UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EZELL'S FRIED CHICKEN,

Plaintiff,

v.

EZELL STEPHENS, *et al.*,

Defendants.

Case No. C10-1424 RSL

ORDER GRANTING MOTION TO REMAND

This matter comes before the Court on plaintiff's "Motion to Remand." Dkt. # 22. Having reviewed the parties' memoranda and the remainder of the record in this matter, the Court GRANTS plaintiff's motion.

I. PROCEDURAL POSTURE

Plaintiff Ezell's Fried Chicken ("EFC") filed suit against defendants Ezell Stephens and Take It Home, Inc. in King County Superior Court on July 30, 2010, alleging various contract claims and business-related tort claims. In their September 2, 2010 amended answer, defendants included a third-party complaint alleging eleven different state and federal claims against plaintiff EFC and third-party defendant Lewis Rudd. On the same day, defendants removed the matter to this Court. Defendants' notice of removal asserts that this Court has original jurisdiction pursuant to the general federal question statute, 28 U.S.C. § 1331, and cites federal claims asserted in the third-party complaint as the grounds for removal. See

Not. of Removal (Dkt. # 2) at 3. Plaintiff now moves the Court to remand this matter for lack of subject matter jurisdiction.

II. REMOVAL JURISDICTION

A. Legal Standard

District courts have jurisdiction to hear removed cases over which they would have had original jurisdiction. 28 U.S.C. § 1441(b).[1] "The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction." Prize Frize, Inc. v. Matrix Inc., 167 F.3d 1261, 1265 (9th Cir. 1999). Jurisdiction over a removed case "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). "Subject matter jurisdiction cannot be established by consent of the parties, and a lack of subject matter jurisdiction is a non-waivable defect." Gibson v. Chrysler Corp., 261 F.3d 927, 948 (9th Cir. 2001). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

"The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." California v. United States, 215 F.3d 1005, 1014 (9th Cir. 2000) (quoting Audette v. Int'l Longshoremen's and Warehousemen's Union, 195 F.3d 1107, 1111 (9th Cir. 1999)). "[A] case may not be removed on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (internal emphasis omitted). "In addition, the plaintiff is the 'master' of her case, and if she can maintain her claims on both state and federal grounds, she may ignore the federal question, assert only state claims, and defeat removal." Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996). The "well-pleaded

[1] 28 U.S.C. § 1441(b) reads in relevant part: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship of the parties."

complaint rule" is limited by the "artful pleading doctrine," which "provides that although the plaintiff is master of his own pleadings, he may not avoid federal question jurisdiction by omitting from the complaint allegations of federal law that are essential to the establishment of his claim." Lippitt v. Raymond James Fin. Serv., Inc., 340 F.3d 1033, 1041 (9th Cir. 2003) (internal quotation omitted).

B. Federal Question Jurisdiction

i. Plaintiff's original complaint

Plaintiff's original complaint alleges nine causes of action against defendants. Compl. (Dkt. # 1), Ex. A at ¶¶ 4.1-12.5. Six are state common law causes of action, two are Washington state statutory causes of action, and one, mislabeled as a cause of action, is a request for injunctive relief pursuant to a Washington state statute.[2] Id. None of plaintiff's claims are ostensibly federal causes of action; the only federal law explicitly raised in the complaint is plaintiff's assertion that it is the owner of the "federally registered trademarks 'Ezell's Famous Chicken' and 'Ezell's Fried Chicken.'" Id. at ¶ 3.7.

Despite a plaintiff's decision not to allege federal causes of action, a matter may still be properly removed if the complaint falls under the artful pleading doctrine. Federal courts may exercise jurisdiction over a purported state law claim if the plaintiff has "omitt[ed] from the complaint federal law essential to his or her claim or cast[] in state law terms a claim that can be made only under federal law." Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1212 (9th Cir. 1998). "Courts should invoke the doctrine only in limited circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." Lippitt, 340 F.3d at 1041 (internal quotation omitted). The artful pleading doctrine is typically invoked to find a federal question in "cases where the claim is

