

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CREDIT CONSULTING SERVICES, INC.,

Plaintiff,

v.

CLIFTON JAMES SCOTT,

Defendant.

Case No. [19-cv-00332-WHO](#)

**ORDER GRANTING MOTION TO
REMAND; DENYING SPECIAL
MOTION TO STRIKE AND MOTION
FOR JUDGMENT ON THE
PLEADINGS AS MOOT**

Re: Dkt. Nos. 10, 16

Plaintiff and cross-defendant Credit Consulting Services, Inc. ("CCS") filed a collection action against defendant and cross-claimant Clifton James Scott ("Scott") in state court on October 30, 2018. Scott filed a cross-complaint against CCS and two of CCS' officers, alleging violations of one state cause of action and the federal Fair Debt Collection Practices Act ("FDCPA"). On the basis of Scott's FDCPA counterclaim, CCS and the officer defendants removed the action to this court.

Scott moves to remand, arguing that a counterclaim based on federal law cannot serve as a basis for removal.¹ He is correct. I grant Scott's motion to remand. The Special Motion to Strike Cross-Complainant's Cross-Complaint and Motion for Judgment on the Pleadings filed by CCS and the officer defendants' is denied as moot.

BACKGROUND

CCS filed an action against Scott in the Superior Court of California, County of San Benito on October 30, 2018, for breach of contract regarding collection of Scott's alleged debt owed to Hazel Hawkins Memorial Hospital. Summons and Complaint, attached as Exhibit A to Cross-

¹ Pursuant to Civil Local Rule 7-1(b), I find this matter suitable for disposition without oral argument and vacate the hearing currently scheduled for February 27, 2019.

Defendant Credit Consulting Services’ and Defendants Rodney Meeks and Christine Meeks’ Amended Notice of Removal of Action Under 28 U.S.C. § 1441 (“Amended Notice of Removal”) [Dkt. No. 13]. Prior to service, CCS stapled a yellow note to the summons at a 90-degree angle, stating CCS’s contract information. Class Action Cross-Complaint Statutory Damages (“Cross-Complaint”) at 7, attached as Exhibit B to Amended Notice of Removal [Dkt. No. 13]. The complaint, summons, and affixed yellow note were served to Scott together. *Id.*

On December 19, 2018, Scott filed a cross-complaint against CCS and CCS’s officers Rodney Lynn Meeks and Christine Louise Meeks (“Meeks”). *Id.* at 4-6. The cross-complaint alleges violation of the California Rosenthal Fair Debt Collection Practices Act, California Civil Code §§ 1788-1788.33 and the federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692-1692p, and seeks individual and class statutory damages. *Id.* at 11-15.

On January 18, 2019, CCS removed this case to federal court under 28 U.S.C. § 1441(a) based upon the federal question raised by FDCPA. Notice of Removal at ¶ 3. On January 22, 2019, Scott filed a motion to remand under 28 U.S.C. § 1447(c) on the ground that a federal question raised in a cross-complaint cannot form the basis for removal and requested award of attorneys’ fees and costs. Memorandum of Points and Authorities in Support of Motion to Remand (“Mot.”) at 3-4 [Dkt. No. 10-1]. On February 5, 2019, CCS and Meeks filed an amended notice of removal claiming that the entire action may be removed under 28 U.S.C. § 1441(c) by Meeks because Scott’s claims against Meeks under the FDCPA arise under federal law and are separate and independent from CCS’s contract claims against Scott. Amended Notice of Removal at ¶¶ 2-3 [Dkt. No. 13]. CCS asserts that the amended notice of removal cures any procedural defects contained in the original notice of removal. *Id.* at ¶ 6.

