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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND 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

REPLY IN SUPPORT OF MOTION TO REMAND; DECLARATION OF IRA BIBBERO

Judge: Hon. Yvonne Gonzalez Rogers
Date: August 15, 2017
Time: 2:00 p.m.
Crtrm.: 1

Trial Date: None Set

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?

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RULES

I. INTRODUCTION.

Plaintiff Sharp Corporation ("Sharp"), a global leader in one-of-a-kind consumer and other products, granted a limited, five-year license to certain of its trademarks to defendant Hisense International (Hong Kong) America Investment Co., Ltd. ("Hisense International") for use by Hisense International and other entities affiliated with defendant Hisense Co., Ltd. ("Hisense Co."). After learning those entities were producing defective products and thereby harming consumers and devaluing Sharp's brand, Sharp brought this action against five of the Hisense entities. Hisense Co. removed the action to this Court based on the Foreign Sovereign Immunities Act ("FSIA"), and in the alternative on alleged federal question jurisdiction. Sharp dismissed Hisense Co. and moved for remand, arguing that there is no federal question jurisdiction, and that with Hisense Co. dismissed, the Court may decline to exercise jurisdiction, which it should do because this case is in its infancy. Also before the Court are defendants' motions for sanctions and to compel arbitration, through which defendants seek to continue manufacturing and selling defective products while preventing Sharp from publicly exposing defendants' misdeeds.

Defendants oppose Sharp's motion to remand, contending that the Court must and should keep jurisdiction, and that the case arises under federal law.

Defendants proffer no authority showing that the Court must keep jurisdiction; their authority all goes to whether removal was proper. If Hisense Co. was entitled to remove under FSIA, Sharp concedes – and never argued otherwise – that removal was proper.

Disregarding the factors used to determine whether to exercise supplemental jurisdiction – the age of a case, whether an answer has been filed, whether discovery has been taken, whether the court is familiar with the issues – defendants contend the Court should retain jurisdiction because Sharp purportedly acted in bad faith by dismissing Hisense Co. and then moving for remand. But the Ninth Circuit has approved analogous conduct – dismissing federal claims immediately after a federal-question removal then seeking remand – as a "legitimate tactical decision." *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 491 (9th Cir. 1995). The usual factors all favor remand.

Defendants contend Sharp's citation to two federal regulations among many bases for its unfair competition claim means this Court has federal question jurisdiction, when controlling

authority holds otherwise. *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir. 1996) (no federal question jurisdiction when a claim can be supported under either federal or state law).

In sum, the Court may keep jurisdiction if removal was proper under FSIA (because this case involves no federal question), but it should not. This motion should be granted, and the pending motions for sanctions and to compel arbitration (Dkt. 19, 20) should be denied as moot.

II. THE COURT SHOULD REMAND THIS ACTION.

The Court should remand this action. There is no dispute – although defendants seek to create one in order to manufacture a claim of bad faith – that the Court may keep this case (if Hisense Co. has met its burden, as discussed below). But it should not do so. With the dismissal of Hisense Co. and the absence of federal question jurisdiction, the facts that (i) no answer has been filed, (ii) no discovery has been taken, and (iii) the Court has decided no substantive matters, all point towards the Court exercising its discretion to decline to exercise supplemental jurisdiction and remanding the action.

A. Sharp Does Not Contend that There Was No Removal Jurisdiction (Assuming Hisense Co. Can Prove that It Is an Agency or Instrumentality of China).

Defendants spend much of their brief railing against Sharp for doing something it did not do: misrepresenting the Court's jurisdiction to hear this case in the first place. This is a classic red herring, and intended to falsely create the appearance that Sharp has acted in bad faith. Just as defendants exposed themselves, in their motion for Civil Local Rule 1-4 sanction, to sanctions under Rule 1-4 by evading Federal Rules of Civil Procedure, rule 11 (see Dkt. 38 at 14 -15 & n.5), defendants act in bad faith by accusing Sharp of acting in bad faith for doing something Sharp did not do.

