BROWNE GEORGE ROSS LLP
Eric M. George (State Bar No. 166403)
egeorge@bgrfirm.com
Ira Bibbero (State Bar No. 217518)
ibibbero@bgrfirm.com
Katherine E. Hertel (State Bar No. 208939)
khertel@bgrfirm.com
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

Attorneys for Plaintiff Sharp Corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

SHARP CORPORATION,

Plaintiff,

vs.

HISENSE CO., LTD.; HISENSE USA CORPORATION; HISENSE ELECTRIC CO., LTD; HISENSE USA MULTIMEDIA R&D CENTER, INC.; and HISENSE INTERNATIONAL (HONG KONG) AMERICA INVESTMENT CO., LTD.,

Defendants.

Case No. 17-CV-3341-YGR
The Hon. Yvonne Gonzalez Rogers

NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES

Date: August 15, 2017
Time: 2:00 p.m.
Ctrm: 1

Trial Date: None Set

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 15 2017, at 2:00 p.m., or as soon thereafter as this matter may be heard, in Courtroom 1 of the United States District Court for the Norther District of California, located at 1301 Clay Street, 4th Floor, Oakland, CA 94612, the Honorable Yvonne Gonzalez Rogers presiding, plaintiff Sharp Corporation ("Sharp") will, and hereby does, move this Court for an order remanding this case to California state court.

Sharp brings this motion pursuant to the provisions of title 28 U.S.C. section 1447(c) on the ground that (1) Sharp having dismissed the removing party, defendant Hisense Co., Ltd. ("Hisense Co."), this Court should decline to exercise jurisdiction over the remaining claims and defendants; and (2) no "federal question" jurisdiction lies as an alternative basis for removal.

Sharp respectfully requests that the Court hear this motion before deciding the pending motions by the defendants to compel arbitration and stay (or, in the alternative, to dismiss) and for sanctions (Dkt. 19, 20). Not only would such priority establish the predicate jurisdictional question, but as a practical matter, remand would obviate the need for the Court to decide the other motions.

This Motion is based upon this notice, the accompanying memorandum of point and authorities, the papers, records and files herein, and upon such oral and documentary evidence that may be presented at or before the hearing on this matter.

Dated: June 30, 2017

BROWNE GEORGE ROSS LLP
Eric M. George
Ira Bibbero
Katherine E. Hertel

By: /s/ Ira Bibbero
Ira Bibbero
Attorneys for Plaintiff Sharp Corporation

STATEMENT OF ISSUES TO BE DECIDED

1. Should this Court exercise supplemental jurisdiction over the claims and remaining parties now that defendant Hisense Co., Ltd., the party that removed this action under the Foreign Sovereign Immunities Act of 1976, is no longer a party to this action?

2. Does the Court have "federal question" jurisdiction to hear Sharp Corporation's claims under 28 U.S.C. section 1331?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant Hisense Co., Ltd. ("Hisense Co.") removed this matter, originally filed in the San Francisco Superior Court, by invoking the Foreign Sovereign Immunities Act ("FSIA"). To justify its removal, Hisense Co. claims to be a "an agency or instrumentality of a foreign state" (China, through the Qingdao Municipal government) for purposes of title 28 U.S.C. section 1603 ("Section 1603"). (Dkt. 1 at 3:1-2.)[1]

Although plaintiff Sharp Corporation ("Sharp") questions whether Hisense Co. could have met its burden of demonstrating entitlement to removal,[2] to streamline this action, to preserve Sharp's right to have its claims tried by a jury, and to avoid embroiling the Chinese government in what should be a dispute between commercial entities, Sharp dismissed Hisense Co. (Dkt. 34.)

This Court would not have had jurisdiction absent the naming of Hisense Co. as an initial defendant, and now – at this incipient stage of the case – this Court should decline to exercise its discretion to retain such jurisdiction; to do otherwise would not serve the interests of "judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

Finally, the Court does not have "federal question" jurisdiction over Sharp's unfair competition claim, which is not premised on subject matter committed exclusively to federal jurisdiction. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 841-42 (9th Cir. 2004).

