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JOHN DOE, Plaintiff,

v.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC., Defendant.

No. CV 13-06436 DDP (ASx).

United States District Court, C.D. California.

November 19, 2013.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND [docket numbers 12 and 13]

DEAN D. PREGERSON, District Judge.

Presently before the Court are Plaintiff's Motion to Remand and For Attorney's Fees and Defendant's Motion to Dismiss. For the reasons stated below, Plaintiff's Motion to Remand is GRANTED. Plaintiff's request for attorney's fees is DENIED. Defendant's Motion to Dismiss is vacated as moot.

I. Background

Plaintiff John Doe ("Plaintiff") is a financial advisor and broker-dealer associated with Merrill Lynch. (Complaint ¶ 4.) Defendant Financial Industry Regulatory Authority ("FINRA" or "Defendant"), formerly known as the National Association of Securities Dealers ("NASD"), is a self-regulatory organization for broker-dealers. (*Id.* ¶ 1.) Under the Securities Exchange Act, FINRA's duties include the duty to "establish and maintain a system for collecting and retaining registration information" about registered broker-dealers such as Plaintiff. 15 U.S.C. § 78o-3(i)(1)(A). "Registration information" includes information about "disciplinary actions, regulatory, judicial, and arbitration proceedings." *Id.* § 78o-3(i)(5). FINRA fulfills this duty by maintaining a database called the Central Registration Depository ("CRD"), publicly available through FINRA BrokerCheck, which contains disclosures relating to disciplinary actions or other proceedings brought against financial advisors. (Complaint ¶¶ 2-3.)

Plaintiff alleges that he has seven disclosure items listed on BrokerCheck as "customer disputes." (*Id.* ¶¶ 6-7.) One disclosure item is listed as "Customer Dispute - Settled" and the other six as "Customer Dispute - Closed - No Action/Withdrawn/Dismissed/Denied." (*Id.*) Plaintiff alleges that in five of the seven cases, the customers did not pursue their complaints after Merrill Lynch responded to them. (*Id.* ¶ 30.) In one of the other cases, the customer filed an arbitration against Merrill Lynch, but no payment was made. (*Id.* ¶ 31.) The last item related to an alleged administrative error. (*Id.* ¶ 32.) Plaintiff alleges that these disclosures have caused him harm and serve no public policy purpose, and requests that the Court use its equitable powers to grant declaratory relief and expungement of these disclosure items. (*Id.* ¶¶ 7-9.)

Plaintiff filed his complaint in the Los Angeles County Superior Court on July 31, 2013. (Notice of Removal ¶ 1.) Defendant was served with a copy of the complaint on August 2, 2013. (*Id.*) Defendant timely removed the action on September 3, 2013 on the grounds of federal question jurisdiction. (*Id.*)

II. Legal Standard

A defendant may remove a case from state court to federal court if the case could have originally been filed in federal court. 28 U.S.C. § 1441(a); see also *Snow v. Ford Motor Co.*, 561 F.2d 787, 789 (9th Cir. 1977). As the removing party, Defendant bears the burden of proving federal jurisdiction. *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); see also *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). The removal statute is strictly construed against removal jurisdiction, and federal jurisdiction must be rejected if any doubt exists as to the propriety of removal. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (explaining that courts resolve doubts as to removability in favor of remand).

Federal question jurisdiction exists where a civil action arises "under the Constitution, laws, or treaties of the

United States." 28 U.S.C. § 1331. "For a case to arise under federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law. Federal jurisdiction cannot hinge upon defenses or counterclaims, whether actual or anticipated." *K2 Am. Corp. v. Roland Oil & Gas, LLC* , 653 F.3d 1024, 1029 (9th Cir. 2011).

Generally, even if federal question jurisdiction exists, state courts have concurrent jurisdiction over cases arising under federal law. *Gulf Offshore Co. v. Mobil Oil Corp.* , 453 U.S. 473, 477-78 (1981). However, "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 478.

III. Discussion

Plaintiff argues that the action should be remanded to state court because this Court does not have jurisdiction over the action.

Under FINRA Rule 2080(a), "[m]embers or associated persons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement." Under Rule 2080(b), a party seeking expungement must "name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived." Rule 2080 does not provide any substantive standard for determining whether expungement is appropriate or required. California has a state law cause of action for expungement. See *Lickiss v. FINRA* , 208 Cal.App.4th 1125, 1135 (2012).

Two federal district courts have squarely addressed the issue of whether federal question jurisdiction exists where a broker-dealer is seeking expungement of disclosures on CRD under a state law cause of action; both courts concluded that no such jurisdiction exists. In re *Lickiss*, 2011 WL 2471022 (N.D. Cal. 2011); *Spalding v. FINRA*, 2013 WL 1129396 (N.D.Ga. 2013).