Sharp never suggested that the Court did not have jurisdiction to hear this case (assuming Hisense Co. meets its burden of proving that it is majority-owned by China). In fact, Sharp argued the Court does have jurisdiction, and even provided authority proving the Court has jurisdiction. (Dkt. 35 at 5:27-6:8 (arguing the Court "may retain supplemental jurisdiction," citing *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) and *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1407-08 (9th Cir. 1989)).) Sharp's argument is that the Court should not retain jurisdiction.

Now, defendants accuse Sharp of "failing to cite binding precedent from this Circuit . . . ." (Dkt. 36 at 12:4-7, 7:25.) Sharp could not have cited any more binding precedent than *Teledyne*. Defendants' protestations should be disregarded.[1]

Because Sharp does not dispute (and has not argued otherwise) that the propriety of removal is determined at the time of removal, there is no need to respond to defendants' points and authorities in support of that irrelevant and non-dispositive proposition. (Dkt. 36 at 12-14.)[2]

B. Hisense Co. Has Not Met Its Burden of Proving that It Is an Agency or Instrumentality of China.

Sharp did argue in a footnote, however, that Hisense Co. was required to prove that it is an agency or instrumentality of China in order for removal jurisdiction to have vested in the first

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[1] Defendants see bad faith in Sharp's dismissal of Hisense Co. and subsequent motion for remand, feigning surprise at Sharp's filing of the motion for remand. (Dkt. 36 at 11:27-12:3.) Sharp explained its reasons for dismissal of Hisense Co. in its notice of dismissal: judicial efficiency, to preserve Sharp's right to a jury trial, and to avoid embroiling the Chinese government in a dispute between businesses. (Dkt. 34 at 2:7-16.) Defendants do not address those reasons, let alone dispute them. Moreover, Sharp told defendants it intended to move for remand three days before filing the motion. (Declaration of Ira Bibbero, attached hereto, Ex. 1.)

Defendants also present as "fact" – i.e. in its "Statement of Facts" – allegations of "bad faith" based wholly on hearsay from newspapers articles and letters, from an emergency arbitrator's unconfirmed order citing to such articles and letters, or from defendants' own pleading in the arbitration. (Dkt. 36 at 9:6-11 (citing Dkt. 19-1, Exs. B and D).) Defendants present as "fact" that its own serious malfeasance alleged in this action is "spurious", citing the same unconfirmed arbitrator's order notwithstanding that the order expressly states that the arbitrator is not deciding the merits of any claims of misconduct and not prejudging the merits of any dispute. (Dkt. 36 at 9:12-21, citing arbitrator's order; Dkt. 19-1, Ex. D [arbitrator's order], ¶¶ 64, 73, 80, 88 [all stating the arbitrator is not deciding the merits], 112-115 [stating the arbitrator is not prejudging the merits].) And defendants present as "fact" the contested legal proposition that Sharp's complaint "arise[s] out of or in connection with" an agreement between Sharp and one of the defendants, using that "fact" to show that Sharp filed this action in bad faith. (Dkt. 36 at 10:15-16.) Plainly, defendants are quick to accuse Sharp of bad faith but have no admissible evidence to prove it.

[2] It does not follow, as defendants assert, that post-removal changes "play no part in this Court's determination of the motion to remand." (Dkt. 36 at 14:12-15.) As argued below, the fact that Hisense Co. has been dismissed means that the Court may remand this case, and the fact that the case is just beginning means that the Court should do so.

place (Dkt. 35 at 6, n.3), but Hisense Co. has not met its burden. Hisense Co. is an agency or instrumentality entitled to remove this case only if a majority of its shares or other ownership interest is owned by China. 28 U.S.C. § 1603(b)(2).[3]

The declaration of Mingfang Chen (Dkt. 36-1) does not meet Hisense Co.'s burden of proof because it is not based on personal knowledge and because it is based on hearsay.

