

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LORIANNE WATTS,)	Case No.: 10-CV-02606-LHK
)	
Plaintiff,)	ORDER DENYING MOTION TO
v.)	REMAND; GRANTING T-MOBILE'S
)	MOTION TO DISMISS WITH LEAVE
ENHANCED RECOVERY CORP.; LAW)	TO AMEND
OFFICES OF MITCHELL N. KAY; BUREAU)	
OF COLLECTION RECOVERY; T-MOBILE)	
USA, INC.; AND DOES I-X,)	
)	
Defendants.)	
)	

Currently before the Court are Plaintiff Lorianne Watts's Second Motion to Remand and Defendant T-Mobile's motion to dismiss, or, in the alternative, for summary judgment. Plaintiff, who is represented by counsel, failed to oppose T-Mobile's motion and failed to file a reply in support of her motion to remand. Plaintiff's counsel also did not appear at the motion hearing and case management conference held on January 13, 2011. Having considered the submissions and arguments of the parties, the Court DENIES Plaintiff's motion to remand and GRANTS Defendant T-Mobile's motion to dismiss with leave to amend.

I. Background

This action arises out of attempts by Defendants T-Mobile USA, Inc. ("T-Mobile"), Enhanced Recovery Corp. ("Enhanced Recovery"), Law Offices of Mitchell N. Kay ("Kay"), and

1 Bureau of Collection Recovery (“BCR”) to collect a debt of a \$404.59 allegedly owed by an
2 individual named Loraine Watis to T-Mobile. FAC ¶¶ 11-13, 31. Plaintiff Lorriane Watts alleges
3 that she was contacted by Defendants Kay and BCR in 2008 regarding this debt. FAC ¶ 11. She
4 alleges further that she informed T-Mobile, Kay, and BCR that she had never had an account with
5 T-Mobile and was not the person responsible for the debt, and she requested that they cease debt
6 collection activity. *Id.* Defendants Kay and BCR continued to pursue the debt, however, and
7 sometime in or around 2009, Enhanced Recovery allegedly obtained Plaintiff’s cell phone number
8 and began making repeated calls to Plaintiff regarding the debt. FAC ¶ 11, 13. Plaintiff claims
9 that despite her persistent efforts to dispute the debt, Defendants’ collection efforts and adverse
10 credit reporting did not cease. *Id.*

11 Plaintiff filed her original Complaint in state court on April 27, 2010, asserting both state
12 and federal causes of action. Defendants removed the action to federal court on June 14, 2010.
13 Notice of Removal, ECF No. 1. Plaintiff moved to remand the case to state court based on
14 procedural defects in the removal process, but this Court denied Plaintiff’s motion, finding removal
15 timely and proper. Order Denying Mot. to Remand, ECF No. 36. The Court then considered
16 Defendant Enhanced Recovery’s motion to dismiss three of Plaintiff’s state law causes of action
17 for intentional misrepresentation, negligent misrepresentation, and violations of the California
18 Unfair Competition Law, Cal. Bus. & Profs. Code § 17200 *et seq.* On October 19, 2010, the Court
19 granted the motion to dismiss with leave to amend the dismissed claims. Order Granting Mot. to
20 Dismiss Pl.’s Fourth, Fifth, and Eighth Causes of Action with Leave to Amend 6, ECF No. 55.
21 Although none of Plaintiff’s federal causes of action were at issue in the motion to dismiss, when
22 Plaintiff filed a First Amended Complaint (“FAC”) on November 17, 2010, she omitted both the
23 dismissed state law causes of action and her federal claims.

24 The complaint as amended alleges four state law causes of action: (1) violations of the
25 California Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*; (2) violations of the
26 California Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.25 *et seq.*; (3) libel;
27 and (4) invasion of privacy/false light. Plaintiff now moves to remand the action to state court on
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1 grounds that the Court lacks subject matter jurisdiction because the FAC no longer contains federal
2 claims. In addition, Defendant T-Mobile moves to dismiss Plaintiff’s FAC as to T-Mobile only, or,
3 in the alternative, seeks summary judgment as to T-Mobile only, on grounds that none of the
4 causes of action contained in the FAC state a claim against T-Mobile. Pursuant to the case
5 scheduled adopted on September 2, 2010, fact discovery closed on December 6, 2010, and this case
6 is set for trial in April 2011. Minute Order & Case Management Order, ECF No. 37.