LEGAL STANDARD

A defendant sued in state court may remove the action to federal court if the action could have been brought in federal court in the first instance. 28 U.S.C. § 1441(a). The Ninth Circuit “strictly construe[s] the removal statute against removal jurisdiction;” accordingly, “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (internal quotation marks and citations

omitted). When a plaintiff challenges the removal of a case to federal court, it is the defendant who bears the burden of establishing the propriety of that removal. *Id.* at 566–67. A district court's order remanding an action to state court for lack of subject matter jurisdiction or a defect in the removal procedure is not reviewable on appeal. 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–128 (1995).

DISCUSSION

I. MOTION TO REMAND

Scott moves to remand, arguing that a counterclaim based on federal law cannot serve as a basis for removal.² Mot. at 3. CCS and Meeks counter that removal is proper under § 1441(c) because the Meeks are third-party defendants and Scott's federal counterclaims under the FDCPA are "separate and independent" from CCS's underlying contract claim. Opposition at 4-7 [Dkt. No. 14].

Under 28 U.S.C. § 1331, federal courts have original jurisdiction over civil actions "arising under" federal law. Removal based on § 1331 is governed by the "well-pleaded complaint" rule. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under this rule, "federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint." *Id.* "Removal, therefore cannot be based on a counterclaim or cross-claim raising a federal question." *Redevelopment Agency of City of San Bernardino v. Alvarez*, 288 F. Supp. 2d 1112, 1115 (C.D. Cal. 2003). Accordingly, the FDCPA claim raised in Scott's cross-complaint cannot form a basis for federal question jurisdiction here. *Bank of New York Mellon v. Hong Xuan Vo*, No.: 14-cv-05110-LHK, 2015 WL 662221, at *2 (N.D. Cal. Feb.12, 2015) (FDCPA counterclaims cannot form a basis for federal question jurisdiction); *NCCS Inc. v. Frank Hegardt*

² Scott also argues in his late filed reply that removal is untimely because CCS asserted a completely different basis for removal in its amended notice of removal and that amended notice of removal was filed past the thirty-day removal period codified in 28 U.S.C. § 1446(b). Reply at 6-7 [Dkt. No. 15]. Although a notice of removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period," "a defendant may amend the notice of removal after the thirty day window has closed to correct a defective allegation of jurisdiction." *ARCO Environmental Remediation, L.L.C. v. Dept. of Health and Environmental Qualify of Montana*, 213 F.3d 1108, 1117 (9th Cir. 2000). CCS's amended removal notice did not add a separate basis for removal jurisdiction and remained based on the FDCPA cross-claim. Therefore, the amendment is permissible.

1 *Ind.*, No. 98-cv-2637-VRW, 1998 WL 574379, at *1 (N.D. Cal. Aug.28, 1998) (same).

2 In addition, only a defendant may remove an action. 28 U.S.C. § 1441(a). The Ninth
3 Circuit has ruled that a counterclaim defendant who is not a plaintiff to the original state action,
4 and third-party defendants, may not remove the case to federal court. *Westwood Apex v.*
5 *Contreras*, 644 F.3d 799, 805 (9th Cir. 2011). Because CCS and Meeks are not considered
6 “defendants” for purpose of the removal statute, this action must be remanded. *Midland Funding*
7 *LLC v. Korte*, No. 2:13-cv-0103, 2013 WL 1165031, at *2 (E.D. Cal. Mar. 20, 2013) (FDCPA
8 cross-complaint cannot form basis for removal jurisdiction under § 1441(a); *Pub. Storage v.*
9 *Sobayo*, No. 12-cv-05263 SBA, 2013 WL 163777, at *2 (N.D. Cal. Jan. 15, 2013) (same).

10 CCS asserts nonetheless that the Meeks are entitled to remove this action under 28 U.S.C.
11 § 1441(c), which states:

12 Whenever a separate and independent claim or cause of action, which
13 would be removable if sued upon alone, is joined with one or more
14 otherwise non-removable claims or causes of action, the entire case
may be removed and the district court may determine all issues
therein, or, in its discretion, may remand all matters not otherwise
within its original jurisdiction.