"Rule 602 [of the Federal Rules of Evidence] requires that a witness have personal knowledge of the matters to which he is testifying." *United States v. Walt*, 117 F.3d 1427 (9th Cir. 1997).

In paragraphs 1 and 3, the declarant testifies that she works for "Hisense International Co., Ltd."[4], which is a subsidiary of defendant Hisense Electric Co., Ltd., which is a subsidiary of Hisense Co. The fact that the declarant works for a company that is owned by a company that is owned by Hisense Co. does not establish that the declarant has personal knowledge of the truth of the assertion that "Hisense Co. is wholly and directly owned by the State-Owned Assets Supervision & Administration Commission of Qingdao Municipal Government." (Dkt. 36-1 at 2:8-10.) Nor does the asserted fact that the aforementioned Commission "is a special commission formed as the investor on behalf of the Chinese Government" (Dkt. 36-1 at 2:10-12) prove that the Chinese Government owns Hisense Co. Is the Commission one and the same with China? If it is a separate entity, Hisense Co. is not an "agency or instrumentality" of China because "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

The remaining paragraphs of the declaration do not meet Hisense Co.'s burden, either. The paragraphs attempt to authenticate hearsay documents, but the declarant offers no evidence to show that an exception to the hearsay rule applies. Hearsay is a statement made out of court

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[3] Defendants rely in part on Sharp's allegation that Hisense Co. was established by Chinese government authorities. (Dkt. 36 at 15:4-6.) But the fact that China may have established Hisense Co. in 1969 (Dkt. 9 at 8 [FAC], ¶ 26) hardly shows that it is today majority owned by China or a political subdivision thereof. Sharp's allegations do not meet Hisense Co.'s burden of proof.

[4] It is unclear whether this entity is the same as defendant Hisense International.

offered to prove the truth of the matters asserted. Fed. R. Evid. 801(c). Hearsay is inadmissible absent an applicable exception. Fed. R. Evid. 802. Business records may be admissible if, among other things, the custodian demonstrates that the records were made contemporaneously by a person with knowledge and kept in the ordinary course of business. Fed. R. Evid. 803(6). "The proponent of the business records must satisfy the foundational requirements of the business records exception." *United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988).

The declarant authenticates certified translations of a Qingdao government document, search results from the National Enterprise Credit Information Publicity System, and a business license. (Dkt. 36-1, ¶¶ 4-6 & Exs. A-C.) The declarant does not testify that she is the custodian of those records or to the existence of the conditions the custodian is required to show. Thus, the exhibits, and the declarant's conclusions about them, are all inadmissible hearsay.

Hisense Co.'s failure to prove that it is an agency or instrumentality of China supplies an independent reason to remand this action.

C. The Post-Removal Dismissal of Hisense Co. Vested the Court with Jurisdiction to Remand.

What Sharp also argues, and defendants cannot dispute, is that Sharp's post-removal dismissal of Hisense Co. means the Court has discretion to remand this action.

This is precisely the holding in one of the authorities defendants rely upon, *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992), which follows the Ninth Circuit rule set out in *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989). *Surinam* holds:

> [I]f the district court loses the bases for its jurisdiction under [28 U.S.C.] § 1441(d) [allowing removal by a foreign state as defined in the FSIA], then it will have discretion whether to remand the remaining claims to state court. Thus, if all of the third party claims against Surinam Airways [the foreign state in *Surinam*] are dismissed, then the district court may decline to exercise jurisdiction over the claims involving only non-sovereign defendants.

