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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

DAVINA GIBSON, individually and on
behalf of all other persons similarly situated,

Plaintiff,

v.

STANFORD HEALTH CARE,

Defendant.

Case No. 23-cv-02320-BLF

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND**

[Re: ECF 10]

Plaintiff Davina Gibson (“Gibson”) filed this putative class action against Defendant Stanford Health Care (“Stanford”) in the Santa Clara County Superior Court, asserting three state law privacy claims on behalf of California residents who have used Stanford’s online patient portal. Gibson claims that Stanford’s website utilizes certain code provided to it by Facebook – “the Facebook Tracking Pixel” – that transmits patients’ personally identifiable information and protected health information to Facebook whenever the patient portal is used, without the patients’ consent and in violation of their privacy rights.

Stanford removed the action to federal district court pursuant to 28 U.S.C. § 1442(a)(1), commonly referred to as the federal officer removal statute, which in relevant part provides for the removal of an action brought against a federal officer or “any person acting under that officer” where the action is “for or relating to any act under color of such office.” Gibson moves to remand the action to state court, arguing that § 1442(a)(1) does not apply because Stanford was not “acting under” a federal officer when Stanford violated patients’ privacy rights. Stanford opposes remand. The Court previously vacated the hearing on the motion. *See* Order, ECF 24.

Gibson’s motion to remand is GRANTED as discussed below.

1 **I. BACKGROUND**

2 Gibson filed this action in the Santa Clara County Superior Court on March 23, 2023,
3 asserting three state law privacy claims against Stanford on behalf of herself and the putative
4 class: (1) violation of the California Invasion of Privacy Act, Cal. Penal Code § 631(a);
5 (2) violation of the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56.10;
6 and (3) Invasion of Privacy under California’s Constitution. *See* Not. of Removal Ex. A
7 (“Compl.”), ECF 1.

8 Gibson’s claims are based on the following allegations: Stanford is a nonprofit entity with
9 its principal place of business in Stanford, California. *See* Compl. ¶ 6. Stanford offers a full range
10 of medical services, including primary and outpatient services, that are utilized by thousands of
11 patients a year. *See id.* Stanford maintains an online patient portal that is accessible through the
12 website stanfordhealthcare.org. *See id.* ¶ 8. Gibson, a California resident, has obtained medical
13 services at Stanford and has used Stanford’s online patient portal to book appointments and view
14 the results of medical tests. *See id.* ¶¶ 7-8.

15 Stanford has integrated a piece of code it obtained from Facebook, referred to as the
16 Facebook Tracking Pixel, into its website stanfordhealthcare.org. *See* Compl. ¶ 28. “When a user
17 accesses a website hosting the Facebook Pixel, Facebook’s software script surreptitiously directs
18 the user’s browser to contemporaneously send a separate message to Facebook’s servers.” *Id.*
19 “This second, secret and contemporaneous transmission contains the original GET request sent to
20 the host website, along with additional data that the Facebook Pixel is configured to collect.” *Id.*
21 When a patient accesses Stanford’s online patient portal, “Facebook causes the browser to secretly
22 duplicate the communication with Stanford, transmitting it to Facebook’s servers, alongside
23 additional information that transcribes the communication’s content and the individual’s identity.”
24 *Id.* ¶ 29. The communications intercepted by Facebook in this manner contain protected health
25 information. *See id.* ¶ 34. Gibson was not informed of, and did not agree to, the disclosure of her
26 protected health information to Facebook. *See id.* ¶¶ 10-11.

27 On May 11, 2023, Stanford removed the action to federal district court pursuant to the
28 federal officer removal statute, 28 U.S.C. § 1442(a)(1). *See* Not. of Removal, ECF 1. In its

1 Notice of Removal, Stanford alleges that § 1442(a)(1) applies because the suit challenges the
2 legitimacy of actions Stanford took in order to participate in the Meaningful Use Program, a
3 voluntary federal program under which eligible healthcare providers receive incentive payments if
4 they facilitate patients’ online access to health records. *See id.* at 1. The Notice of Removal
5 describes in great detail former President George W. Bush’s issuance of an Executive Order
6 establishing the office of National Health Information Technology Coordinator (“National
7 Coordinator”); the National Coordinator’s decision to make online access to health care records a
8 national priority; and the subsequent creation of the Meaningful Use Program. *See id.* ¶¶ 14-30.
9 Stanford alleges that “[t]he Stanford patient portal and electronic Health Information Exchange
10 (‘HIE’) are tools leveraged and promoted by Stanford for its patients’ use as a direct result of the
11 federal initiative to make health care records available to patients online.” *Id.* ¶ 31. “Since
12 leveraging the patient portal and electronic HIE, Stanford has continually met the Meaningful Use
13 criteria, and has thus received incentive payments from the federal government.” *Id.* Based on
14 these allegations, Stanford contends that it was “acting under” a federal officer when it engaged in
15 the conduct giving rise to this suit. *See id.* ¶¶ 36-47.