A. Exclusive Jurisdiction

Section 78aa of the Securities Exchange Act provides that "[t]he district courts of the United States... shall have exclusive jurisdiction... of all suits in equity and actions at law brought to enforce any liability or duty created by this title [15 U.S.C. §§ 78a et seq.] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a). This includes violations of duties established by FINRA's rules. *Sparta Surgical Corp. v. NASD, Inc.* , 159 F.3d 1209, 1212 (9th Cir. 1998); see also *Dobbins v. NASD*, 2007 WL 2407081, at *1-2 (N.D. Ohio 2007). However, it is clear that there is not exclusive federal question jurisdiction under the Securities Exchange Act for *all* claims relating to securities. See *Matsushita Elec. Indus. Co., Ltd. v. Epstein* , 516 U.S. 367, 383 (1996); *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013). In order for there to be exclusive federal jurisdiction over Plaintiff's claims, Plaintiff's lawsuit must seek to enforce a "liability" or "duty" created by the Securities Exchange Act.

Plaintiff's complaint seeks expungement, as well as related declaratory relief. There is no "duty to expunge" under FINRA rules. See *Lickiss*, 2011 WL 2471022, at *3. FINRA has a duty to "collect[] and retain[]" information pursuant to the Securities Exchange Act. 15 U.S.C. § 78o-3(i)(1)(A). Plaintiff, however, does not seek enforcement of this duty; he is not bringing this action to compel FINRA to "collect" or "retain" information. See *Lickiss*, 2011 WL 2471022, at *3. In both *Lickiss* and this case, FINRA has failed to point to any other specific "duty" under the Act that Plaintiff's cause of action for expungement seeks to enforce.^[1] Therefore, there is no exclusive federal question jurisdiction over Plaintiff's cause of action for expungement.

B. Substantial Issues of Federal Law

Plaintiff brings a state law claim for expungement and a related declaratory relief claim.^[2] Therefore, in order for this Court to have jurisdiction over the action, there must be substantial federal issues involved in the state law claim. "Federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, ___ U.S. ___, 133 S.Ct. 1059, 1065 (2013).

Defendant argues that Plaintiff's claims for expungement and declaratory relief "are based on FINRA's failure to

follow its rules and fulfill its regulatory responsibilities." (Opp. to Motion to Remand, p. 18.) Defendant bases this argument primarily on Plaintiff's claim for declaratory relief, which "seeks a declaration that the conduct alleged is not a sales practice violation' and was reported as such in error of law." (Complaint ¶ 104.) Defendant argues that this raises a substantial issue of federal law because Plaintiff "bases his Complaint on claims that FINRA has failed to fulfill its duties... and on facial challenges to the validity and propriety of FINRA's SEC-approved rules." (Opp., p. 21.)

Contrary to Defendant's characterization of Plaintiff's claims, however, Plaintiff does not claim that FINRA failed to fulfill any particular duty or that FINRA's rules are facially invalid. Plaintiff does allege that FINRA refused to remove a disclosure item from his CRD record and that FINRA is required to do so pursuant to their own rules, but he does not seek a declaration or other direct relief for FINRA's failure to remove the disclosures. (Complaint ¶ 34.) For example, Plaintiff does not seek a declaration that FINRA violated their duty to remove the disclosures. As a result, no determination need be made by the Court as to whether FINRA was required to remove the disclosures under the circumstances in determining whether expungement is appropriate in this case. See *Spalding*, 2013 WL 1129396, at *5. Plaintiff's cause of action for expungement therefore does not raise a substantial issue of federal law, as a determination of whether expungement is appropriate in this particular case is a fact-specific analysis. See *Gunn*, 133 S.Ct. at 1066 ("[I]t is not enough that the federal issue be significant to the particular parties in the immediate suit... The substantiality inquiry... looks instead to the importance of the issue to the federal system as a whole.").

IV. Conclusion

For the foregoing reasons, Plaintiff's Motion to Remand is GRANTED. Therefore, the Court has no jurisdiction over this action and does not reach Defendant's Motion to Dismiss. Said motion is VACATED. (Dkt. 12.) The matter is remanded to the Los Angeles Superior Court, Central District, Case No. BC516756.

IT IS SO ORDERED.

Notes:

^[1] FINRA argues that the Court should understand the "duty" requirement for exclusive jurisdiction more broadly, encompassing FINRA's general duty to maintain CRD and retain or expunge the disclosures listed there. (Opp. to Mtn. to Remand, pp. 14-16.) However, Plaintiff's complaint does not seek to challenge FINRA's maintenance of the database. Therefore, the Court finds that Plaintiff's complaint does not seek to enforce any "duty" of FINRA.

^[2] To the extent that Defendant argues that there is a federal cause of action for expungement, Plaintiff's complaint will still not be construed as asserting a federal cause of action. "When a claim can be supported by alternative and independent theories - one of which is a state law theory and one of which is a federal law theory - federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir. 1996).