Surinam, 974 F.2d at 1260.[5] In *Surinam*, Surinam Airways, the foreign state which was impleaded as a third-party defendant, removed the case from state court. *Id.* at 1256. The plaintiff

[5] Defendants quote from just prior to the passage quoted above. (Dkt. 36 at 15:20-22.)

moved to remand, and the district court's error was that it remanded claims not involving Surinam Airways, and retained the other claims. *Id.* at 1257. The Eleventh Circuit cited *Teledyne* for the proposition that the foreign state may remove the entire action to federal court, but held that the district court did not have the discretion to remand part of the action so long as the foreign state remained in the case. *Id.* 1260. It then held, as quoted above, that should the foreign state be dismissed, the court "may decline to exercise claims involving only non-sovereign defendants." *Id.*

No court holds, as defendants assert, that a court to which a case has been removed by a foreign state is required to retain jurisdiction after the foreign state has been dismissed. The cases defendants cite in section III of their opposition hold that post-removal changes do not divest the Court of jurisdiction, but they do not hold that the Court is required to retain jurisdiction. Sharp does not dispute that the Court is not divested of jurisdiction. But that proposition is not at issue here: if Hisense Co. properly removed this action, the Court may exercise jurisdiction. Sharp contends, however, that it should not.

The hypothetical procedure described in *Surinam* was implemented in this Circuit, by the Eastern District of Washington, when it was confronted with a situation in which an insurance coverage case was removed from state court by a foreign-state defendant, and three and one-half years later, the claims against that defendant were dismissed. *Teck Metals*, 2010 WL 1286364, at *1. The court concluded that it had discretion to either exercise jurisdiction over the remaining claims or remand the case. *Id.* at *6. Applying the law construing supplemental jurisdiction under 28 U.S.C. section 1367, the court held that it should, in that case, continue to exercise jurisdiction. *Id.* at *6-*7. This made sense in *Teck Metals* because the case had been pending for many years, the court was presiding over both the coverage action and the underlying action, the court was "very familiar with the complex factual and procedural background of this case," and because interlocutory appeals were then pending in the Ninth Circuit. *Id.* at *6.

This case is no different in terms of the Court's ability to exercise discretion, but far different in terms of the factors that figure into the Court's exercise of discretion. As set forth in the next section, it would practically be an abuse of discretion for this Court to retain discretion,

and Sharp asks the Court to remand the case now that the putative foreign state, Hisense Co., has been dismissed.

D. The Court Should Decline to Exercise Jurisdiction.

Where, as here, a case is at the very early stages – indeed, the complaint has not yet been answered – and the Court has not been required to become familiar with the issues, the Court should remand when jurisdiction is only supplemental.

There is little authority to guide the Court when removal is under the FSIA, but other courts have, and this Court should, apply the same standards used when a court is deciding whether to exercise supplemental jurisdiction under 28 U.S.C. section 1367. *See, e.g., Teck Metals*, 2010 WL 1286364, at *6-*7. This is especially true here, where all claims are under state law and no foreign state remains as a defendant.

In *Carnegie-Mellon Univ. v. Cohill*, 484 US 343, 350 (1988), the Supreme Court held:

> [A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Id. (citations and footnote omitted; emphasis added) (holding later that the court could also, in the proper circumstances, remand rather than dismiss without prejudice). *Carnegie-Mellon* further explained:

> in 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.
>
> The Court in [*Mine Workers v. Gibbs*, 383 U.S. 715 (1966)] also indicated that these factors usually will favor a decision to relinquish jurisdiction when "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought."

Id. at 350, n.7 (citations omitted, emphasis added).

In the Ninth Circuit, it is practically an abuse of discretion to decline to dismiss when only state law claims are left in a case. "When the state issues apparently predominate and all federal

claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim." *Wren v. Sletten Const. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) (emphasis added). Consistent with this principle:

- In *Glover v. Borelli's Pizza, Inc.*, 886 F.Supp.2d 1200, 1202 (S.D. Cal. 2012), where all federal-law claims in a removed case had dropped out of the lawsuit in its early stages, the defendants filed a motion to dismiss, and an answer had not yet been filed, the court declined to exercise jurisdiction and remanded the case.
- In *Cervantes v. RGW Constr., Inc.*, No. 16-CV-05460-TEH, 2017 WL 76895, at *1 (N.D. Cal. Jan. 9, 2017), Judge Henderson of this District held that remand "is generally preferable" when only state-law claims remain in a removed action.
- In *Perryman v. JPMorgan Chase Bank, N.A.*, No. 116CV00643LJOSKO, 2016 WL 4441210, at *9 (E.D. Cal. Aug. 23, 2016), order clarified, 2016 WL 6124209 (E.D. Cal. Oct. 19, 2016), the court held it was "appropriate to decline jurisdiction" where the federal claims had been dismissed, "the state law claims raise important issues of state law that are more appropriately resolved by the state courts [and] this case is in its earliest stages: an answer has not yet been filed nor has discovery commenced." The court noted: "the fact that this case was removed significantly alleviates any prejudice to Plaintiff since the state claims can be remanded, rather than dismissed, and Plaintiff will return to the original forum of his choice." *Id.*