[2] Plaintiff's complaint lists causes of action for: breach of contract; breach of settlement agreement; breach of fiduciary duty; breach of Washington's Uniform Trade Secrets Act; trademark infringement under RCW 19.86; unfair competition; breach of good faith and fair dealing; injunctive relief; and tortious interference with a business relationship. See Compl. (Dkt. # 1), Ex. A at ¶¶ 4.1-12.5.

necessarily federal in character, or where the right to relief depends on the resolution of a substantial, disputed federal question." Id. at 1042 (internal citation omitted). Though defendants' notice of removal cites only their third-party complaint as a basis for federal jurisdiction, see Not. of Removal (Dkt. # 1) at 3, defendants now argue that plaintiff's original unfair competition claim should be recast as a federal claim. See Opp'n (Dkt. # 24) at 4-5.

Plaintiff's unfair competition claim is neither necessarily federal in character nor dependent on a substantial, disputed federal question. Plaintiff's unfair competition claim does not necessarily arise under federal law because Washington's Consumer Protection Act ("CPA") provides a cause of action for "[u]nfair methods of competition . . . in the conduct of any trade or commerce." RCW 19.86.020; see also Duncan, 76 F.3d at 1486 n.9 (discussing reasons for analyzing whether state law provides cause of action alleged in ambiguous complaint). In accord with plaintiff's allegation, the CPA's prohibition on "unfair competition" has been held to provide a remedy for trademark infringement. See, e.g., Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 739-41 (1987) (en banc) (describing elements of CPA action for trademark infringement). Defendants argue that plaintiff's claim is a latent federal claim because the form in which it is alleged in the complaint mimics language in the Lanham Act, 15 U.S.C. §§ 1125(a) and 1127. See Opp'n (Dkt. # 24) at 4-5. The two phrases that plaintiff identifies as closely mirroring the Lanham Act, however, are reasonably construed as alleging the first element of a Washington CPA violation.[3] Furthermore, plaintiff's allegation that the infringement occurred "in commerce" does not necessarily presage a federal cause of action because the term appears

[3] Plaintiff's complaint alleges that defendants used plaintiff's trade names "in a manner that is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of their goods." Compl. (Dkt. # 1), Ex. A at ¶ 9.3. While this language closely mimics the phrasing of 15 U.S.C. § 1125(a)(1)(A), it can also be reasonably interpreted as alleging the first element of a Washington CPA violation. See Nordstrom, 107 Wn.2d at 739 (elements of CPA claim include "(1) Is the action complained of an unfair or deceptive act or practice?"); see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785 (1986) (en banc) ("A plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public." (emphasis in original) (internal citation omitted)).

on the face of the CPA and is an essential element of a state unfair competition claim. See RCW 19.86.020 (declaring unlawful "[u]nfair competition . . . in the conduct of any trade or commerce."); see also Nordstrom, 107 Wn.2d at 739 (elements of CPA claim include "(2) Did the action occur in the conduct of trade or commerce?"). Though plaintiff's CPA claim is hardly a model pleading of a state unfair competition claim, nothing in the claim itself indicates that it necessarily arises under federal law; rather, it is apparent that plaintiff chose to "ignore the federal question, assert only state claims, and defeat removal." Duncan, 76 F.3d at 1485.

Nor is plaintiff's unfair competition claim dependent on a substantial, disputed federal question. The only federal issue raised in the complaint is plaintiff's putative ownership of a federally-registered trademark. Compl. (Dkt. # 1), Ex. A at ¶ 3.7. Plaintiff currently owns a federally-registered trademark, a point of fact that defendants admit. See Opp'n (Dkt. # 24) at 3 ("As alleged, [plaintiff] does currently own a federal trademark registration . . . for the 'Ezell's Famous Chicken' mark."). Defendants challenge the validity of this trademark and claim that the mark should be cancelled under 15 U.S.C. § 1052(c). See Third-Party Compl. (Dkt. # 7) at ¶¶ 6.1-6.9. Plaintiff's unfair competition claim does not purport to depend on the validity of this federal registration, see Compl. (Dkt. # 1), Ex. A at ¶¶ 9.1-9.5, nor does it have to. Washington law allows unfair competition claims based on the infringement of common law and state-registered trademarks. See, e.g., Seattle Endeavors, Inc. v. Mastro, 123 Wn.2d 339, 350 (1994) (en banc) (infringement of state-law trademark does not necessarily violate CPA, but can). Defendants' disputation of plaintiff's federal mark is better characterized as a cause of action to invalidate the mark which, as discussed below, can not establish federal question jurisdiction because it is raised in a third party complaint.