II. STATEMENT OF FACTS.

A. The Complaint.

On May 9, 2016, Sharp sued various defendants in the San Francisco Superior Court. (Dkt. 1 at 2:7-10.) On June 9, 2017, Sharp filed its First Amended Complaint ("FAC"). (Dkt. 9 at 4.) The FAC is based entirely on California common and statutory law causes of action: for

---

[1] References to page numbers of documents in the Court's ECF docket are to the page numbers at the top of each page.

[2] Hisense Co. has proffered no admissible evidence that it is majority owned by a foreign state or political subdivision thereof, for example. 28 U.S.C. § 1603(b)(2).

common law fraud, rescission, and violation of California Business & Professions Code sections 17200 et seq. (Dkt. 9 at 18:17-21:5.)

In a nutshell, Sharp alleges that defendants licensed from Sharp the prestigious and well-known SHARP trademark and brand name, built up over a century, ostensibly to access Sharp's retailer and customer bases and profit from sales of SHARP-branded televisions manufactured by defendants. In fact, defendants' motivations were nefarious. Contrary to their stated promise to promote the SHARP brand and trademark, defendants intended to devalue the SHARP brand name and image to boost sales of their competing but inferior quality televisions, which bear defendants' own proprietary HISENSE brand name. Sharp therefore has filed suit to regain and rebuild its prestigious trademark and brand name, and to redress the injuries defendants caused by attempting to suppress competition and deceive the consuming public.

B. The Removal.

The same day Sharp filed its First Amended Complaint, Hisense Co. filed a Notice of Removal of Action under 28 U.S.C. §1441(d) (Foreign Sovereign Immunities Act of 1976). (Dkt. 1.) In its Notice of Removal, Hisense Co. asserts that it is "a separate limited liability company, wholly-owned by a political subdivision of the Chinese government, created pursuant to Chinese law, and is neither a citizen of the United States nor any third country." (*Id.* at 3:2-4.) Hisense Co. then concludes that it is a foreign state under the FSIA. (*Id.* at 3:4-5.) It submitted no evidence to support these assertions. Hisense Co. (presumably joined by the other defendants) asserted federal question jurisdiction as an alternate basis for removal.

In the interest of judicial efficiency, to preserve Sharp's right to a jury trial, to avoid protracted litigation over a side issue of whether Hisense Co. is truly an agency or instrumentality of China, and to avoid embroiling China in litigation between commercial entities, Sharp dismissed Hisense Co. (Dkt. 34.)

III. THE COURT SHOULD REMAND BECAUSE HISENSE CO. HAS BEEN DISMISSED.

Although the Court arguably may retain supplemental jurisdiction over this action, Sharp respectfully submits that it should decline to do so.

So long as there is "minimal diversity" – where a case is "between a state, or the citizens thereof, and foreign states, citizens or subjects," U.S. Const. art. III, § 2 – the Court retains "pendent party jurisdiction" over non-foreign state defendants who remain in an action following the dismissal of a foreign state. *Teck Metals, Ltd. v. Certain Underwriters at Lloyd's London*, No. CV-05-411-LRS, 2010 WL 1286364, at *2 (E.D. Wash. Mar. 29, 2010), citing *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1407-08 (9th Cir. 1989). Sharp is a citizen of Japan and certain defendants are alleged to be citizens of the State of Georgia, therefore such jurisdiction would, arguably, remain even after Hisense Co. was dismissed.[3]

But now that Hisense Co. has been dismissed, the Court has discretion to decline to exercise its jurisdiction over the California-law claims pleaded in this action. 28 U.S.C. § 1367(c). "Depending on a host of factors, then – including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims – district courts may decline to exercise jurisdiction over supplemental state law claims." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997).