As explained in the moving papers, this case is ripe to be remanded because it is at the early stages, no discovery has been commenced, no answer has been filed, and the Court has not been required to become familiar with the facts and issues that have been raised. (*See* Dkt. 35 at 7.) The Court should allow Sharp to "return to the original forum of [its] choice." *Perryman*, 2016 WL 4441210, at *9.

Defendants repeat their mantra of alleged bad faith as a reason for this Court to retain jurisdiction, but their speculations do not rise to the level of fact and Sharp's reasons for dismissing Hisense Co. are fully explained in the notice of dismissal. (Dkt. 34 at 2.) Sharp's streamlining of this litigation – simultaneously dismissing an unnecessary party and disentangling

a sovereign state from this dispute, and dismissing a duplicative action in another forum – should be applauded, not cited as a basis to retain jurisdiction.

Moreover, the Ninth Circuit rejected a similar claim of bad faith in a case involving federal question removal. In *Baddie*, 64 F.3d 487 (9th Cir. 1995), the plaintiffs sued in state court including both federal and state claims, and after removal, promptly dismissed the federal claims and sought remand. *Id.* at 489. The district court found the plaintiffs had been "'manipulative'" and should have "'dropped their federal claims before ever filing a complaint.'" *Id.* 491. The Ninth Circuit disagreed, explaining:

> Filing federal claims in state court is a legitimate tactical decision by the plaintiff: it is an offer to the defendant to litigate the federal claims in state court. The defendant is not obligated to remove; rather, he has the choice either to submit to state court resolution of his claims, or to assert his right to a federal forum. If the defendant rejects the plaintiff's offer to litigate in state court and removes the action, the plaintiff must then choose between federal claims and a state forum. Plaintiffs in this case chose the state forum. They dismissed their federal claims and moved for remand with all due speed after removal. There was nothing manipulative about that straight-forward tactical decision, and there would be little to be gained in judicial economy by forcing plaintiffs to abandon their federal causes of action before filing in state court.

Id.

Here, Sharp sued Hisense Co. in state court, and Hisense Co. was not obligated to remove. Having done so, Sharp had a choice between litigating against Hisense Co. or litigating in state court. Sharp, through this motion, has chosen a state forum, and did so with all due speed. This is not manipulative, but a "legitimate tactical decision." *Baddie*, 64 F.3d at 491.[6]

Defendants' concurrently-pending motion to compel arbitration, stay, and dismiss does not supply a ground to retain jurisdiction because the state court can decide that issue after remand; there is no reason for this Court to take up issues arising purely under state law – both California and New York (the law governing the arbitration agreement between Sharp and one of the four

[6] Nor, as set forth at length in opposition to Hisense International's motion for sanctions, was there any bad faith involved in Sharp filing this action in court, especially given that the arbitrator has no jurisdiction over three of the defendants and Sharp's unfair competition claims is not within the scope of the arbitration agreement. Should the Court determine that it should address Hisense International's sanctions motion, rather than simply remanding this action and declaring it moot, Sharp respectfully refers the Court to Docket 38 at 10-14.

defendants). In *Glover*, a motion to dismiss and motion for remand were both filed promptly after removal, which happened in the first few months of the case. *Glover*, 886 F.Supp.2d at 1201. The court, also after rejecting the defendants' claim of bad faith tactics, and after finding that guiding principles militated towards declining to exercise supplemental jurisdiction, remanded and denied the motion to dismiss as moot. *Id.* at 1202-03. So, too, here, the Court, once it finds that the factors favoring remand are met, should simply deny defendants' pending motions as moot rather than look to them as a basis for retaining jurisdiction.

