gallo’s] information from unauthorized access, use, and
3 disclosure” is “implicitly based on HIPAA.” *Id.*

4 However, Gallo’s complaint contains no reference to HIPAA at all, and Anthem Blue
5 Cross does not argue that HIPAA preempts Gallo’s claims. In fact, as Gallo points out, his
6 complaint “does not even assert that ‘health information’ has been taken or misused.” Mot. at 11;
7 *see also* 42 U.S.C.A. § 1320d(4)(B) (limiting the definition of “health information” to information
8 that “relates to the past, present, or future physical or mental health or condition of an individual,
9 the provision of health care to an individual, or the past, present, or future payment for the
10 provision of health care to an individual.”). Instead, Gallo alleges only that his personal
11 identification information was stolen. Thus, neither the complaint nor Anthem Blue Cross’s
12 opposition establish that HIPAA is relevant to the instant case, let alone that HIPAA is an
13 “actually disputed and substantial” issue sufficient to establish federal jurisdiction. *Grable*, 545
14 U.S. at 310, 314.

15 Indeed, this Court has previously held in the *Anthem* MDL that a “single reference to
16 HIPAA in a sixty-three paragraph complaint” is insufficient to justify federal jurisdiction.
17 *Sabatino*, 129 F. Supp. 3d at 897. This holding was based on the well-established principle that
18 “the mere reference of a federal statute in a pleading will not convert a state law claim into a
19 federal cause of action if the federal statute is not a necessary element of the state law claim and
20 no preemption exists.” *Easton*, 114 F.3d at 982. This is all the more true in the instant case, in
21 which the complaint contains no reference to HIPAA and no allegations establishing that HIPAA
22 is at all relevant to Gallo’s claims.

23 Furthermore, the Ninth Circuit has held that “HIPAA itself does not provide for a private
24 right of action.” *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007).
25 “[W]here there is no federal private right of action,” the Ninth Circuit continued, federal courts
26 generally “may not entertain a claim that depends on the presence of federal question jurisdiction
27 under 28 U.S.C. § 1331.” *Id.* at 1083 (citing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804,

1 817 (1986)). Indeed, Anthem Blue Cross has conceded that it “recognizes that HIPAA provides no
2 private right of action and that state law claims based on alleged violations of HIPAA may not in
3 and of themselves be sufficient to confer federal jurisdiction.” Opp. at 13. Thus, allowing federal
4 question jurisdiction based on Anthem Blue Cross’s contention that some of Gallo’s assertions are
5 “implicitly based on HIPAA,” Opp. at 13, would effect an “end-run around clear precedent
6 precluding a private right of action under HIPAA.” *Huling v. City of Los Banos*, 2012 WL
7 253251, at *8 (E.D. Cal. Jan. 25, 2012); *see also Dickman v. MultiCare Health Sys.*, 2015 WL
8 3477178, at *3 (W.D. Wash. June 2, 2015) (concluding that “it would undermine congressional
9 intent to allow claims for private relief into federal court through a state cause of action when a
10 federal private right of action is unavailable” (citing *Merrell Dow*, 478 U.S. at 812)).

11 Accordingly, the Court concludes that Anthem Blue Cross has not met its burden to show
12 that federal question jurisdiction exists over this action based on HIPAA.

13 **E. Attorney’s Fees**

14 Finally, Gallo argues that he is entitled to attorney’s fees under 28 U.S.C. § 1447(c)
15 because Anthem Blue Cross “lacked an objectively reasonable basis for seeking removal.” Mot. at
16 14. Under 28 U.S.C. § 1447(c), after a motion to remand “[a]n order remanding the case may
17 require payment of just costs and any actual expenses, including attorney fees, incurred as a result
18 of the removal.” However, “the standard for awarding fees should turn on the reasonableness of
19 the removal. Absent unusual circumstances, courts may award attorney’s fees under § 1447(c)
20 only where the removing party lacked an objectively reasonable basis for seeking removal.”
21 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

22 In the instant case, Anthem Blue Cross asserted two grounds for removal in its notice of
23 removal: (1) an important federal issue regarding national security and HIPAA, and (2) ERISA.
24 The Court concludes that Anthem Blue Cross “lacked an objectively reasonable basis for seeking
25 removal” on any of these grounds. *Id.*

26 When Anthem Blue Cross filed its notice of removal, the Court had already decided
27 *Sabatino et al. v. HMO Missouri, Inc., et al.*, 129 F. Supp. 3d 887, 897 (N.D. Cal. 2015). In

1 *Sabatino*, the Court rejected Anthem’s argument that the complaint “implicate[d] a compelling
2 federal interest under *Grable* because cyber attacks are one of the most serious national security
3 challenges we must confront.” *Id.* The *Sabatino* case was part of the same *Anthem* MDL to which
4 the instant case was transferred after removal. ECF No. 22. Additionally, the same firm, Hogan
5 Lovells US LLP, represented the Defendants in both *Sabatino* and the instant case. Thus, Anthem
6 Blue Cross was well aware of the Court’s prior order remanding *Sabatino* when Anthem Blue
7 Cross removed the instant case.