16 Following removal, Gibson filed the present motion to remand, arguing that Stanford’s
17 voluntary participation in the Meaningful Use Program does not create a basis for removal under
18 § 1442(a)(2).

19 II. LEGAL STANDARD

20 A defendant may remove a civil action from state court by filing a notice of removal
21 “containing a short and plain statement of the grounds for removal” along with a copy of the
22 process, pleadings, and orders served on the defendant in the state court action. 28 U.S.C.
23 § 1446(a). The notice of removal must contain more than legal conclusions – “it must allege the
24 underlying facts supporting each of the requirements for removal jurisdiction.” *Leite v. Crane*
25 *Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014).

26 A plaintiff who contests the existence of federal jurisdiction may file a motion to remand.
27 *See* 28 U.S.C. § 1447(c). Such motion is “the functional equivalent of a defendant’s motion to
28 dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1).” *Leite v. Crane Co.*, 749 F.3d

1 1117, 1122 (9th Cir. 2014). “As under Rule 12(b)(1), a plaintiff’s motion to remand may raise
2 either a facial attack or a factual attack on the defendant’s jurisdictional allegations[.]” *Id.* The
3 same rules governing a defendant’s challenge to federal jurisdiction under Rule 12(b)(1) also
4 govern a plaintiff’s challenge to federal jurisdiction under § 1447(c). *See id.* A facial attack
5 accepts the truth of the allegations in the defendant’s notice of removal, while a factual attack
6 contests the truth of those allegations. *See id.* at 1121-22. When the plaintiff raises a facial attack
7 to the notice of removal, the court must accept the facts alleged in the notice of removal as true
8 and draw all reasonable inferences in the removing defendant’s favor when determining whether
9 the allegations are sufficient as a legal matter to invoke the court’s jurisdiction. *See id.*; *see also*
10 *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1098 (9th Cir. 2018). When the plaintiff raises a
11 factual attack to the notice of removal, the defendant must support the jurisdictional allegations in
12 the notice of removal with “competent proof.” *Liete*, 749 F.3d at 1121-22.

13 The removing defendant bears the burden of establishing the existence of federal subject
14 matter jurisdiction. *Love v. Villacana*, 73 F.4th 751, 755 (9th Cir. 2023).

15 **III. DISCUSSION**

16 Stanford removed this action under the federal officer removal statute, 28 U.S.C.
17 § 1442(a)(1). Gibson contends that § 1442(a)(1) does not apply and that the action should be
18 remanded for lack of subject matter jurisdiction. The complaint does not disclose a basis for
19 federal question jurisdiction or diversity jurisdiction, as it contains only state law claims between
20 California parties.

21 The Court first sets forth the requirements for removal under § 1442(a)(1) and then
22 discusses the application of the statute in this case.

23 **A. Requirements for Removal under § 1442(a)(1)**

24 In relevant part, § 1442(a)(1) permits removal of a state court action against an “officer (*or*
25 *any person acting under that officer*) of the United States or of any agency thereof, in an official
26 or individual capacity, for or relating to any act under color of such office[.]” 28 U.S.C.
27 § 1442(a)(1) (emphasis added). “The statute protects federal officers from interference with their
28 official duties through state-court litigation.” *Fidelitad*, 904 F.3d at 1099. “The federal officer

1 removal statute responds to three general concerns: (1) ‘State-court proceedings may reflect ‘local
2 prejudice’ against unpopular federal laws or federal officials’; (2) ‘States hostile to the Federal
3 Government may impede’ federal law; and (3) ‘States may deprive federal officials of a federal
4 forum in which to assert federal immunity defenses.’” *Id.* (quoting *Watson v. Philip Morris Cos.*,
5 551 U.S. 142, 150 (2007)).

6 Although § 1442(a)(1) is “liberally construed,” the Supreme Court has made clear that “its
7 ‘broad language is not limitless.’” *Fidelitad*, 904 F.3d at 1099 (quoting *Watson*, 551 U.S. at 147).
8 “To invoke § 1442(a)(1) removal, a defendant in a state court action must demonstrate that (a) it is
9 a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken
10 pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a colorable
11 federal defense.” *Id.* (quotation marks and citation omitted).