In sum, the Court, following guiding principles from the Supreme Court in *Carnegie-Mellon* and from the Ninth Circuit in *Wren*, should remand this action back to the state court and deny defendants' pending motions – for sanctions and to compel arbitration – as moot.

E. There Is No Federal Question Jurisdiction.

In its motion, Sharp demonstrated that no federal question jurisdiction lies because its Unfair Competition Law ("UCL", Cal. Bus. & Prof. Code § 17200, et seq.) claims are not based exclusively on federal law. (Dkt. 35 at 6-11.) In response, defendants grasp for straws. First, they assert that the "unlawful" prong of Sharp's UCL claim is "predicated entirely on alleged violations of federal laws and regulations." (Dkt. 36 at 18:2.) This is untrue. Second, they assert that because Sharp alleges that defendants' conduct is "*unlawful*, unfair, *and* fraudulent" (Dkt. 36 16 17:24 (emphasis added by defendants)) – i.e. because Sharp's complaint is in the conjunctive, not in the disjunctive – Sharp must prove violations of federal law to prevail. This is not the law. Third, defendants attempt to mislead the Court into believing that federal courts – and specifically, the Court of Appeals in the first instance (in one case, specifically the District of Columbia Circuit) – have exclusive jurisdiction over all claims arising under the federal law mentioned in Sharp's complaint. If this last point were true, query why defendants are demanding that this Court retain jurisdiction, and not asking to have the case transferred to the Ninth or District of Columbia Circuits?

For the purposes of the UCL, unfair competition includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. "'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.'" *Cortes v. Bank of Am., N.A.*, No. CV 09-7457 AHM(FFMX), 2009 WL 4048861, at *2 (C.D. Cal. Nov. 20, 2009) (quoting *Rains,* 80 F.3d at 346) (remanding removed action to state court where complaint alleged violations of the UCL (and other laws) premised on violations of federal law, including the Federal Trade Commission Act, finding the claim does not "'arise under' federal law"). Sharp alleged that defendants' SHARP-branded televisions (1) emit excess radiation in violation of Federal Communications Commission ("FCC") regulations; (2) have mislabeled screen sizes, in violation of Federal Trade Commission ("FTC") regulations and California law; (3) are incorrectly labeled as to their brightness; (4) do not comply with Underwriters Laboratories ("UL") standards, which are not federally-mandated; and (5) are falsely advertised as having higher resolution than they actually possess. (First Amended Complaint ("FAC", starting at Dkt. 9 at 4), ¶¶ 54, 60, 70, 75, 78.)

Sharp's UCL claim can therefore be supported by either state-law or federal-law theories. For example, Sharp can satisfy the "unlawful" prong of the UCL by proving that defendants' SHARP-branded televisions emit excess radiation in violation of FCC regulations (a federal-law theory). Alternatively, Sharp can satisfy the "unlawful" prong by proving that the televisions have mislabeled screen sizes in violation of California law. The brightness, UL standard, and resolution allegations are totally unmoored from federal law, and rely solely on California consumer and fraud protections. Those allegations also show violations of the "deceptive, untrue or misleading advertising" prong of the UCL. Cal. Bus. & Prof. Code § 17200. Any of these violations, alone, meets the definition of unfair competition, and hence any of these violations, alone, can support a UCL claim. Cal. Bus. & Prof. Code § 17203 ("Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction."). Federal law is "not a necessary element of the claim" hence no federal question jurisdiction lies. *Cortes*, 2009 WL 4048861, at *2.

