

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE: COUNTRYWIDE FINANCIAL
CORP. MORTGAGE MARKETING AND
SALES PRACTICES LITIGATION

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,

Plaintiff,

v.

COUNTRYWIDE FINANCIAL
CORPORATION, a Delaware corporation, et
al.

Defendants.

CASE NO. 08md1988 DMS (LSP)
CASE NO. 09cv0289 DMS (LSP)

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

[Docket No. 51]

This matter comes before the Court on Plaintiff's motion for remand. Defendant Mozilo has filed an opposition to the motion, and Plaintiff has filed a reply. For the reasons set out below, the Court grants the motion.

I.

BACKGROUND

This case was originally filed in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida on June 30, 2008. Plaintiff is the Office of the Attorney General,

1 Department of Legal Affairs, State of Florida. Defendants are Countrywide Financial Corporation
2 (“CFC”), Countrywide Home Loans, Inc., and Angelo Mozilo. The Complaint alleges one claim for
3 violation of Florida’s Deceptive and Unfair Trade Practices Act (“DUTPA”), Chapter 501, Part II,
4 Florida Statutes. Plaintiff seeks damages, civil penalties, attorneys fees, and equitable relief.

5 On September 23, 2008, Defendants removed the case to the United States District Court for
6 the Southern District of Florida, citing 28 U.S.C. §§ 1331, 1332, 1334, 1367, 1441, 1446, 1452 and
7 1453 as the bases for removal. Plaintiff dismissed the corporate Defendants from this case on
8 November 12, 2008.

9 On February 11, 2009, the case was transferred to this Court pursuant to an order from the
10 Judicial Panel for Multidistrict Litigation. On February 26, 2009, Plaintiff filed the present motion
11 to remand.

12 II.

13 DISCUSSION

14 Although the corporate Defendants cited several bases for removal jurisdiction, Defendant
15 Mozilo is content to rely on 28 U.S.C. § 1331, the federal question statute. He asserts the Complaint
16 rests entirely on an question of federal law, and alternatively, the Complaint raises a substantial federal
17 question.

18 A. 28 U.S.C. § 1331

19 Title 28 U.S.C. § 1331 provides: “The district courts shall have original jurisdiction of all civil
20 actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.
21 Although the Complaint does not include a claim for violation of any specific federal law, Defendant
22 Mozilo asserts that his liability under state law depends on “whether [his] alleged conduct constitutes
23 a violation of the Sarbanes-Oxley’s certification requirements of the Exchange Act and federal
24 criminal law.” (Mem. in Opp’n to Mot. to Remand at 6.) Defendant Mozilo argues that federal courts
25 have exclusive jurisdiction to decide these questions, *see* 15 U.S.C. § 78aa, therefore this Court should
26 exercise jurisdiction over this case.

27 Plaintiff does not dispute that its Complaint “alleges unfair or deceptive acts or practices by
28 public misrepresentations in Forms 10-K that Countrywide exercised due diligence in underwriting

1 and closing Subprime mortgage loans.” (Reply at 5.) However, it does dispute that federal courts
2 have exclusive jurisdiction over these questions, citing 15 U.S.C. § 78r(a).

3 Section 78r(a) provides for personal liability for misleading statements in documents filed
4 pursuant to the Securities Exchange Act of 1934 (“the Act” or “the Exchange Act”). 15 U.S.C. §
5 78r(a). It also states: “A person seeking to enforce such liability may sue at law or in equity in any
6 court of competent jurisdiction.” 15 U.S.C. § 78r(a). Plaintiff relies on this portion of the statute to
7 support its argument that federal courts do not have exclusive jurisdiction over these kinds of
8 allegations. However, Plaintiff misreads the statute. The statute does not provide for jurisdiction in
9 “any court.” Rather, it provides that parties seeking to enforce the rules and regulations of the Act
10 may bring suit in “any court of competent jurisdiction.” 15 U.S.C. § 78r(a). Section 78aa defines
11 those courts to include only “[t]he district courts of the United States and the United States courts of
12 any Territory or other place subject to the jurisdiction of the United States[.]” 15 U.S.C. § 78aa.
13 Thus, contrary to Plaintiff’s argument, and consistent with Defendant’s position, federal courts do
14 have exclusive jurisdiction over whether Defendant Mozilo committed a violation of the Exchange
15 Act. *Sparta Surgical Corp. v. National Ass’n of Securities Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir.
16 1998).