12 **B. Stanford’s Removal in this Case**

13 In its Notice of Removal, Stanford asserts that it satisfies all three requirements for
14 removal, alleging that: Stanford is a “person” within the meaning of § 1442(a)(1) (first
15 requirement); Stanford was acting under a federal officer when creating and maintaining its patient
16 portal and there was a causal nexus between its actions and Gibson’s claims (second requirement);
17 and Stanford raises a colorable federal defense to Gibson’s claims (third requirement). *See* Not. of
18 Removal ¶¶ 32-52. Gibson’s motion does not address the first or third requirements, but raises a
19 facial challenge to Stanford’s allegations with respect to the second requirement. The Court
20 therefore limits its discussion to the second requirement. Before undertaking that discussion,
21 however, the Court addresses two procedural issues.

22 First, Gibson raises a new argument in her reply, asserting that Stanford has not adequately
23 alleged the third requirement for removal, that it can assert a colorable federal defense. The Court
24 declines to consider that argument. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007)
25 (“The district court need not consider arguments raised for the first time in a reply brief.”); *Phan v.*
26 *Transamerica Premier Life Ins. Co.*, No. 20-CV-03665-BLF, 2023 WL 3468313, at *2 (N.D. Cal.
27 Apr. 17, 2023) (“It is improper for the moving party to ‘shift gears’ and introduce new facts or
28 different legal arguments in the reply brief than presented in the moving papers.”).

1 Second, Stanford requests judicial notice of four documents relating to federal policy and
2 the Meaningful Use Plan, which are available on federal governmental websites. *See* Def.’s RJN,
3 ECF 12. The request for judicial notice is granted. *See Eidmann v. Walgreen Co.*, 522 F. Supp.
4 3d 634, 642 (N.D. Cal. 2021) (“Documents published on government-run websites are proper for
5 judicial notice given their reliability.”)

6 Turning to the merits of the motion, the Court must determine whether the factual
7 allegations in Stanford’s Notice of Removal, accepted as true, are sufficient to satisfy the second
8 requirement for removal under § 1442(a)(1), the existence of “a causal nexus between its actions,
9 taken pursuant to a federal officer’s directions, and plaintiff’s claims.” *Fidelitad*, 904 F.3d at 1099
10 (quotation marks and citation omitted). “To demonstrate a causal nexus, the private person must
11 show: (1) that the person was ‘acting under’ a federal officer in performing some ‘act under color
12 of federal office,’ and (2) that such action is causally connected with the plaintiff’s claims against
13 it.” *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 755 (9th Cir. 2022) (citation omitted).

14 The Ninth Circuit has identified several factors that are relevant to determining whether a
15 private person is “acting under” a federal officer for purposes of § 1442(a)(1). *See Cnty. of San*
16 *Mateo*, 32 F.4th at 756-57. Those factors include whether the person: (1) “is acting on behalf of
17 the officer in a manner akin to an agency relationship”; (2) “is subject to the officer’s close
18 direction, such as acting under the subjection, guidance, or control of the officer, or in a
19 relationship which is an unusually close one involving detailed regulation, monitoring, or
20 supervision”; (3) “is assisting the federal officer in fulfilling basic governmental tasks that the
21 Government itself would have had to perform if it had not contracted with a private firm”; and
22 (4) is engaged in “activity is so closely related to the government’s implementation of its federal
23 duties that the private person faces a significant risk of state-court prejudice, just as a government
24 employee would in similar circumstances[.]” *Id.* (quotation marks and citations omitted).

25 Stanford contends that it satisfies all of these factors. As to the first factor, Stanford asserts
26 the existence of a sufficiently close relationship based on its receipt of incentive payments to
27 participate in the Meaningful Use Program, which assists the federal government to achieve its
28 goal of building a nationwide electronic health records system. Stanford argues that “[t]he

1 government paying providers like Stanford for their compliance with the Meaningful Use Program
2 reflects the ‘payment’ relationship that satisfies the ‘acting under’ requirement[.]” Def.’s Opp. at
3 6, ECF 11 (citation omitted). As to the second factor, Stanford asserts that it was subject to the
4 close direction of the federal government when creating and maintaining its online patient portal,
5 as the Meaningful Use Program prescribed a specific framework and guidelines for providers to
6 follow, and Stanford submitted detailed reports on patient portal activities. As to the third factor,
7 Stanford argues that absent the creation of online patient portals by private actors like Stanford,
8 the federal government would have to take on the task of building a nationwide electronic health
9 records system. Finally, as to the fourth factor, Stanford argues that it “faces a significant
10 risk of state-court prejudice because this case falls squarely in the essential purpose of the federal
11 officer removal statute – protecting federal operations and programs from interference through
12 state-court litigation.” *Id.* at 9.