Defendants' sole authority on this point is *National Credit Reporting Ass'n, Inc. v. Experian Info. Sols., Inc.*, No. C04-01661 WHA, 2004 WL 1888769, at *4 (N.D. Cal. July 21,

2004), which involved a complaint stating a UCL violation. Under that complaint, "[f]or a finding of 'unlawful' business practices under [the UCL], there must first be resolution of federal antitrust laws, namely the Sherman Act which counsel admits he is asserting." *Id.* The case was removed, and a motion to remand was denied because the "[UCL] claim requires resolution of federal law." *Id.* at *5. Courts have distinguished *National Credit Reporting* in situations where the plaintiff may succeed in its UCL claim "with or without proving a violation of federal law." *Gershfeld v. Champion Aerospace LLC.*, No. SACV131318JVSJEMX, 2013 WL 12123685, at *3 (C.D. Cal. Oct. 8, 2013) (remanding after finding no federal question jurisdiction where five of eight alleged UCL violations were not based on federal law, distinguishing *National Credit Reporting*). As discussed below, it is not necessary for Sharp to prove a federal law violation in order to prove its UCL claim, hence federal question jurisdiction does not lie.

We now refute defendants' specific arguments in favor of federal question jurisdiction.

1. Defendants' "Unlawful" Acts Are Not Entirely Federal Law Violations.

Addressing defendants' first argument, the "unlawful" prong of Sharp's UCL claim is not premised "entirely" on federal law. As alleged, the screen size violation is based in part on California law. (FAC, ¶ 60, 65 & Ex. B to FAC (Dkt. 9 at 26-32).) Thus, the "unlawful" prong is premised on state law violations in addition to federal law violations. Moreover, it is unlawful under California law to make "untrue or misleading" statements in connection with selling products, and therefore the alleged brightness misstatement, the alleged misrepresentation that the televisions comply with UL standards, and the alleged resolution misstatements are "unlawful" under California law. Cal. Bus. & Prof. Code § 17500. Therefore, the "unlawful" prong of Sharp's UCL may be supported by numerous acts that are not based on violations of federal law.

2. Sharp Need Not Prove Federal Law Violations to Prove Unfair Competition.

Addressing defendants' second argument, Sharp's use of the word "and" in paragraph 102 of the FAC does not mean that it must prove federal law violations in order to prevail on its UCL claim. Defendants' argument is sophistry. A plaintiff may prevail on a UCL claim by proving any single act of unfair competition. *Olivera v. American Home Mortgage Servicing, Inc.*, 689

F.Supp.2d 1218, 1225 (N.D. Cal. 2010) (holding that a single act may create UCL liability). The fact that Sharp pleaded that defendants committed acts that were unlawful, unfair, and fraudulent does not mean that Sharp can only prevail by proving unlawful, unfair, and fraudulent acts. Thus, even were the unlawful acts to be premised solely on federal law violations – they are not – the fact that the unfair and fraudulent conduct, and the false advertising, is not premised on federal law violations means that Sharp can prevail on its UCL claim without proving federal law violations. Again, because federal law is "not a necessary element of the claim," no federal question jurisdiction lies. *Cortes*, 2009 WL 4048861, at *2.[7]

3. There Is No Exclusive Federal Jurisdiction for FTC and FCC Violations.

Defendants' final argument is simply intended to mislead the Court. Defendants contend that the Federal Trade Commission Act (the "FTC Act") and the Federal Communications Act (the "FCA") each "provides exclusive jurisdiction to the federal courts." (Dkt. 36 at 16:25-26 & n.4.) They must make this argument to salvage their removal because, as explained in Sharp's moving papers, the case defendants cited for removal – *California ex rel. Lockyer v. Dynegy, Inc.* 375 F.3d 831 (9th Cir. 2004) (see Dkt. 1 at 3:6-13) – supports the proposition that reliance on a federal statute for a UCL violation creates federal question jurisdiction only where the federal statute provides for exclusive jurisdiction in federal court to address violations. (See Dkt. 35 at 11:1-15.) Unable to overcome that authority, they seek to mislead the Court. They cite, in footnote 4 of their brief, two statutes vesting the Court of Appeals – any Circuit for the FTC Act and the District of Columbia Circuit for the FCA – with exclusive jurisdiction to hear actions to attack or enforce orders of the FTC or to appeal decisions or orders of the FCC, respectively.

