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4 UNITED STATES DISTRICT COURT
5 SOUTHERN DISTRICT OF CALIFORNIA
6

7 MABVAX THERAPEUTICS
8 HOLDINGS, INC., a Delaware
9 Corporation,

Plaintiff,

10 v.

11 BARRY HONIG, et al.,

12 Defendants.
13

Case No.: 19-cv-981-WQH-MSB

ORDER

14 HAYES, Judge:

15 The matter before the Court is the Motion to Remand filed by Plaintiff MabVax
16 Therapeutics Holdings, Inc. (ECF No. 21).

17 **I. BACKGROUND**

18 On April 8, 2019, Plaintiff filed a Complaint in the Superior Court of the State of
19 California for the County of San Diego against Defendants. (ECF No. 1-2). Plaintiff is a
20 clinical-stage biotechnology company that develops cancer treatments. *Id.* ¶ 1. Plaintiff
21 alleges that Defendants, “a group of market manipulators” led by Defendant Barry Honig,
22 accumulated a controlling position in Plaintiff’s stock. *Id.* ¶ 3. Plaintiff alleges that
23 Defendants “pretended they sought legitimate returns” by investing in Plaintiff, but they
24 really sought to manipulate Plaintiff. *Id.* Plaintiff alleges that Defendants “defrauded
25 [Plaintiff] through illicit transactions for their enormous profit to the detriment of
26 [Plaintiff].” *Id.* Plaintiff alleges that, among other things, Defendants caused Plaintiff to
27 issue Defendants “tens of millions of dollars’ worth of common stock;” cut Plaintiff off
28 from legitimate investors; caused Plaintiff to be subjected to a SEC investigation; forced

1 Plaintiff to “publicly disclaim reliance on past financial statements rendered inaccurate by
2 Defendants;” and caused Plaintiff to be delisted from trading on Nasdaq. *Id.*

3 Plaintiff brings state law claims against Defendants for 1) market manipulation in
4 violation of section 25400 of the California Corporations Code; 2) unlawful business
5 practices in violation of section 17200 of the California Business & Professions Code; 3)
6 fraud and deceit in violation of sections 1709 and 1710 of the California Civil Code and
7 California common law; 4) fraudulent concealment in violation of section 1710 of the
8 California Civil Code and California common law; 5) constructive fraud in violation of
9 section 1573 of the California Civil Code and California common law; 6) negligent
10 misrepresentation in violation of section 1710 of the California Civil Code and California
11 common law; 7) tortious interference with prospective economic advantage; 8) breach of
12 fiduciary duty; and 9) restitution for unjust enrichment. (ECF No. 1-2). Plaintiff seeks
13 damages, including punitive damages, attorneys’ fees, costs, and pre- and post-judgment
14 interest. Plaintiff requests that the Court require Defendants “to make a full disclosure and
15 accounting of their interests and transactions in Plaintiff’s securities” and seeks “other legal
16 and equitable relief as [the Court] may deem proper.” *Id.* at 42.

17 On March 21, 2019, Plaintiff filed a petition for relief under chapter 11 of title 11 of
18 the United States Code in the United States Bankruptcy Court for the District of Delaware.
19 (ECF No. 21-1 at 9).

20 On May 24, 2019, Defendants OPKO Health, Inc., Steven Rubin, Philip Frost, and
21 Frost Gamma Investments Trust (collectively, the “OPKO Defendants”) removed
22 Plaintiff’s California state court action to this Court “[p]ursuant to 28 U.S.C. §§ 1334, 1441
23 and 1452.” (ECF No. 1 at 3). The OPKO Defendants removed this action on the grounds
24 that this Court has jurisdiction based on this action’s relationship to Plaintiff’s bankruptcy
25 action. (ECF No. 1 at 5). The Notice of Removal states that the claims brought by Plaintiff
26 “represent an asset of the estate” in Plaintiff’s bankruptcy action. Any recovery in this
27 action “will have an effect on MabVax’s bankruptcy estate as it will inure to the benefit of
28 creditors.” *Id.* The OPKO Defendants assert that this Court, therefore, has jurisdiction

1 under 28 U.S.C. § 1334, because this action is “related to” Plaintiff’s bankruptcy action.
2 *Id.* at 4.