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon*, 484 U.S. at 350, n.7. Where, as here, no federal-law claims were ever pleaded, and the only basis for the Court's exercise of jurisdiction was the

---

[3] To be entitled to remain in this Court under its supplemental jurisdiction, Hisense Co. is still obligated to prove that it is an agency or instrumentality of China because "removal statutes are strictly construed against removal." *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (emphasis added); *see also Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (there is a "strong presumption against removal jurisdiction") (emphasis added). This "'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphasis added). Hisense Co. must establish, by a preponderance of the evidence, facts supporting the existence of federal subject matter jurisdiction. *McCormick v. Aderholt*, 293 F.3d 1254-1257 (11th Cir. 2002); *Steel Valley Authority v. Union Switch & Signal Division*, 809 F.2d 1006, 1010 (3d Cir. 1987).

presence of a foreign state actor, if that actor is dismissed, the balance of factors points even more strongly towards declining the exercise of jurisdiction.

For example, in *Perez v. Wells Fargo Bank, N.A.*, 929 F.Supp.2d 988 (N.D. Cal. 2013), this Court remanded an action that was removed on federal question grounds after the federal claim was dismissed and diversity was lacking. The Court decided to remand after examining the facts of the case in light of the considerations of judicial economy, convenience, fairness, and comity. The case had been pending for over one and one half years, but in that time, there had been "some discovery," the pleadings were still being challenged, the trial date was not imminent, the pending claims were all under California law, and the Court had "not performed a substantial amount of legal analysis that would need to be repeated by the state court." *Id.* at 1006. For these reasons, economy and comity weighed in favor of remand. The state and federal courts were not far apart geographically, so remand would not cause inconvenience. Fairness was close to a wash because the state and federal courts were equally fair, although there might be some delay in state court. Balancing all the factors, remand was warranted. *Id.*

Here, the factors favor remand even more strongly. This case was only recently filed, no discovery has occurred, the pleadings are still being challenged, the trial date has not been set, the Court has performed little or no legal analysis that would need to be repeated by the state court, the state and federal courts are in close proximity, and both are fair. Judicial economy, convenience, fairness, and comity all favor remand.

Thus, because Hisense Co. is no longer a party to this action, this Court should remand the action to state court rather than retain jurisdiction under 28 U.S.C. section 1367.

IV. DEFENDANTS' FEDERAL QUESTION GROUND FOR REMOVAL LACKS MERIT.

As an afterthought, defendants take the counterintuitive position that this court also has federal subject matter jurisdiction over the case based on Sharp's inclusion in its Complaint of a claim under a California statute – the Unfair Competition Law, found in California Business & Professions Code section 17200 *et seq.* (the "UCL"). (Dkt. 1 at 2:6-13.) According to defendants, the fact that Sharp's UCL claim references, *inter alia*, regulations adopted pursuant to the Federal

Trade Commission Act (the "FTC Act") and the Federal Communications Act (the "FCA") confers federal jurisdiction. This argument, however, has been rejected by virtually all courts that have considered it, including this one.[4]

The Ninth Circuit thus has made clear that the "mere use of a federal statute as a predicate for a state law cause of action does not necessarily transform that cause of action into a federal claim." *E.g.*, *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 675 (9th Cir. 2012), citing *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"). As a result, courts within the Ninth Circuit have regularly held that "mere references to federal law in UCL claims do not convert the claim into a federal cause of action." *Guerra v. Carrington Mortgage Servs. LLC*, No. CV 10-4299 GAF (Ex), 2010 WL 2630278, at *2 (C.D. Cal. June 29, 2010).

For example, the Central District in *Guerra* remanded a case to state court even though plaintiff included a UCL claim that was predicated on alleged violations of RICO, the federal Fair Debt Collection Practices Act ("FDCPA"), and 42 U.S.C. §§ 1981 and 1982. *Guerra*, 2010 WL 2630278, at *1-2. Plaintiffs, however, ha[d] not asserted a claim pursuant to RICO, the FDCPA, or 42 U.S.C. § § 1981, 1982." *Id.* at *2. Instead, as Sharp did here, they "allege[d] violations of the UCL, and merely cite[d] federal law violations to support their state claim." *Id.* As a result, the UCL claim was "not properly characterized as a federal cause of action" and there was no federal question jurisdiction. *Id.*

On facts very similar to those here, Judge Illston of this District held in *Montoya v. Mortgageit Inc.*, No. C 09-05889 SI, 2010 WL 546891 (N.D. Cal. Feb. 10, 2010), that the inclusion of allegations in a state law UCL claim that defendants had violated the federal Real Estate Settlement Procedures Act ("RESPA"), the federal Equal Credit Opportunity Act

