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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 VINCENT MANIKAN,
12 Plaintiff,
13 v.
14 PACIFIC RIDGE NEIGHBORHOOD
15 HOMEOWNERS ASSOCIATION, N.N.
16 JAESCHKE, INC., PETERS &
17 FREEDMAN, L.L.P., AND DOES 1-10,
Defendants.

Case No.: 17-cv-00467-BEN-BLM

**ORDER DENYING MOTION FOR
REMAND**

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19 Before the Court is Plaintiff’s Motion to Remand to San Diego County Superior
20 Court. Specifically, Plaintiff argues that the Notice of Removal filed by Defendants
21 Pacific Ridge Neighborhood Homeowners Association (“Pacific Ridge”) and N.N.
22 Jaeschke, Inc. (“Jaeschke”) is procedurally defective, and that this Court lacks subject
23 matter jurisdiction over Plaintiff’s claims. Defendants Pacific Ridge and Jaeschke
24 contest both of these assertions. Defendant Peters & Freedman, L.L.P. (“Peters &
25 Freedman”) did not join in the motion. Upon consideration of the arguments and law, the
26 Court **DENIES** Plaintiff’s Motion to Remand.

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1 **I. BACKGROUND¹**

2 On July 20, 2012, Plaintiff filed a bankruptcy case in the U.S. Bankruptcy Court
3 for the Southern District of California. (Compl. ¶ 21, ECF No. 1). Plaintiff scheduled a
4 claim held by Pacific Ridge in his bankruptcy case, with Pacific Ridge alleging arrears
5 owed in the amount of \$3,047.04. (*Id.* ¶ 22). Defendant Jaeschke filed a Proof of Claim
6 in the bankruptcy case as a collection agent for Pacific Ridge. (*Id.* ¶ 25). On November
7 24, 2015, the Chapter 13 Trustee in Plaintiff’s bankruptcy case filed a Notice of Final
8 Cure Payment and Completion of Payments Under the Plan, and the parties were notified
9 that Plaintiff had repaid all arrears due. (*Id.* ¶ 28).

10 Plaintiff’s instant claims arise from one incident which took place on September 2,
11 2016, when an unknown male process server broke through Plaintiff’s back gate and
12 began pounding on the windows of Plaintiff’s house. (*Id.* ¶¶ 32-35). The police were
13 called and, after their arrival, the unknown male identified himself as an off-duty police
14 officer hired to serve Plaintiff with a Notice of Default (“NOD”) on behalf of Pacific
15 Ridge. (*Id.* ¶¶ 36-37). The NOD had a stamped recordation date of April 9, 2012 and
16 cited a balance owed of \$2,597.04. (*Id.* ¶¶ 38, 40). Across the top of the document, the
17 NOD identified Peters & Freedman as “acting in the function of a debt collector.” (*Id.* ¶
18 39).

19 A few days later, Plaintiff spoke to a representative from Peters & Freedman. (*Id.*
20 ¶ 42). Plaintiff explained that he had repaid all pre-bankruptcy arrears due to Pacific
21 Ridge. (*Id.*) The representative explained that, according to her records, the arrears
22 balance on the NOD was correct and that amount was still due to Pacific Ridge.

23 Plaintiff filed a complaint in San Diego County Superior Court on February 1,
24 2017, alleging two claims for relief. The first claims alleges a violation of the Fair Debt
25 Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, against Defendant Peters
26

27 ¹ The Court is not making any findings of fact, merely summarizing the relevant factual
28 and procedural information to evaluate the motion at hand.

1 & Freedman. The second claim alleges a violation of the Rosenthal Fair Debt Collection
2 Practices Act (“RFDCPA”), California Civil Code §§ 1788-1788.32, against all
3 Defendants.

4 Defendants Pacific Ridge and Jaeschke filed a Notice of Removal on March 7,
5 2017, based on 28 U.S.C. §§ 1331, 1441, and 1446. Paragraph seven of the Notice states:
6 “On information and belief, after conferring with counsel for Peters & Freedman, L.L.P.
7 regarding the grounds for removal, Pacific Ridge and N.N. Jaeschke *have no reason to*
8 *believe that Peters & Freedman, L.L.P. opposes the instant notice of removal.*” (Notice
9 of Rem., ECF No. 1) (emphasis added).

