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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PROPERTY WEST, INC., a California corporation, et al,

Plaintiffs,

v.

KINSALE INSURANCE COMPANY, an Arkansas corporation; DOES 1 through 20, inclusive,

Defendant.

Case No.: 3:22-cv-530-W-BGS

ORDER:
(1) GRANTING PLAINTIFFS’ MOTION TO REMAND [DOC. 7];
AND
(2) DENYING PLAINTIFFS’ REQUEST FOR ATTORNEYS’ FEES [DOC. 7]

AND RELATED COUNTERCLAIMS

Pending before the Court is Plaintiffs Property West, Inc., Juan Maciel, Laura Rabago, Irma Conde, Adrianna Garcia, and Alejandra Lopez’ (collectively, “Plaintiffs”) Motion to Remand this case to the San Diego Superior Court. (*Mot.* [Doc. 7].) Plaintiffs also request \$22,089.25 in attorneys’ fees that were incurred due to the removal. (*Reply* [Doc. 13] at 10.) Defendant Kinsale Insurance Company opposes both requests. (*Opp’n* [Doc. 12].)

1 The Court takes the matter under submission and without oral argument. See Civ.
2 R. 7.1(d)(1). For the following reasons, the Court **GRANTS** Plaintiffs’ Motion to Remand,
3 **ORDERS** the case remanded, and **DENIES** Plaintiffs’ request for attorneys’ fees. [Doc.
4 7].

5
6 **I. RELEVANT BACKGROUND**

7 This case concerns an insurance coverage dispute arising out of an underlying
8 lawsuit alleging various employment practice claims. Plaintiff Property West is a property
9 management company; Plaintiffs Juan Macial, Laura Rabago, Irma Conde, Adrianna
10 Garcia, and Alejandra Lopez were at all relevant times employees of Property West. (*Mot.*
11 at 3:11-13.) In March of 2020, Sandra Castro, a former employee of Property West, filed
12 suit against Property West and the above-referenced individuals in San Diego Superior
13 Court, alleging (among other things) employment discrimination, harassment, wrongful
14 discharge, and retaliation. (*Caplan Decl. Ex. A* [Doc. 7-3] at 8:6-8.)

15 Property West then tendered Castro’s Complaint to its Employment Practices
16 Liability insurer, Defendant Kinsale Insurance Company (“Kinsale”). (*Id.* at 9:6-7.) But
17 Kinsale denied coverage because the claim was allegedly made prior to the policy period.
18 (*Id.* at 9:10-15.) As a result, on February 17, 2022, Plaintiffs sued Defendant Kinsale in
19 San Diego Superior Court, alleging breach of contract, and seeking a declaration of
20 coverage. (*Caplan Decl. Ex. A* at 10-17.) The Complaint, however, did not clearly allege
21 whether the amount in controversy exceeded \$75,000. (*Opp’n* at 3:19-23.) So Kinsale
22 requested that Plaintiffs stipulate that it did. (*Id.*) Plaintiffs agreed and on March 30, 2022,
23 sent Kinsale the executed stipulation. (*Caplan Decl. Ex. B* [Doc. 7-4].)

24 On April 14, 2022, Kinsale filed an Answer to Plaintiffs’ Complaint along with a
25 Cross-Complaint against Plaintiffs and Sandra Castro in the Superior Court, seeking a
26 declaration of non-coverage and alternatively, a rescission of the insurance policy. (*Mot.*
27 at 5:1-6.) Castro was not a party to this action prior to Kinsale naming her in its Cross-
28 Complaint. (*Id.* at 5:6-8.)

1 On April 18, 2022, four days after filing its Cross-Complaint in state court, Kinsale
2 removed the case to this Court based on diversity jurisdiction. (*Id.* at 5:9-11.) Plaintiffs
3 now move to remand the case back to state court. (*Mot.* at 2:2-9.)
4

5 **II. LEGAL STANDARD**

6 A federal court cannot reach the merits of any dispute until it confirms that it retains
7 jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998). “Federal
8 courts are courts of limited jurisdiction.” Kokkonen v. Guardian Life Ins. Co. of Am., 511
9 U.S. 375, 377 (1994). “They possess only that power authorized by Constitution or a
10 statute, which is not to be expanded by judicial decree.” *Id.* (internal citations omitted).
11 “It is to be presumed that a cause lies outside this limited jurisdiction ... and the burden of
12 establishing the contrary rests upon the party asserting jurisdiction.” *Id.* (internal citations
13 omitted).