3 On May 31, 2019, Defendants Robert Prag, The Del Mar Consulting Group, Inc.,
4 and The Del Mar Consulting Group, Inc. Retirement Plan Trust (collectively, the “Del Mar
5 Defendants”) filed an Answer. (ECF No. 7).

6 On June 13, 2019, Plaintiff filed a Motion to Remand this action to state court. (ECF
7 No. 21). Plaintiff contends that the Court should exercise its discretion to remand this
8 action pursuant to 28 U.S.C. § 1452(b). Plaintiff contends that each of the 14 factors courts
9 may consider pursuant to § 1452(b) weigh in favor of remand. *Id.* at 11. On July 1, 2019,
10 the OPKO Defendants filed a Response in opposition to Plaintiff’s Motion to Remand.
11 (ECF No. 48). The OPKO Defendants contend that this Court has subject matter
12 jurisdiction pursuant to § 1452, and the 14 factors weigh in favor of maintaining this action
13 in federal court. (ECF No. 48 at 5-6).

14 On July 1, 2019, Defendants Michael Brausner, Grander Holdings, Inc., and Grander
15 Holdings, Inc. 401K (collectively, the “Grander Defendants”) joined the OPKO
16 Defendants’ Response. (ECF No. 51). On July 2, 2019, Defendants Honig, GRQ
17 Consultants, Inc., GRQ Consultants, Inc. 401K, GRQ Consultants, Inc. Roth 401K FBO
18 Barry Honig, GRQ Consultants, Inc. Roth 401K FBO Renee Honig, Barry and Renee
19 Honig Charitable Foundation, Inc., Southern Biotech, Inc. (collectively, the “GRQ
20 Defendants”) joined the OPKO Defendants’ Response. (ECF No. 55). Defendants John
21 O’Rourke, III and ATG Capital, LLC also Joined the OPKO Defendants’ Response.¹ (ECF
22 No. 56). On July 8, 2019, Plaintiff filed a Reply. (ECF No. 65).

23 **II. LEGAL STANDARD**

24 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*
25 *Co. of Am.*, 511 U.S. 375, 377 (1994). The party seeking to remove a case from state court
26

27
28 ¹ The Court will, hereinafter, refer to all Defendants that filed or joined the OPKO Defendants’ Response
as “Defendants.”

1 to federal court “always has the burden of establishing that removal is proper.” *Gaus v.*
2 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The propriety of removal may be “tested in
3 the federal court, either on a motion by a party to remand, or by the court on its own
4 motion.” *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979). There
5 is a “strong presumption against removal.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.
6 1992). The removal statutes are strictly construed against removal; “any doubt about the
7 right of removal requires resolution in favor of remand.” *Moore-Thomas v. Alaska Airlines,*
8 *Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009).

9 28 U.S.C. § 1452 governs the removal of claims related to bankruptcy proceedings.
10 Under § 1452, “[a]ny party may remove any claim or cause of action in a civil action . . .
11 to the district court for the district where such civil action is pending, if the district court
12 has jurisdiction . . . under section 1334 of this title.” 28 U.S.C. § 1452(a). Section 1334
13 provides that district courts have original, but not exclusive, jurisdiction of all civil actions
14 “arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b).
15 A proceeding is “related to” a bankruptcy case if “the outcome of that proceeding could
16 conceivably have an effect on the estate being administered in the bankruptcy;” that is, if
17 the outcome “could alter the debtor’s rights, liabilities, options, or freedom of action
18 (either positively or negatively) and which in any way impacts upon the handling and
19 administration of the bankrupt estate.” *In re Feitz*, 852 F.2d 455, 457 (9th Cir. 1988)
20 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)).

21 Section 1452(b) allows the court to which an action has been removed under
22 subdivision (a) to “remand such claim or cause of action on any equitable ground.” In
23 determining whether equitable remand is appropriate, “[c]ourts may consider up to
24 fourteen factors.” *Nielsen v. Nielsen*, 419 B.R. 807, 820 (B.A.P. 9th Cir. 2009) (citing
25 *Citigroup, Inc. v. Pac. Inv. Mgmt.*, 296 B.R. 505, 508 n. 2 (Bankr. C.D. Cal. 2003)).