10 On April 6, 2017, Plaintiff filed the instant Motion for Remand. Plaintiff argues
11 that Defendants’ Notice of Removal is defective because Peters & Freedman, L.L.P. did
12 not affirmatively consent to the removal. Plaintiff further argues that this Court does not
13 have original subject matter jurisdiction over Plaintiff’s claims against Defendants Pacific
14 Ridge and Jaeschke because those claims were based in California law. *Id.* Defendants
15 Pacific Ridge and Jaeschke oppose the motion. Defendants contend that the Notice of
16 Removal is not defective because Peters & Freedman never objected to removal and have
17 implicitly consented to federal jurisdiction by filing a motion to dismiss under Federal
18 Rule of Civil Procedure 12(b)(6). Defendants further argue that this Court has original
19 subject matter jurisdiction because Plaintiff included a federal claim in his complaint.

20 II. ANALYSIS

21 I. Procedural Defects in the Notice of Removal

22 The right of a defendant to remove a civil action to federal court is based in statute.
23 *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal
24 statute, 28 U.S.C. § 1441, allows defendants to remove when a case presents a federal
25 question or is between citizens of different states. 28 U.S.C. §§ 1441(a), (b). However,
26 the removing party must comply with certain procedural mandates. At issue here is the
27 “rule of unanimity,” which requires that all properly served and joined defendants “must
28 join in or consent to the removal.” 28 U.S.C § 1446(b)(2)(A). Where fewer than all the

1 defendants have joined in a removal action, the removing party has the burden under §
2 1446(a) to explain affirmatively the absence of any co-defendants in the notice of
3 removal. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999),
4 *superseded by statute on other grounds in Abrego v. The Dow Chem. Co.*, 443 F.3d 676,
5 681 (9th Cir. 2006). The party invoking the court’s jurisdiction bears the burden of
6 demonstrating that removal was proper. *Prize Frize*, 167 F.3d at 1266. The removal
7 statute is strictly construed against removal, and all doubts regarding jurisdiction are
8 resolved in favor of remand. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

9 In *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1224 (9th Cir. 2009), the
10 Ninth Circuit first considered how the unanimity requirement could be met. There, one
11 defendant filed a timely notice a removal indicating that “[a]ll defendants consent to the
12 removal of this action,” but the other defendant failed to timely file a written notice
13 stating its joinder. The court noted that no federal rule or statute specifically explains the
14 particular manner in which a co-defendants’ joinder must be expressed and, as such, it
15 looked to the general principles that govern procedures for removal and attorney
16 representations to district courts under Federal Rule of Civil Procedure 11. The Ninth
17 Circuit concluded that “the filing of a notice of removal can be effective without
18 individual consent documents on behalf of each defendant.” *Id.* at 1225. “One
19 defendant’s timely removal notice containing an averment of the other defendants’
20 consent and signed by an attorney of record is sufficient.” *Id.*

21 In this case, Plaintiff contends that paragraph seven of Pacific Ridge and
22 Jaeschke’s Notice of Removal is insufficient to meet the *Proctor* standard. Plaintiff
23 asserts that the Notice’s language stating that Pacific Ridge and Jaeschke have “no reason
24 to believe that Peters & Freedman opposes the instant notice of removal” is not sufficient
25 because it is not an affirmative statement that all defendants consent to removal. This
26 argument is not without merit.

27 Defendants Pacific Ridge and Jaeschke could have simply made the averment of
28 consent in the language prescribed by the Ninth Circuit. Plaintiff also points out, and this

1 Court takes note, that Peters & Freedman have not joined in the instant motion or made
2 any declarations to support its co-Defendants' contention that Peters & Freedman
3 consented to removal. An averment that the defendant has "no reason to believe" that its
4 co-defendant objects is not an averment of consent. Accordingly, the Court finds that the
5 Notice of Removal is facially deficient. This, however, is not the end of the analysis.

6 Even where a notice of removal is technically deficient, remand is not
7 automatically required. The rule of unanimity in 28 U.S.C. § 1446(b)(2)(A) is a
8 procedural requirement, not a jurisdictional prerequisite. *See Soliman v. Philip Morris*,
9 311 F.3d 966, 970 (9th Cir. 1998). "Procedural requirements exist primarily for the
10 protection of the parties." *Corona-Contreras v. Gruel*, 857 F.3d 1025, 1028-29 (9th Cir.
11 2017) (citing *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d
12 1190, 1192 (9th Cir. 2003)). "[A] procedural defect existing at the time of removal but
13 cured prior to entry of judgment does not warrant reversal and remand of the matter to
14 state court." *Soliman*, 311 F.3d at 970-71 (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 703
15 (9th Cir. 1998)).