ii. Defendants' third-party complaint

Defendants also argue that removal was proper because their third-party complaint alleges federal claims. Opp'n (Dkt. # 24) at 5. While the Ninth Circuit has not ruled specifically on whether a defendant may remove a case on the basis of their third-party complaint, other

circuits have held that a defendant's third-party complaint cannot support removal jurisdiction.[4] See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 326-27 (5th Cir. 1998) ("It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim. Similarly, the defendant's third-party claim alleging a federal question does not come within the purview of § 1441 removability." (internal quotation omitted)); see also id. at 327 n.22 ("While a third-party defendant may remove a case to federal court based on the third-party claim, a defendant/third-party plaintiff may not." (internal citation omitted)). This rule is also supported by the law of this Circuit because a defendant's third-party complaint is not a "voluntary act" of the plaintiff that would render an otherwise non-removable action removable. See California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (discussing "voluntary/involuntary rule").

This interpretation of a district court's removal jurisdiction is further supported by analogy to counterclaims, and by the decisions of other courts that have addressed this question. The United States Supreme Court has explicitly held that counterclaims alleging federal causes of action cannot establish federal question jurisdiction for purposes of removal. See Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 831-32 (2002). Holmes Group involved a challenge to the Federal Circuit's jurisdiction to hear an appeal containing a compulsory patent counterclaim with exclusive appellate jurisdiction in the Federal Circuit. Id. at 828-29.[5] In holding that the Federal Circuit lacked jurisdiction, the Supreme Court explained that allowing removal based on the counterclaim "would allow a defendant to . . . defeat[] a plaintiff's choice of forum," as well as "radically expand the class of removable cases." Id. at

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[4] The dearth of appellate cases on this topic is unsurprising given that under 28 U.S.C. § 1447(d), district court orders remanding cases to state court are ordinarily immune from appellate review.

[5] Though Holmes Group involved the Federal Circuit's patent jurisdiction under 28 U.S.C. § 1338(a), that provision "uses the same operative language," and is thus subject to the same analysis as Section 1331. Id. at 829-30 (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988)).

831. The Court also noted that allowing removal based on counterclaims "would undermine the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts." Id. (internal citation omitted). The reasoning that underlies Holmes Group is equally applicable to a defendant's third-party complaint. Allowing a defendant to remove based on claims alleged in their own third-party complaint would abrogate plaintiffs' choice of forum, dramatically expand the scope of removal jurisdiction, and confound the "quick rule of thumb" provided by the well-pleaded complaint rule. Other district courts addressing this issue have also held that third-party complaints cannot supply a federal question for purposes of removal by the third party complaintant. See, e.g., Cross Country Bank v. McGraw, 321 F. Supp. 2d 816, 819-21 (S.D. W.Va. 2004) (ordering remand despite Sherman Act claims in defendant's third-party complaint).[6] Defendants may not use their own third-party complaint as a basis for removing the entire matter to this Court.

Defendants argue that this matter should not be remanded because the trademark claims alleged in their third-party complaint "must be heard in Federal court for Ezell Stephens to have any kind of meaningful remedy." Opp'n (Dkt. # 24) at 5. Though a state court would have concurrent jurisdiction over defendants' Lanham Act claims, see, e.g., Silvaco Data Sys., Inc. v. Tech. Modeling Assocs., Inc., 896 F.Supp. 973, 977 (N.D. Cal. 1995), defendants argue that such a suit would be ineffectual because "a state court cannot order the United States Patent and Trademark Office to cancel a federal trademark registration." Opp'n (Dkt. # 24) at 5. Even if this Court were the exclusive forum for defendants' Lanham Act claims, however, federal exclusivity of a counter-claim or third-party claim is neither a basis for removal nor for retention