26 The factors are: (1) the effect or lack thereof on the efficient administration of
27 the estate if the Court recommends [remand or] abstention; (2) extent to which
28 state law issues predominate over bankruptcy issues; (3) difficult or unsettled
nature of applicable law; (4) presence of related proceeding commenced in

1 state court or other nonbankruptcy proceeding; (5) jurisdictional basis, if any,
2 other than § 1334; (6) degree of relatedness or remoteness of proceeding to
3 main bankruptcy case; (7) the substance rather than the form of an asserted
4 core proceeding; (8) the feasibility of severing state law claims from core
5 bankruptcy matters to allow judgments to be entered in state court with
6 enforcement left to the bankruptcy court; (9) the burden on the bankruptcy
7 court's docket; (10) the likelihood that the commencement of the proceeding
8 in bankruptcy court involves forum shopping by one of the parties; (11) the
9 existence of a right to a jury trial; (12) the presence in the proceeding of
10 nondebtor parties; (13) comity; and (14) the possibility of prejudice to other
11 parties in the action.

12 *Nielsen*, 419 B.R. at 821 n. 18.

13 **III. DISCUSSION**

14 **A. Original Jurisdiction**

15 Plaintiff does not contest that this Court has original jurisdiction over this action
16 because it is “related to” Plaintiff’s bankruptcy proceeding, pursuant to § 1334(b). Plaintiff
17 and Defendants agree that “any recovery or outcome here will have an effect on MabVax’s
18 bankruptcy estate as it will inure to the benefit of creditors.” (ECF No. 21-1 at 13 (quoting
19 Notice of Removal, ECF No. 1 at 5)). As a potential asset, the outcome of this action could
20 “conceivably have an[] effect” on Plaintiff’s bankruptcy estate; therefore, it is “related to”
21 Plaintiff’s bankruptcy proceeding. *See Stokes v. Duncan*, No. MT-13-1097-TaPaJu, 2013
22 Bankr. LEXIS 4654, at *22 (B.A.P. 9th Cir., Sep. 23, 2013) (citing *Feitz*, 852 F.2d at 457).

23 **B. Equitable Considerations**

24 Plaintiff contends that all fourteen equitable factors courts may consider pursuant to
25 § 1452(b) favor remand. (ECF No. 21-1 at 11). Plaintiff has brought only state law claims.
26 *Id.* at 11-14, 16. Plaintiff contends that remand would aid in the efficient administration of
27 justice and support the principles of comity, because Plaintiff’s action raises no federal or
28 bankruptcy issues. *Id.* at 12-13, 15. Plaintiff commenced this action in state court prior to
removal by the OPKO Defendants. *Id.* at 12-13. Plaintiff contends that there is no
jurisdictional basis for the federal court to hear this case, apart from § 1334. *Id.* at 13.
Plaintiff’s action is a “noncore” proceeding. *Id.* at 14. The bankruptcy court cannot preside

1 over a jury trial, and the state court deemed this action “complex.” *Id.* at 14-15. Plaintiff
2 contends that Defendants are forum shopping to get venue transferred to Delaware.
3 Plaintiff would be prejudiced if this action were moved to Delaware because Plaintiff
4 resides in California, and the conduct giving rise to the action occurred largely in
5 California. *Id.* at 15-16. All 31 Defendants are non-debtors. *Id.* at 15.

6 Defendants contend that most factors weigh in favor of this Court retaining this
7 action. Defendants contend that Plaintiff’s state law claims are straightforward, so there is
8 no need to refer them to state court. Both the district court and state court can provide a
9 jury trial. (ECF No. 48 at 7-8). Defendants contend that there are two related cases
10 involving Plaintiff in federal court, and the state proceeding was at an early stage when it
11 was removed. *Id.* at 9. Defendants contend that this action is Plaintiff’s primary remaining
12 asset. *Id.* at 10-11. Defendants contend that Plaintiff is forum shopping in California state
13 court, and Plaintiff will not be prejudiced if this action is heard in San Diego district court.
14 *Id.* at 11-12.