14 The district court has an obligation to raise lack of subject matter or removal
15 jurisdiction *sua sponte*. See 28 U.S.C. § 1447(c). Therefore, in a removal action, a district
16 court must remand a case to state court if, at any time before final judgment, the court
17 determines that it lacks subject matter jurisdiction. See id. Consistent with the limited
18 jurisdiction of federal courts, the removal statute is strictly construed against removal
19 jurisdiction. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). “The ‘strong
20 presumption’ against removal jurisdiction means that the defendant always has the burden
21 of establishing that removal is proper.” *Id.* (citations omitted). “Federal jurisdiction must
22 be rejected if there is any doubt as to the right of removal in the first instance.” *Id.* (citation
23 omitted).

24 25 **III. DISCUSSION**

26 Plaintiffs challenge the removal on grounds that Defendant Kinsale invoked the
27 jurisdiction of the state court and waived its right to remove by filing a permissive Cross-
28 Complaint in San Diego Superior Court. (*Mot.* at 2:10-14.) Additionally, Plaintiffs request

1 attorneys' fees and costs in the amount of \$22,089.25 incurred as a result of Kinsale's
2 removal. (*Reply* at 10.) Defendant Kinsale opposes.

3
4 **A. Defendant Kinsale Waived the Right to Remove by Filing a Permissive**
5 **Cross-Complaint in State Court**

6 On April 14, 2022, Defendant Kinsale filed an Answer and Cross-Complaint against
7 Plaintiffs in state court. (*Mot.* at 5:1-6.) The Cross-Complaint also named Sandra Castro,
8 who was not previously a party to this action. (*Id.* at 5:6-8.) Four days later, on April 18,
9 2022, Defendant purported to remove the entire action to this Court based on diversity
10 jurisdiction. (*Id.* at 5:9-11.) The issue before the Court is whether Defendant Kinsale may
11 properly remove an action to federal court after it has submitted a state court Answer and
12 Cross-Complaint against Plaintiffs and a new third party.

13 A defendant “may waive the right to remove to federal court where, after it is
14 apparent that the case is removable, the defendant takes actions in state court that manifest
15 his or her intent to have the matter adjudicated there and to abandon his or her right to a
16 federal forum.” Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th
17 Cir. 1994). The alleged waiver of such a right must be “clear and unequivocal,” and in
18 general, “the right of removal is not lost by action in state court short of proceeding to an
19 adjudication on the merits.” Beighley v. F.D.I.C., 868 F.2d 776, 782 (5th Cir. 1989)
20 (superseded by statute on other grounds) (citations omitted).

21 On the one hand, “merely filing a responsive pleading,” like an answer or a
22 compulsory cross-complaint, does not constitute a waiver of the right to remove. Acosta
23 v. Direct Merchants Bank, 207 F.Supp.2d 1129, 1131 (S.D. Cal. 2002) (relying on Bayside
24 Developers, 43 F.3d at 1240) (finding no waiver of the right to remove where the removing
25 party took defensive action to avoid a judgment being entered automatically against him).
26 Indeed, under California law, a defendant is obligated to make any compulsory claims
27 against the plaintiff at the time of its answer or risk being unable to assert such claims in a
28 later lawsuit. Cal. Civ. Proc. Code (“CCP”) § 426.30. On the other hand, taking an

1 “offensive” action like “[f]iling a permissive counterclaim or third-party complaint ... does
2 constitute waiver.” Cal. Republican Party v. Mercier, 652 F.Supp. 928, 931 (C.D. Cal.
3 1986) (citation omitted); see also Acosta, 207 F.Supp.2d at 1132 (holding that defendant
4 waived its right to removal by filing a permissive cross-complaint against plaintiff in state
5 court, even though defendant removed the case to federal court only four days later).

6 The narrow issue here is whether Kinsale’s Cross-Complaint against Plaintiffs and
7 Third-Party Sandra Castro in state court was compulsory or permissive. Kinsale argues
8 that its Cross-Complaint consists *solely* of compulsory counterclaims. However, by
9 joining Castro as a new party, Kinsale’s Cross-Complaint is necessarily rendered
10 permissive, even if the declaratory relief sought against the original Plaintiffs is
11 compulsory. That is because “[e]xcept as between plaintiffs and defendants, there is no
12 compulsory cross-complaint in California procedure.” Maldonado v. Harris, 370 F.3d 945,
13 952 (9th Cir. 2004) (holding that cross complaints are permissive between parties and
14 nonparties) (citation omitted).

15 In other words, Kinsale was not required to bring an action against Sandra Castro at
16 the time of its Answer because she was not an original plaintiff in the state court action.
17 Thus, Kinsale’s cross-complaint in state court was permissive.