17 Nevertheless, Plaintiff argues that it is not seeking to enforce the rules or regulations of the
18 Exchange Act through this case. “Rather, the Office of the Attorney General of the State of Florida
19 seeks to hold Defendant Angelo R. Mozilo liable for the misleading and deceptive practices associated
20 with [the] sale and marketing of mortgages and mortgage backed securities.” (Mot. at 10.) Plaintiff
21 states its claim is similar to the claim in *Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d
22 1033 (9th Cir. 2003). In that case, the plaintiff brought a claim under California’s Unfair Competition
23 Law “to challenge the marketing by national brokerage firms (‘Defendants’) of an instrument known
24 as a ‘callable certificate of deposit’ or ‘callable CD.’” *Id.* at 1036. The plaintiff filed his complaint
25 in state court, and the defendants removed the case to federal court on the ground that the federal court
26 “had original jurisdiction under 28 U.S.C. § 1331 and exclusive jurisdiction under § 27 of the 1934

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Securities Exchange Act.” *Id.*¹ The district court denied the plaintiff’s motion to remand, and the Ninth Circuit reversed. First, the court considered under the “well-pleaded complaint” rule “whether the face of Lippitt’s complaint contains any allegations that would render his cause of action one that ‘arises’ under federal law.” *Id.* at 1040. Based on the face of the complaint and plaintiff’s explanation of his claim, the court concluded that his claim did not arise under federal law. *Id.* Next, the court applied the artful pleading doctrine, which provides that although the plaintiff is master of his own pleadings, he “‘may not defeat removal by omitting to plead necessary factual questions in a complaint.’” *Id.* at 1041 (quoting *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983)). The court considered whether the case fell within the two types of cases in which the artful pleading doctrine has been applied, complete preemption cases and substantial federal question cases, and concluded it did not.

In this case, as in *Lippitt*, the parties offer different interpretations of the Complaint. Defendant asserts “[t]he gravamen of the Attorney General’s complaint is that the defendants made false representations about Countrywide’s lending practices in federally filed 10-Ks, which misled borrowers and investors as to the quality of the underwriting of Countrywide’s loans[.]” (Mem. in Opp’n to Mot. to Remand at 3.) However, Plaintiff states it “does not seek to enforce the 1934 Securities and Exchange Act. Rather, the Office of the Attorney General of the State of Florida seeks to hold Defendant Angelo R. Mozilo liable for the misleading and deceptive practices associated with [the] sale and marketing of mortgages and mortgage backed securities.” (Mot. at 10.)

Despite these conflicting interpretations of the Complaint, the parties do not dispute that the Complaint makes reference to Defendants’ “representations about its lending practices in its Form 10-K filings for the years 2002 - 2007[.]” (Compl. at 5.) Yet as the court stated in *Lippitt*, “It is a ‘long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction[.]’” 340 F.3d at 1040 (quoting *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). Thus, although the Complaint includes allegations about Defendant’s Form 10-K filings, those allegations do not convert Plaintiff’s state law claim into a claim arising under federal law.

¹ Section 27 of the Exchange Act is now codified at 15 U.S.C. § 78aa.

1 Defendant argues against this conclusion, asserting that this case is more akin to *Sparta* than
2 *Lippitt*. In *Sparta*, the plaintiff corporation filed suit in state court against the National Association
3 of Securities Dealers alleging claims for breach of contract, bad faith, negligence, misrepresentation
4 and interference with economic relations. 159 F.3d at 1211. The basis for these claims was the
5 defendant's decision to de-list the plaintiff's stock from the Nasdaq Stock Market in the midst of a
6 public offering and its suspension of trading on the offering without explanation. *Id.* Although the
7 plaintiff alleged only state law claims, the court concluded the claims "are founded on the defendants'
8 conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively
9 determined by federal law." *Id.* at 1212.

10 In this case, however, Plaintiff's claims are not founded on statements in Defendants' Form
11 10-K filings. Rather, Plaintiff's claims are founded on a state statute. Unlike the situation in *Sparta*,
12 "a state court need not inquire into NYSE regulations, or even refer to federal law, in this case before
13 us." *Lippitt*, 340 F.3d at 1045. To prevail on its claim, Plaintiff need only show that Defendants
14 engaged in "[u]nfair methods of competition, unconscionable acts or practices," or "unfair or
15 deceptive acts or practices in the conduct of any trade or commerce[.]" F.S.A. § 501.204(1).

16 Other factors also distinguish this case from *Sparta*. First, the defendants in *Sparta* were "the
17 primary regulatory body for the broker-dealer industry" and the corporation "which processes
18 quotations for most over-the-counter equity trading." 159 F.3d at 121-11. Defendants in this case are
19 a thrift holding company, its subsidiary and one of its individual owners. Second, the plaintiff in
20 *Sparta* was a corporation, while Plaintiff here is the Attorney General of the State of Florida. These
21 factors render this case more like *Lippitt* than *Sparta*, and lead this Court to the conclusion reached
22 in *Lippitt*, namely that federal jurisdiction does not exist over Plaintiff's claim.