15 The Court finds that the equitable factors articulated in *Nielsen* weigh in favor of
16 remanding this action to state court. State law predominates in this action. Plaintiff has
17 brought claims under California state statutes and common law. Plaintiff has raised no
18 issues of federal law or bankruptcy law in the Complaint. This action is related to Plaintiff’s
19 bankruptcy action because any recovery in this action would be an asset to Plaintiff’s
20 bankruptcy estate. Remanding to state court would have little to no effect on the efficient
21 administration of Plaintiff’s bankruptcy estate. The first, second, sixth, and eighth factors,
22 therefore, favor remand.

23 The fifth factor weighs in favor of remand. This Court’s jurisdictional basis over this
24 action is § 1334. Defendants cite no basis for subject matter jurisdiction pursuant to § 1441
25 in their Notice of Removal or Response. The seventh and twelfth factors also favor remand.
26 Plaintiff is the only debtor in this case. All 31 Defendants are non-debtors. This action is
27 not a “core proceeding.” *See Maitland v. Mitchell*, 44 F.3d 1431, 1435 (9th Cir. 1995)
28

1 (“[C]laims that arise under or in Title 11 are deemed to be ‘core’ proceedings, while claims
2 that are related to Title 11 are ‘noncore’ proceedings.”).

3 At least seven of the *Nielsen* factors weigh in favor of remand. The court in
4 *McCarthy v. Prince* affirmed the bankruptcy court’s remand based on similar findings. 230
5 B.R. 414 (B.A.P. 9th Cir. 1999). In *McCarthy*, the court concluded that the decision to
6 remand was “easy.” *Id.* at 418. The court found:

7 All counts in the four-count complaint are grounded upon state law. Two of
8 them are purely statutory theories . . . that do not commonly arise in
9 bankruptcy. Federal subject-matter jurisdiction over the counts is merely
10 concurrent with state courts and is not exclusive. To the extent they are
11 asserted against a non-debtor party, . . . jurisdiction is more attenuated. State
12 courts are, by definition, fully competent to resolve disputes governed by state
law. Nor is the outcome of the action likely to impair the ability of the trustee
to distribute the estate.

13 *Id.* (citations omitted). The court found that “[any] of these, and a host of other reasons,
14 would justify an exercise of discretion to order remand under 28 U.S.C. § 1452(b).” *Id.* In
15 this case, at least half of the *Nielsen* factors weigh in favor of remand, any one of which
16 would be sufficient for this Court to exercise its discretion to remand. *See* 28 U.S.C. §
17 1452(b) (permitting remand on “any equitable ground”); *see also McCarthy*, 230 B.R. at
18 417-18 (to be affirmed on appeal, a district court’s decision to remand need only be
19 supported by “any plausible basis”).

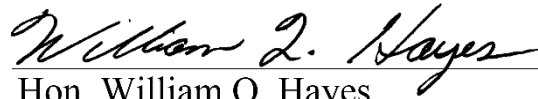
20 The only factor that weighs against remand is the fourth. There is no pending state
21 court proceeding, because the state court proceeding has been removed. *Schulman v. Cal.*,
22 237 F.3d 967, 981-82 (9th Cir. 2001). There are two related federal cases pending in this
23 Court, one of which has not been stayed pending the bankruptcy action. The fourth factor
24 weighs against remand because some of the issues and facts underlying this action also
25 predominate in the related federal action. However, the related federal action is against
26 different defendants and is based on different legal claims. The fourth factor, therefore,
27 does not outweigh the other factors suggesting remand. This is a state law case by a
28 company in California, that suffered harm in California, with witnesses and documents

1 located in California. The remaining six factors are neutral. Accordingly, this Court
2 exercises its “broad discretion” to remand this action. *See, e.g., In re Roman Catholic*
3 *Bishop*, 374 B.R. 756, 761 (Bankr. S.D. Cal. 2007).

4 **IV. CONCLUSION**

5 IT IS HEREBY ORDERED that Plaintiff’s Motion to Remand (ECF No. 21) is
6 GRANTED. This action is REMANDED to the Superior Court for the State of California,
7 County of San Diego, where it was originally filed under case number 37-2019-00018398-
8 CU-SL-CTL. Defendants’ Motions to Dismiss (ECF Nos. 8, 38, 68) are DENIED AS
9 MOOT.

10 Dated: October 4, 2019


11 Hon. William Q. Hayes
12 United States District Court