13 These arguments have been rejected by numerous district courts in cases arising from
14 nearly identical facts. In *Quinto v. Regents of Univ. of California*, No. 3:22-CV-04429-JD, 2023
15 WL 1448050 (N.D. Cal. Feb. 1, 2023), the Regents of the University of California (“UC”) owned
16 and operated UCLA Health, offering a full range of medical services. The plaintiff was a patient
17 of UCLA Health and used its website to book appointments and access its online patient portal.
18 *See id.* at *1. The plaintiff alleged that when she did so, her personal identifying information and
19 private medical information were transmitted to Facebook by means of the Facebook Tracking
20 Pixel, which was a component of the UCLA Health website. *See id.* The plaintiff filed a putative
21 class action in state court, asserting claims under the California Invasion of Privacy Act, Cal.
22 Penal Code § 631(a), the California Confidentiality of Medical Information Act, Cal. Civ. Code §
23 56.10, and California’s Constitution. *See id.*

24 UC removed the state court action under § 1442(a) based on its assertion that it “use[d] the
25 Facebook Tracking Pixel as part of its broader effort to assist the federal government in achieving
26 its ‘mission of a nationwide digitized healthcare system.’” *Quinto*, 2023 WL 1448050 at *2. The
27 *Quinto* court found that to be insufficient for removal, concluding that “receiving incentive
28 payments for acting in a way that promotes a broad federal interest – in an area outside the

1 traditional responsibility of the federal government – is not the same as being contracted to carry
2 out, or assist with, a basic governmental duty.” *Id.* Rejecting UC’s assertion that it was subject to
3 the close direction of a federal officer by virtue of the specific framework and guidelines provided
4 by the Meaningful Use Program, the *Quinto* court observed that “merely being subject to a
5 regulatory scheme is not the same as acting under a federal agency’s close direction.” *Id.* at *3.
6 The *Quinto* court therefore granted the plaintiff’s motion to remand the action to state court for
7 lack of subject matter jurisdiction. *See id.* at *1, 3.

8 Every other district court in this circuit to consider the issue has reached the same result.
9 *See, e.g., Crouch v. Saint Agnes Med. Ctr.*, No. 1:22-cv-01527-ADA-EPG, 2023 WL 6940170, at
10 *2 (E.D. Cal. Oct. 20, 2023) (“[T]he mere furthering of a federal goal is not tantamount to
11 assisting or carrying out a federal task or duty.”); *Valladolid v. Mem’l Health Servs.*, No. CV 23-
12 3007-MWF (ASX), 2023 WL 4236179, at *1 (C.D. Cal. June 27, 2023) (“[T]his Court joins the
13 majority of district courts and concludes that implementing the Meaningful Use Program is
14 insufficient to establish that Defendant was ‘acting under’ a federal agency[.]”); *Davis v. Hoag*
15 *Mem’l Hosp. Presbyterian*, No. SACV2300772CJCADSX, 2023 WL 4147192, at *1 (C.D. Cal.
16 June 23, 2023) (“[W]hile the Meaningful Use program may subject private entities like Hoag to
17 some degree of government control, simply complying with a law or regulation is not enough to
18 bring a private person within the scope of the statute.”) (quotation marks and citation omitted).

19 This Court finds the reasoning of these decisions to be persuasive and follows them in
20 concluding that Stanford’s voluntary participation in the Meaningful Use Program is insufficient
21 to establish that it was “acting under” a federal officer when creating and implementing its online
22 portal, and in particular when choosing to integrate the Facebook Tracking Pixel into the portal.
23 The Court declines to follow the two out-of-circuit district court decisions cited by Stanford, *Doe I*
24 *v. UPMC*, No. 2:20-CV-359, 2020 WL 4381675 (W.D. Pa. July 31, 2020), and *Doe v. ProMedica*
25 *Health Sys., Inc.*, No. 3:20 CV 1581, 2020 WL 7705627 (N.D. Ohio Oct. 30, 2020). In this
26 Court’s view, the courts in both *UPMC* and *ProMedica* applied an overly broad interpretation of
27 the “acting under” requirements. This Court cannot agree that Stanford was “acting under” a
28 federal officer when creating and maintaining its online patient portal, simply because Stanford

1 chose to adhere to the guidelines of a voluntary federal program in order to obtain incentive
2 payments. “[M]ere compliance with federal directives does not satisfy the ‘acting under’
3 requirement of § 1442(a)(1), even if the actions are highly supervised and monitored.” *Riggs v.*
4 *Airbus Helicopters, Inc.*, 939 F.3d 981, 989 (9th Cir. 2019) (quotation marks and citation omitted).

5 Accordingly, Gibson’s motion to remand this action to state court is GRANTED.

6 **IV. ORDER**

- 7 (1) The motion to remand is GRANTED.
8 (2) The Clerk shall remand the case to the Santa Clara County Superior Court and
9 close the file in this Court.
10 (3) This order terminates ECF 10.

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12 Dated: November 9, 2023

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15 BETH LABSON FREEMAN
16 United States District Judge
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