7 **II. Motion to Remand**

8 **A. Legal Standard**

9 A Plaintiff may bring a motion to remand to challenge removal of an action to federal court.
10 28 U.S.C. § 1447(c). Once the action has been removed, if at any time before final judgment it
11 appears that the district court lacks subject matter jurisdiction, the case must be remanded. *Id.* In
12 considering a motion to remand, “jurisdiction must be analyzed on the basis of the pleadings filed
13 at the time of removal without reference to subsequent amendments.” *Sparta Surgical Corp. v.*
14 *National Ass’n of Securities Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998). “The removal
15 statute is strictly construed, and any doubt about the right of removal requires resolution in favor of
16 remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) (citing
17 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). Because of the “strong presumption”
18 against removal jurisdiction, the defendant bears the burden of establishing the facts to support
19 jurisdiction. *Gaus*, 980 F.2d at 566-67.

20 **B. Discussion**

21 Plaintiff argues that this Court now lacks subject matter jurisdiction over this action because
22 the First Amended Complaint no longer contains federal causes of action, and she requests that the
23 Court remand the case to state court on this ground. As an initial matter, the Court notes that it is
24 not divested of subject matter jurisdiction on the basis of Plaintiff’s amended complaint. In a
25 removed action, “jurisdiction must be analyzed on the basis of the pleadings filed at the time of
26 removal without reference to subsequent amendments.” *Sparta Surgical*, 159 F.3d at 1213.
27 Accordingly, “a plaintiff may not compel remand by amending a complaint to eliminate the federal
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1 question upon which removal was based.” *Id.* See also *Williams v. Costco Wholesale Corp.*, 471
2 F.3d 975, 976 (9th Cir. 2006) (per curiam) (“We have long held that post-removal amendments to
3 the pleadings cannot affect whether a case is removable, because the propriety of removal is
4 determined solely on the basis of the pleadings filed in state court.”). Because the Court has
5 already determined that federal question jurisdiction existed at the time of removal, Order Denying
6 Mot. to Remand 4, Plaintiff’s decision to omit her federal claims from the First Amended
7 Complaint does not divest this court of subject matter jurisdiction.

8 Moreover, as Defendants point out, it is not clear that Plaintiff has in fact omitted all of her
9 federal claims from the First Amended Complaint. Although styled as a claim for violations of
10 California’s Fair Debt Collection Practices Act, Plaintiff’s first cause of action contains an
11 allegation that Defendants violated 15 U.S.C. § 1692g(b) by refusing to cease collection activity on
12 a debt disputed by Plaintiff. FAC ¶ 16(c). The Court cannot determine whether (a) retention of
13 this federal claim in the FAC was simply an oversight, (b) Plaintiff intends to allege a violation of
14 Cal. Civ. Code § 1788.17, which requires compliance with 15 U.S.C. §§ 1692b – 1692j, or (c)
15 Plaintiff intends to allege an independent claim under the federal Fair Debt Collection Practices
16 Act. As Plaintiff’s counsel did not file a reply in support of the motion to remand and did not
17 appear at the motion hearing, Plaintiff has waived two opportunities to explain the presence of this
18 federal claim in the FAC. Accordingly, it appears that Plaintiff has conceded that her claim under
19 15 U.S.C. § 1692g(b) is a federal claim that confers federal question jurisdiction on this Court and
20 prevents remand of the case to state court.

21 Even if the Court assumes, however, that Plaintiff would be willing to strike the federal
22 allegation from the FAC, the Court agrees with Defendants that remand is not warranted at this
23 stage of the case. As noted above, removal jurisdiction is analyzed at the time of removal, and “a
24 plaintiff may not compel remand by amending a complaint to eliminate the federal question upon
25 which removal was based.” *Sparta Surgical*, 159 F.3d at 1213. Nonetheless, in cases where all
26 federal claims have dropped out and only pendent state law claims remain, a district court has
27 discretion to remand the removed case upon a determination that retaining jurisdiction over the
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1 case would be inappropriate. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 357 (1988). “A
2 district court's decision whether to exercise [supplemental jurisdiction over state claims] after
3 dismissing every claim over which it had original jurisdiction is purely discretionary.” *Carlsbad*
4 *Technology, Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862, 1866 (2009). In determining whether remand is
5 appropriate, a district court should consider “the values of judicial economy, convenience, fairness,
6 and comity.” *Cohill*, 484 U.S. at 350. The court should also take into account whether the plaintiff
7 has attempted to manipulate the forum by deleting federal claims, *id.* at 357, and whether the state
8 claims present novel or complex issues of state law. 28 U.S.C. § 1367(c); *see also Holly D. v.*
9 *California Institute of Technology*, 339 F.3d 1158, 1181 n.28 (9th Cir. 2003) (remanding remaining
10 state law claims because they “require[d] multiple decisions on important, unsettled, and policy-
11 laden issues of California law”).