[7] Should the Court deems there to be federal question jurisdiction solely because Sharp used "and" paragraph 102 of the FAC, Sharp asks leave to amend to replace "and" with "or" and then to have the case remanded. *See Cosby v. City of Oakland*, No. C-97-0267 MHP, 1997 WL 703776, at *1 (N.D. Cal. Oct. 28, 1997) (where federal question removal was based on a "typographical error," parties stipulated to correct error and case was remanded).

(Dkt. 36 at 17, n.4 (citing 15 U.S.C. § 45(d) and 47 U.S.C. § 402(b)).)[8] But this is not an action to attack or enforce an order of the FTC or to appeal a decision or order of the FCC. (And if it were, by defendants' authority, exclusive jurisdiction would lie in the Court of Appeals, not in this Court.) Sharp's UCL claim is to remedy harm to Sharp and to California's consumers flowing from defendants' acts of unfair competition, some of which involve violations of federal regulations. No authority holds that exclusive jurisdiction over such claims lies with the federal courts, let alone with the Court of Appeals.

In sum, the fact that Sharp reference two federal regulations does not mean that its UCL claim arises under federal law, and therefore removal under federal question jurisdiction was not proper. Federal question jurisdiction is not a reason to deny this motion to remand.

III. CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the moving papers, the Court should grant Sharp's motion and remand this case to the San Francisco Superior Court without considering the motions filed by defendants.

DATED: July 21, 2017

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

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

[8] Defendants also assert that "initial remedial power [under the FCA] rests with the FCC." (Dkt. 36 at 17, n.4.) This statement is unsupported by authority.

DECLARATION OF IRA BIBBERO

DECLARATION OF IRA BIBBERO

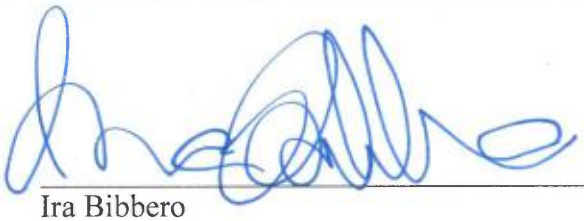
I, Ira Bibbero, declare and state as follows:

1. I am an attorney at law, duly admitted to practice before this Court and all courts of the State of California. I am a partner with Browne George Ross LLP, counsel of record for Plaintiff Sharp Corporation in this matter. I have firsthand, personal knowledge of the facts set forth below and if called as a witness could competently testify thereto.

2. Attached hereto as Exhibit 1 is a true and correct copy of an e-mail I sent to counsel for defendants on June 27, 2017. I know counsel received this e-mail because they responded to it.

Executed July 21, 2017 at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Ira Bibbero

EXHIBIT I

Ira Bibbero

From: Ira Bibbero
Sent: Tuesday, June 27, 2017 4:46 PM
To: 'Hille, David'; Lamm, Julian; Lewis, Matthew
Cc: Eric M. George; Kate Hertel
Subject: Sharp/Hisense - motion to compel arbitration or dismiss

Counsel,

On behalf of Sharp Corporation, I request that you stipulate to a two-week extension of time for Sharp to oppose the Hisense defendants' motion to compel arbitration or, in the alternative, to dismiss. "Unless time is of the essence, a lawyer should agree as a matter of courtesy to first request for reasonable extensions of time...." (N.D. Cal. Guidelines for Professional Conduct.) (We intend to oppose your sanction motion this week.)

Note that we intend to file a motion to remand, and we expect that the Court will want to hear that motion first, to determine its jurisdiction, before hearing any motions that go the merits of the case or of the pleadings.

Please let us know today or on Wednesday, June 27, 2017 if you will stipulate to the requested extension.

Thanks

Ira Bibbero
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