16 Where consent is not explicit, courts have considered other indications of non-
17 removing defendants' consent to removal. In *Hernandez v. Six Flags Magic Mountain*,
18 *Inc.*, 688 F. Supp. 560, 562 (C.D. Cal. 1988), the district court found that by filing an
19 answer to the complaint in federal court, the non-removing defendant "manifested its
20 assent" to removal. In another case, the district court again took note that the non-
21 removing defendant filed an answer after removal, rather than oppose removal. *Gerawan*
22 *Farming, Inc., v. Worrel & Worell*, No. 1:10-cv-02011, 2011 WL 202453, at *2 (E.D.
23 Cal. Jan. 20, 2011). The non-removing defendant's "consent to removal was further
24 evidence[d] by discussions between counsel weeks prior to filing of the Notice of
25 Removal," in which its counsel notified removing defendant's counsel that his client
26 consented to removal. *Id.* at *3. Furthermore, in *Cardroom International LLC v.*
27 *Scheinberg, Inc.*, No. CV 12-02870, 2012 WL 263330, at *6 (C.D. Cal. June 18, 2012),
28 the district court did not find fault with the unanimity requirement where one of the non-

1 removing defendants filed a Rule 12(b)(1) motion after removal. And, in *Proctor*, the
2 Ninth Circuit considered the lack of objection from the non-removing defendant
3 important in denying remand. *Proctor*, 584 F.3d at 1225.

4 Here, Peters & Freedman did not join in the Notice of Removal, nor has it joined
5 its co-Defendants' Opposition to Motion for Remand. However, Pacific Ridge and
6 Jaeschke indicated in their Notice of Removal that they "conferred" with counsel from
7 Peters & Freedman before filing their Notice of Removal and that Peters & Freedman did
8 not oppose removal. Pacific Ridge and Jaeschke's counsel signed that Notice under
9 threat of Rule 11 sanctions. Furthermore, Peters & Freedman never objected to the
10 removal and, instead, filed a motion to dismiss under Rule 12(b)(6) within the time
11 period given to oppose removal. Given these circumstances, Peters & Freedman has
12 manifested its consent to removal. *See Proctor*, 584 F.3d at 1225 (explaining that the
13 availability of sanctions and opportunity to object to removal "mitigate concerns that one
14 defendant might falsely state the other defendants' consent, or that one defendant might
15 game the system by silently allowing another to remove and, if the federal forum proves
16 disadvantageous, belatedly object that he had not consented.").

17 **II. Subject Matter Jurisdiction**

18 With the issue of consent resolved, the remaining issue is whether the Court has
19 subject matter jurisdiction. Plaintiff argues that the Court lacks jurisdiction because the
20 complaint does not allege any federal claims against removing Defendants Pacific Ridge
21 and Jaeschke and, instead, only alleges claims against them based in California law. The
22 Court disagrees and finds that it has subject matter jurisdiction over Plaintiff's claims.

23 The existence of federal question jurisdiction is determined from the face of the
24 complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Federal courts hold
25 original jurisdiction over those cases in which the complaint establishes that federal law
26 creates the cause of action for plaintiff's claims, thereby conferring original jurisdiction
27 under 28 U.S.C. § 1441. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*
28 *for S. Cal.*, 463 U.S. 1, 22 (1983). Once federal court jurisdiction is established,

1 supplemental jurisdiction is also established over state law claims that are “so related to
2 the claims in the action within original jurisdiction that they form part of the same case or
3 controversy.” 28 U.S.C. § 1367(a).

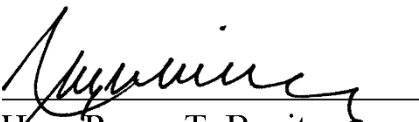
4 Although Plaintiff rightfully argues that his California state law claims do not
5 create subject matter jurisdiction, his claim based on federal law does. “The threshold
6 requirement for removal jurisdiction under 28 U.S.C. § 1441 is a finding that the
7 complaint contains a cause of action that is within the original jurisdiction of the district
8 court.” *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 861 (9th Cir. 2003). The
9 plaintiff is the “master of his complaint” and may avoid federal jurisdiction by relying
10 exclusively on state law. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102,
11 1106 (9th Cir. 2000). Plaintiff alleges only two claims: one based in federal law under
12 15 U.S.C. § 1692 and one based in California law under California Civil Code § 1788.
13 Thus, this is a straightforward example of a complaint that “contains a cause of action
14 that is within the original jurisdiction of the district court.” *Ansley*, 340 F.3d at 861. In
15 turn, the Court exercises supplemental jurisdiction over Plaintiff’s state law claims.

16 III. CONCLUSION

17 For the reasons set forth above, Plaintiff’s Motion for Remand is **DENIED**.

18 **IT IS SO ORDERED.**

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20 Dated: July 10, 2017

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22 Hon. Roger T. Benitez
23 United States District Judge
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