---

[4] Sharp's other two claims – fraud and rescission – are state law claims. *See Avedisian v. Mercedes-Benz USA, LLC*, 43 F.Supp.3d 1071, 1080 (C.D. Cal. 2014) (listing elements of California tort of fraudulent concealment); *Wood v. Apodaca*, 375 F.Supp.2d 942, 948 (N.D. Cal. 2005) (citing California law for proposition that "[i]n order to rescind a contract, a plaintiff must plead that she gave consent relying on fraudulent or mistaken representations of another party, or that consideration for her obligation failed, either through the fault of another party or from any other cause").

("EOCA"), and the federal Truth in Lending Act ("TILA") did not convert the claim into a federal cause of action because "UCL claims typically borrow violations from other laws and treat them as independently actionable." *Id.* at *2-3, citing *O'Grady v. Wachovia Bank*, No. CV 08-5065 SVW (SSX), 2008 WL 438482, *2 (C.D. Cal. Sept. 10, 2008). She too remanded the matter to state court. *Id.* Significant to her decision was the fact that the *Montoya* plaintiff predicated his UCL claim, just as Sharp does here, both on these federal statutes and on unfair practices independently actionable under state law. As Judge Illston explained:

> Here, the complaint alleges both unfair practices and federal violations as the basis for the UCL claim. The reference to the alleged RESPA, EOCA, and TILA violations are not a necessary element of the § 17200 claim because plaintiff could prevail on that claim by showing any "unlawful, unfair, or fraudulent practice" independent of the federal law allegations. "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."

Montoya, 2010 WL 546891, at *3, citations and footnote omitted, emphasis added.[5]

The same is true here. As in *Montoya*, while Sharp references the FTC Act in its pleading, it also expressly predicates its UCL claim on unfair practices directed by defendants at Sharp (FAC (starting at Dkt. 9 at 4), ¶¶ 45-49), on violations of "California consumer protection laws" (FAC, ¶ 52), and on "false advertising in violation of California Business and Professions Code section 17500" (FAC, ¶ 102). As in *Montoya*, Sharp's "reference to the alleged [federal] violations are not a necessary element of the UCL claim because plaintiff could prevail on that

[5] This is but a specific application of the general rule that, if a plaintiff can support his claim with "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." *Rains v. Criterion Systems Inc.*, 80 F.3d 339, 346 (9th Cir. 1996) (in wrongful termination action, direct and indirect references to Title VII were not sufficient to establish federal jurisdiction).

claim by showing any 'unlawful, unfair, or fraudulent practice' independent of the federal law allegations." *Montoya*, 2010 WL 546891, at *3. As a result, remand is required, as in *Montoya*.[6]

Indeed, virtually every court that has considered the argument made here by defendants has rejected it. *See, e.g., Ortiz v. Indymac Bank, F.S.B.*, No. CV 09-8669 PSG (AJWx), 2010 WL 2035791, at *1 n.3 (C.D. Cal. May 20, 2010) (allegation in UCL claim that defendant violated TILA implementing regulations "will not support federal question jurisdiction here, as Plaintiff's § 17200 claim is based on numerous other independent, state-law theories;" case remanded); *O'Grady v. Wachovia Bank, N.A.*, No. CV 08-5065 SVW (SSX), 2008 WL 4384282, *2 (C.D. Cal. Sept. 10, 2008 (remanding where UCL claim predicated on both state law violations and the federal Real Estate Settlement Procedures Act); *Asante v. Ocwen Loan Servicing, LLC*, CV16-8281 PSG (KSx), 2017 WL 111298, *2-3 (C.D. Cal. Jan. 11, 2017) (ordering remand despite references to RICO and federal Fair Credit Reporting Act because "the Complaint referenced federal statutes as a non-exclusive means of supporting the alleged state law causes of action"); *Collins v. West Coast Ultrasound Institute, Inc.*, No. CV 12–1795 DSF (SPx), 2012 WL 6094176, *3 (C.D. Cal. Dec. 7, 2012) (to same effect); *Papke v. Network Capital Funding Corp.*, No. SACV 13-00525, 2013 WL 1942120, *2 (C.D. Cal. May 9, 2013) (no federal question jurisdiction where plaintiff based UCL claim in part on violation of federal Fair Labor Standards Act); *see also Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1040 (9th Cir. 2003) (ordering remand even though UCL claim sought to enforce rules and regulations implemented by the NYSE pursuant to the federal Securities Exchange Act).