[6] Other district courts, including courts within this Circuit, have reached the same result in unpublished opinions. See, e.g., Mike Nelson Co., Inc. v. Hathaway, 2006 WL 3826736 at *3-4 (E.D. Cal. 2006) (ordering remand despite Miller Act claims in counterclaim and third-party complaint); Leo Finnegan Constr. Co., Inc. v. Nw. Plumbing & Pipefitting, 2005 WL 3348918 at *3 (W.D. Wash. 2005) (ordering remand despite third-party complaint alleging ERISA claims); Metro. Life Ins. Co. v. Balinas, 2002 WL 1298774, at *3 (E.D. La. 2002) (ordering remand despite Sherman Act counterclaim filed after removal).

of jurisdiction over a removed case. Because jurisdiction over a removed case is determined solely by examination of the complaint at the time of removal, see California, 215 F.3d at 1014, this Court has no discretion to retain jurisdiction over defendants' third-party claims. See 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded." (emphasis added)).

Defendants further contend that CR 1 should incline the court to retain jurisdiction over federal claims asserted in the third-party complaint. Opp'n (Dkt. # 24) at 2, 8. Like defendants' exclusive remedy argument, however, this line of reasoning is foreclosed by the Court's lack of original jurisdiction over this matter.

III. ATTORNEY'S FEES

Both parties have requested that the Court grant attorney's fees in ruling on this motion. See Mot. (Dkt. # 22) at 5; Opp'n (Dkt. # 24) at 8; Reply (Dkt. # 25) at 6. Because the Court is granting plaintiff's motion to remand, the Court's order "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Section 1447(c) neither encourages nor discourages fee awards, but instead permits a grant of attorney's fees "only where the removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). "[W]hen an objectively reasonable basis exists, fees should be denied." Id. Courts in this Circuit determine whether removal was objectively reasonable in part "by looking to the clarity of the law at the time of removal." Lussier v. Dollar Tree Stores, Inc., 518 F.3d 1062, 1066 (9th Cir. 2008) (citing Martin, 546 U.S. at 141). District courts also have "discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." Martin, 546 U.S. at 141.

Here, defendants did not have an objectively reasonable basis for removing this matter. Defendants state that they "believed that EFC was stating a federal cause of action in its Complaint," Opp'n (Dkt. # 24) at 4, but this subjective belief was not objectively reasonable

considering the absence of federal law from plaintiff's complaint. Furthermore, defendants' notice of removal cites only to their own third-party complaint. See Not. of Removal (Dkt. # 1) at 3. As discussed above, though there is a paucity of Ninth Circuit case law explicitly dealing with the removability of third-party complaints, the well-pleaded-complaint rule is a long-settled and fundamental tenet of civil procedure. Defendants had no objectively reasonable basis for believing they could remove this case by relying solely on federal claims they themselves asserted, and an award of attorney's fees is appropriate. Cf. FIA Card Services, N.A. v. McComas, 2010 WL 4974113, No. 10-1178, slip op. at 2 (S.D.Cal. Dec. 2, 2010) (awarding attorney's fees after defendant improperly removed on basis of federal counterclaims). There are no unusual circumstances present that would support a departure from the rule.

Mr. Richardson states that Charles Newton and himself incurred a total cost of $9,520.00 in researching and drafting plaintiff's motion to remand. Richardson Decl. (Dkt. # 26) at ¶¶ 7-8; see also id. at Ex. D. Defendants do not address the issue of attorney's fees except to request that the Court award them fees in the event they prevail. See Opp'n (Dkt. # 24) at 8. The Court finds that both the amount of time plaintiff's attorneys expended in researching and drafting the motion to remand, and the attorneys' respective hourly rates, are reasonable. Accordingly, the Court grants plaintiff's motion for attorney's fees in the amount of $9,520.00.

IV. CONCLUSION

For the reasons discussed above, this matter is REMANDED to the court from which it was removed. The Clerk of the Court is directed to transmit the file regarding C10-1424RSL to the Superior Court of the State of Washington in and for the County of King.

Plaintiff's request for attorney's fees in the amount of $9,520.00 is GRANTED.

DATED this 1st day of March, 2011.

Robert S. Lasnik
United States District Judge