8 Nevertheless, despite the Court’s ruling in *Sabatino*, Anthem Blue Cross asserts similar
9 “national security implications” as a ground for removal in the instant case. Opp. at 1. Anthem
10 Blue Cross claims that the federal interests from the nationwide data breach are especially urgent
11 because the breach of Anthem was “a cyberattack of national significance perpetrated by a foreign
12 nation-state actor.” *Id.* at 2. However, Anthem Blue Cross makes no attempt to distinguish
13 *Sabatino* and cites no law establishing that “national security implications” alone can confer
14 federal jurisdiction over straightforward state law claims. Instead, Anthem Blue Cross relies
15 primarily on *New SD Inc. v. Rockwell Intl’s Corp.*, 79 F. 3d 953 (9th Cir. 1996), which found
16 federal jurisdiction because state law was preempted by federal common law. However, Anthem
17 Blue Cross makes no argument that Gallo’s state law claims are preempted by federal common
18 law in the instant case. Furthermore, as Gallo points out in his Reply, Anthem Blue Cross does not
19 even provide any evidence for its assertion that the Anthem data breach was caused by a state
20 actor. ECF No. 789, at 2. As noted above, even for state law claims arising from the September
21 11, 2001 attacks, Congress felt compelled to enact a specific statute providing for federal
22 jurisdiction. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-
23 42, § 408. No such statute exists here.

24 Additionally, in *Sabatino* the Court found that “Plaintiffs’ single reference to HIPAA in a
25 sixty-three-paragraph complaint does not convert Plaintiffs’ state law claim for breach of fiduciary
26 duty into a federal cause of action.” *Sabatino*, 129 F. Supp. 3d at 897. In the instant case, it is even
27 more obvious that HIPAA is not a basis for federal jurisdiction, because Gallo’s complaint

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1 contains no references at all to HIPAA, and the complaint does not even allege that Gallo’s health
2 information was stolen. Mot. at 17. Anthem Blue Cross makes no attempt to distinguish *Sabatino*
3 or to support its assumption that HIPAA will be relevant in the instant case.

4 Finally, Anthem Blue Cross’s notice of removal asserted ERISA preemption as a ground
5 for removal even though Gallo’s complaint made clear that Gallo is self-employed and therefore is
6 not subject to ERISA. Compl. ¶ 11 (“Plaintiff is an attorney . . . who has practiced under the trade
7 name, ‘the Law Offices of David J. Gallo,’ since the early 1990s.”). Perhaps recognizing that it
8 lacked an objective basis to remove based on ERISA preemption, Anthem Blue Cross abandoned
9 its ERISA preemption argument in its opposition to the motion to remand.

10 In short, Anthem Blue Cross’s arguments for federal jurisdiction in this case were already
11 either abandoned or squarely rejected by this Court in *Sabatino*. There is no jurisdiction under
12 § 1331 if federal law “is not a necessary element of the state law claim and no preemption exists,”
13 and yet Anthem Blue Cross has presented almost no argument that either of these factors is met.
14 *Easton*, 114 F.3d at 982. Therefore, the Court finds that Anthem Blue Cross “lacked an objectively
15 reasonable basis for seeking removal.” *Martin*, 546 U.S. at 141. For that reason, the Court finds
16 that an award of attorney’s fees is proper.

17 In the declaration accompanying Gallo’s motion for remand, Gallo states that he has spent
18 ten hours in work associated with the motion for remand and the reply. Gallo also reports that his
19 “regular published hourly rate of compensation is \$550.00.” ECF No. 25, at ¶ 8. Gallo graduated
20 from the University of Texas at Austin School of Law in 1985, was admitted to both the Texas and
21 California bars, and has been designated a Legal Specialist in Civil Trial Advocacy by the State
22 Bar of California. *Id.* at ¶ 9. Gallo also has substantial litigation experience and has worked as a
23 solo practitioner for 24 years. *Id.* ¶ 4. Additionally, at least one court has approved a rate of \$550
24 for experienced litigators in San Diego. *See, e.g., 569 E. Cty. Boulevard LLC v. Backcountry*
25 *Against the Dump, Inc.*, 6 Cal. App. 5th 426, 439 n.14 (Ct. App. 2016) (“\$550 per hour for a
26 seasoned litigator fell within the range of appropriate market rates for San Diego attorneys”)
27 Finally, Anthem Blue Cross has not objected to Gallo’s hourly rate or his reported hours.

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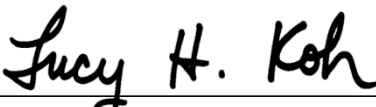
For these reasons, Court concludes that a \$550 hourly rate is reasonable for an attorney of Gallo’s education and experience. The Court also concludes that ten hours is reasonable for the work associated with the instant motion to remand and the reply. Therefore, the Court hereby ORDERS Anthem Blue Cross to pay Gallo attorney’s fees in the amount of \$5,500.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Gallo’s motion for remand and REMANDS the instant case to San Diego County Superior Court. The Court also ORDERS Anthem Blue Cross to pay Gallo attorney’s fees in the amount of \$5,500.

IT IS SO ORDERED.

Dated: May 31, 2017



LUCY H. KOH
United States District Judge