---

[6] Judge Breyer of this District reached a similar result in *Hoekstra v. State Farm General Ins. Co.*, No. C 12–06328 CRB, 2013 WL 556798 (N.D. Cal. Feb. 12, 2013). There, as here, a plaintiff alleged a cause of action for "'unfair business practices.'" *Id.* at *1. Like Sharp here, it cited California Business and Professions Code sections 17200 *et seq.* and 17500 *et seq.*, and 15 U.S.C. § 45(a)(1) – the FTC Act. *Id.* Defendant removed. Plaintiff moved to remand. To avoid remand, defendant asserted, as Hisense Co. asserts here, that the reference to the FTC Act created federal subject matter jurisdiction. *Id.* Judge Breyer disagreed. He noted that "Congress created no private right of action to enforce § 45(a)(1)" and that plaintiff therefore "lack[ed] standing to assert a claim under Section 45(a)(1)." *Id.* He concluded that the "reference to 15 U.S.C. § 45(a)(1) is merely illustrative and not intended to stand as an independent cause of action," and therefore its inclusion did not create federal court jurisdiction over the state law claim. *Id.* at *2.

Defendants ignores this uniform line of cases and instead cites *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004). But the case is easily distinguishable. *Dynegy* involved UCL claims that were predicated on violations of tariffs filed under the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.* *Dynegy*, 375 F.3d at 839. Under 16 U.S.C. section 825p, federal courts have exclusive jurisdiction over suits to enforce the FPA. *Dynegy*, 375 F.3d at 839-40. California, the plaintiff in *Dynegy*, did not have a direct cause of action under the FPA, and while there is normally no federal question jurisdiction where there is no right of action conferred by a federal statute, "the exclusive jurisdiction provision takes the case outside of the rule" denying federal question jurisdiction. *Id.* at 841. Here, however, there is no escape from the rule. The FTC Act includes no statute analogous to 16 U.S.C. section 825p in the FPA conferring federal courts with exclusive jurisdiction. The FCA includes a statute conferring exclusive jurisdiction for one subsection of one statute (which is not implicated here), 47 U.S.C. § 227(g)(2) (exclusive federal jurisdiction "over all civil actions brought under this subsection"), but no general grant of exclusive jurisdiction for the entirety of the FCA. Thus, the exception to the rule that governed *Dynegy* and mandated federal question jurisdiction there is not implicated here.

This case is on all fours with, and governed by *Montoya*, *Guerra*, and the other cases cited above, not *Dynegy*. Sharp's UCL claim, at most, is predicated on federal regulations, California statutes, and California's unique prohibition on "unfair" business practices. Because Sharp "could prevail on that claim by showing any 'unlawful, unfair, or fraudulent practice' independent of the federal law allegations," there is no federal question jurisdiction and remand is required. *Montoya*, 2010 WL 546891, at *3.

V. CONCLUSION.

For the foregoing reasons, this motion to remand should be granted. Now that Hisense Co. has been dismissed, the Court should decline to exercise supplemental jurisdiction in the interests of judicial economy, convenience, fairness, and comity. *Carnegie-Mellon*, 484 U.S. at 350, n.7. Moreover, defendants cannot establish that Sharp's UCL action, which is predicated on numerous

California statutes and which asserts claims for "unfair" business acts under California law, confers federal subject matter jurisdiction. The matter should be remanded.

Dated: June 30, 2017

BROWNE GEORGE ROSS LLP
Eric M. George
Ira Bibbero
Katherine E. Hertel

By: /s/ Ira Bibbero
Ira Bibbero
Attorneys for Plaintiff Sharp Corporation