18 Kinsale counters that Castro is an “indispensable” party and that joining a third-party
19 claimant as a defendant in a declaratory relief action is proper and assures that the court’s
20 determination regarding coverage will bind the third party in later litigation. See Shapiro
21 v. Republic Indem. Co. of America, 52 Cal.2d 437, 440 (1959). However, the insurance
22 company is still not required to join the injured third party. See Royal Indem. Co. v. United
23 Enters., Inc., 162 Cal.App.4th 194, 212 (2008) (“Although a liability insurer is allowed to
24 affirmatively join an injured third party as a codefendant in a declaratory relief action to
25 determine coverage, *the insurer is not required to do so.*”) (citations omitted; emphasis
26 added). Castro is not an indispensable party because her absence would not prevent the
27 court from rendering an effective judgment between the original Parties. See CCP § 389.
28

1 Lastly, Kinsale argues that it never actually invoked the jurisdiction of the state court
2 as to Castro because it never requested a state court summons for her and only served her
3 with a summons issued by this Court. (*Opp'n* at 7:25-8:4). Kinsale relies on Sullivan v.
4 Sullivan for this argument, but that case is distinguishable because it concerned the inherent
5 power of a court to set aside void judgments based on fraudulent service. 256 Cal.App.2d
6 310, 304-05 (1967). In contrast, the issue here is whether Kinsale filed a permissive or
7 compulsory cross-complaint in state court. Not whether the state court exercised personal
8 jurisdiction over Castro.

9 Accordingly, this case was improperly removed and is subject to immediate remand
10 to San Diego Superior Court for all further proceedings.

11
12 **B. Plaintiffs Are Not Entitled to Attorneys' Fees Because Defendant Had an**
13 **Objectively Reasonable Basis for Seeking Removal**

14 Plaintiffs also request attorneys' fees in the amount of \$22,089.25 incurred as
15 a result of Defendant Kinsale's removal under 28 U.S.C. Section 1447(c).

16 Attorneys' fees in connection with remand are discretionary, not mandatory.
17 Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005) ("a remand order 'may'
18 require payment of attorney's fees—not 'shall' or 'should.'"); see also Fogerty v.
19 Fantasy, Inc., 510 U.S. 517, 533 (1994) ("[t]he word 'may' clearly connotes
20 discretion."). The standard for awarding attorneys' fees turns on whether removal
21 was reasonable. See Martin, 546 U.S. at 141. "Absent unusual circumstances,
22 courts may award attorney's fees under § 1447(c) only where the removing party
23 lacked an objectively reasonable basis for seeking removal. Conversely, when an
24 objectively reasonable basis exists, fees should be denied." Id. A showing of bad
25 faith by the removing party is not necessary for an award of costs an attorney's fees.
26 Moore v. Permanente Med. Grp., Inc., 981 F.2d 443, 446 (9th Cir. 1992).

27 Here, Defendant Kinsale had an objectively reasonable basis to invoke federal
28 jurisdiction by removing the case such that attorneys' fees should not be awarded.

1 While these authorities are not binding on this Court, Kinsale reasonably relied on
2 several unpublished cases from other jurisdictions that did not find waiver if *at least*
3 *some* of the claims asserted in a state court cross-complaint constituted compulsory
4 counterclaims. See Lang v. Mattison, 2013 WL 2103145, at *4 (E.D. Ky. May 14,
5 2013) (where “at least a portion of the claims and counterclaims arise out of the same
6 transaction or occurrence,” remand is not appropriate); B & S Equip. Co. v. Cent.
7 States Underwater Contracting, Inc., 2020 WL 1466765, at *6 (E.D. La. Mar. 26,
8 2020) (where a counterclaim consists of both compulsory and permissive claims, “it
9 cannot be said that [defendant] clearly and unequivocally waives its right to
10 removal”; further noting that “waiver should not be so lightly inferred” in such
11 circumstances). These cases are distinguishable from the present as each involved
12 counterclaims between plaintiff and defendant alone and did not address the
13 permissive joinder of a new third party.

14 In addition, Kinsale filed its Notice of Removal only four days after filing its
15 Answer and Cross-Complaint in state court, so any prejudice to Plaintiffs is slight.
16 (*Mot.* at 5:9-11.)

17 Accordingly, Kinsale had an objectively reasonable basis for removal such that
18 attorneys’ fees are not warranted.

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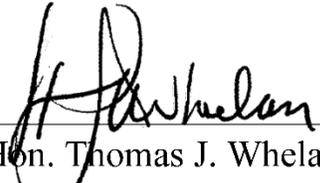
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1 **IV. ORDER & CONCLUSION**

2 In light of the foregoing, the Court **GRANTS** Plaintiffs' Motion to Remand [Doc.
3 7], **ORDERS** the case remanded to the San Diego Superior Court, and **DENIES** Plaintiffs'
4 request for attorneys' fees [Doc. 7].

5 **IT IS SO ORDERED.**

6 Dated: June 13, 2022

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9 Hon. Thomas J. Whelan
United States District Judge

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