15 28 U.S.C. § 1441(c). According to CCS, the FDCPA claim is a “separate and independent claim”
16 which allows removal of the entire case, even if raised in a cross-complaint. *Oppo*. at 4-7.

17 Federal circuit courts that have squarely decided the issue are split on whether third-party
18 defendants may remove an action under § 1441(c). *Compare Thomas v. Shelton*, 740 F.2d 478,
19 486–87 (7th Cir.1984) (holding that third-party defendants may not remove under § 1441(c) in the
20 “broad run of third-party cases”) and *Lewis v. Windsor Door Co.*, 926 F.2d 729, 733 (8th
21 Cir.1991) (following the Seventh Circuit's analysis in *Thomas v. Shelton*) with *Carl Heck*
22 *Engineers, Inc. v. Lafourche Parish Policy Jury*, 622 F.2d 133, 135–36 (5th Cir.1980). Although
23 the Ninth Circuit has not squarely ruled on this question, several district courts within the Ninth
24 Circuit, including in this District, have followed the majority view of the Seventh and Eighth
25 Circuits. *See Ciolino v. Ryan*, No. 03-cv-1396-TEH, 2003 WL 21556959, at *5 (N.D. Cal. July 9,
26 2003) (“[T]he court is persuaded that the prevailing view is the correct one: removal by a third-
27 party defendant is not permitted under 28 U.S.C. § 1441(c)); *Cross v. Kaiser Found. Hosps.*, No.
28 98-cv-03141 MMC, 1998 WL 737998, at *4 (N.D. Cal. Oct. 15, 1998) (finding third-party

defendants have no right to remove); *Aramid Entm't B.V. v. Bontempo Holdings, LLC*, No. 10-cv-9078, 2011 WL 71441, at *3 (C.D. Cal. Jan. 7, 2011) (adopting the majority view that a third-party defendant is not entitled to remove an action). I find no reason to depart from the majority view that a third-party defendant is not entitled to remove an action.³

II. ATTORNEY FEES

Scott requests an award of attorneys' fees and costs in relation to his motion to remand pursuant to 28 U.S.C. § 1447(c).⁴ Mot. at 3-4. The standard for awarding fees turns on the reasonableness of the removal. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). As the Supreme Court recognized, "[a]bsent unusual circumstances, courts may award attorney's fees under 28 U.S.C. § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.*

Here, since the Ninth Circuit has never squarely ruled on a third party's ability to remove under 28 U.S.C. § 1441(c) and CCS and Meeks have cited some authority supporting their position, I cannot say that their removal petition lacked an objectively reasonable basis. The request for attorneys' fees is denied.

CONCLUSION

For the foregoing reasons, CCS and Meeks have failed to establish a basis for subject matter jurisdiction or their right to remove this action. Accordingly, I remand this action to Superior Court of California, County of San Benito. *See* 28 U.S.C. § 1447(c). Attorney's fees are

³ CCS and Meeks cite to a district court decision in the 11th Circuit to support their position. *Oppo. 4*; *see North Star Capital Acquisitions, LLC v. Krig*, 2007 WL 3522425, at *2-4 (M.D. Fla. 2007) (removal of FDCPA counterclaims by third-party proper because "the FDCPA counterclaim and the plaintiffs' original claims involve two distinct wrongs"). However, *North Star* relies on former Fifth Circuit case law, which is at odds with the majority view, and the view of other courts in this Circuit. *Id.* *North Star* is of little persuasive value in this case.

⁴ Under § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."

not awarded to Scott. CCS and Meeks's special motion to strike and motion for judgment on the pleadings [Dkt. No. 16] is denied as moot.

IT IS SO ORDERED.

Dated: February 25, 2019

A handwritten signature in black ink, appearing to read "W. H. Orrick", written over a horizontal line.

William H. Orrick
United States District Judge

United States District Court
Northern District of California