23 **B. Substantial Federal Question**

24 Nevertheless, Defendant Mozilo argues this case should remain in federal court because
25 Plaintiff's claim "depends on the resolution of substantial, disputed federal questions." (Mem. in
26 Opp'n to Mot. to Remand at 8.) In support of this argument, Defendants relies on *Grable & Sons*
27 *Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005).

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1 In *Grable*, the Internal Revenue Service (“IRS”) seized real property belonging to the plaintiff
2 to satisfy a tax delinquency, and then sold that property to the defendant. *Id.* at 310. The plaintiff
3 thereafter brought a quiet title action against the defendant in state court asserting that, although it had
4 received actual notice of the IRS seizure, the IRS did not comply with the strict requirements of the
5 notice statute. *Id.* at 311. The defendant removed the case to federal court, and the district court
6 declined to remand the case because it found the plaintiff’s claim “depended on the interpretation of
7 the notice statute in the federal tax law.” *Id.* The Court of Appeal affirmed that decision, as did the
8 Supreme Court.

9 In doing so, the Court explained the rationale behind the “substantial” or “significant” federal
10 question jurisdiction doctrine:

11 The doctrine captures the commonsense notion that a federal court ought to be able to
12 hear claims recognized under state law that nonetheless turn on substantial questions
13 of federal law, and thus justify resort to the experience, solicitude, and hope of
uniformity that a federal forum offers on federal issues[.]

14 *Id.* at 312. However, the Court also stated these interests were “subject to a possible veto[.]” namely,
15 an analysis of whether the exercise of jurisdiction “is consistent with congressional judgment about
16 the sound division of labor between state and federal courts governing the application of [28 U.S.C.]
17 § 1331.” *Id.* at 313-14. In other words, “the question is, does a state-law claim necessarily raise a
18 stated federal issue, actually disputed and substantial, which a federal forum may entertain without
19 disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Id.* at
20 314.

21 As the party invoking this Court’s subject matter jurisdiction, Defendant bears the burden of
22 showing that Plaintiff’s claim necessarily raises a disputed and substantial federal issue. Defendant
23 argues that burden is met here because the only allegations of his direct involvement in the violation
24 of the DUTPA involve his certification of the 10-K filings. (Mem. in Opp’n to Mot. to Remand at 9-
25 10.) However, the Court disagrees. The Complaint alleges generally that “Defendant MOZILO at
26 all times material hereto, has managed, controlled, participated and has knowledge of the day-to-day
27 activities of Defendant COUNTRYWIDE FINANCIAL CORPORATION[.]” (Compl. at ¶ 10.)
28 Contrary to Defendant’s suggestion, this is more than a simple allegation of knowledge: Plaintiff also

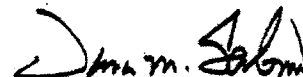
1 alleges Defendant Mozilo “managed, controlled” and “participated” in the “day-to-day activities” of
2 CFC. Although these allegations are conclusory, they are sufficient to allow Plaintiff to proceed with
3 its claim against Defendant Mozilo. *See KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1074 (2008)
4 (stating “it has long been the law in Florida that in order to proceed against an individual using a
5 FDUTPA violation theory an aggrieved party must allege that the individual was a direct participant
6 in the improper dealings.”) Accordingly, the Court rejects Defendant’s argument that Plaintiff’s claim
7 necessarily raises a disputed and substantial federal issue. In the absence thereof, there is no reason
8 to “resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal
9 issues[.]” *Grable*, 545 U.S. at 312.²

10 **III.**

11 **CONCLUSION**

12 In light of the above, the Court finds that neither 28 U.S.C. § 1331 nor 15 U.S.C. § 78aa
13 provides a basis for this Court to exercise subject matter jurisdiction in this case. Accordingly, the
14 Court grants Plaintiff’s motion for remand. Plaintiff’s request for fees and costs pursuant to 28 U.S.C.
15 § 1447(c) is denied. Pursuant to 28 U.S.C. § 1446(c), the Clerk of Court shall provide a certified copy
16 of this order to the clerk of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward
17 County, Florida, and thereafter close this case.

18 DATED: April 28, 2009

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20 HON. DANA M. SABRAW
21 United States District Judge
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26 _____
27 ² There is also no reason to address whether the federal court’s exercise of jurisdiction over
28 this case would disturb any congressionally approved balance of federal and state judicial
responsibilities. Accordingly, the Court does not address that issue. The Court also declines to
address the parties’ arguments concerning how the absence of a private right of action under the
Sarbanes-Oxley Act effects this Court’s exercise of jurisdiction.