12 In this case, the Court believes that the balance of factors favors retaining jurisdiction over
13 Plaintiff’s state claims. Plaintiff’s case has been in federal court for approximately seven months
14 now. *See Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991) (noting that retention of
15 pendent claims may be appropriate even when case has been in federal court as little as four
16 months). During that time, the Court ruled on three of Plaintiff’s state claims, *see* Order Granting
17 Mot. to Dismiss Pl.’s Fourth, Fifth, and Eighth Causes of Action with Leave to Amend 6, ECF No.
18 55, and set a schedule, stipulated to by the parties, that would allow Plaintiff to resolve her case
19 expeditiously in federal court. Under the case schedule, fact discovery closed on December 6,
20 2010, more than a month ago. Dispositive motions are due by January 20, 2011, two days from
21 now. Trial is set for April 11, 2011, less than three months from now. The Court has also referred
22 the case to court-sponsored mediation, and the parties have selected a mediator. *See* ADR Clerks
23 Notice Appointing Barbara Clay as Mediator, EFC No. 57.

24 It is true that the Court has not yet ruled on any of the claims in Plaintiff’s First Amended
25 Complaint, and in that sense, the Court has not invested extensive resources in the state claims
26 currently alleged. However, Defendant T-Mobile’s motion to dismiss the FAC is currently before
27 the Court, and Plaintiff moved for remand only after T-Mobile filed its motion. No party has
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1 argued that Plaintiff’s state claims involve complex or unsettled issues of state law, and the Court
2 has no reason to believe these claims cannot be resolved competently in federal court. Moreover,
3 as this Court has never indicated that Plaintiff’s federal claims may lack merit, the Court is
4 concerned that Plaintiff may have dropped her federal claims in an attempt to manipulate the
5 forum. The Court notes, in addition, that Plaintiff has declined to submit arguments as to why the
6 values of judicial economy, convenience, fairness, and comity support a discretionary remand,
7 either in a reply to Defendants’ opposition briefs or through argument at the motion hearing.

8 Considering the proximity of trial, the relatively straight-forward appearance of Plaintiff’s
9 state law claims, and the seven months of federal litigation in this case, the Court concludes that
10 retaining supplemental jurisdiction over Plaintiff’s state claims will best serve judicial economy,
11 convenience, comity, and fairness.¹ Accordingly, the Court DENIES Plaintiff’s motion to remand.

12 **III. T-Mobile’s Motion to Dismiss**

13 **A. Legal Standard**

14 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
15 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering
16 whether the complaint is sufficient to state a claim, the court must accept as true all of the factual
17 allegations contained in the complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). However,
18 the court need not accept as true “allegations that contradict matters properly subject to judicial
19 notice or by exhibit” or “allegations that are merely conclusory, unwarranted deductions of fact, or
20 unreasonable inferences.” *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d
21 1049, 1055 (9th Cir. 2008). While a complaint need not allege detailed factual allegations, it “must
22 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
23 face.’” *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
24 (2007)). A claim is facially plausible when it “allows the court to draw the reasonable inference
25 that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949. If a court grants
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27 ¹ Because the Court concludes that the case should remain in federal court on the basis of federal
28 question and supplemental jurisdiction, the Court does not decide whether diversity jurisdiction
provides an independent jurisdictional basis that would require the case to remain in federal court.

1 a motion to dismiss, leave to amend should be granted unless the pleading could not possibly be
2 cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

3 **B. Discussion**

4 Plaintiff's First Amended Complaint asserts three causes of action against Defendant
5 T-Mobile: (1) the first cause of action for violations of California's Fair Debt Collection Practices
6 Act; (2) the third cause of action for libel; and (3) the fourth cause of action for invasion of
7 privacy/false light. T-Mobile argues that none of these causes of action state a viable claim against
8 it. Accordingly, T-Mobile moves to dismiss the entire FAC as against T-Mobile only pursuant to
9 Federal Rule 12(b)(6), or, in the alternative, seeks summary judgment in its favor. Plaintiff has not
10 opposed the motion.

11 **1. California Fair Debt Collection Practices Act**

12 Plaintiff's first cause of action alleges two violations of the California Fair Debt Collection
13 Practices Act, also known as the Rosenthal Act, Cal. Civ. Code. §§ 1788 et seq, and a violation of
14 the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692g(b). First, Plaintiff
15 alleges that Defendants violated California Civil Code § 1788.10(c) by making periodic monthly
16 reports to credit reporting agencies that falsely represented that the debt at issue was owed by
17 Plaintiff. FAC ¶ 16(a). As T-Mobile points out, although Plaintiff alleges that BCR and Kay
18 reported adverse credit information to credit reporting agencies, FAC ¶ 11, the amended complaint
19 does not allege that T-Mobile made any communications regarding the purported debt to any credit
20 reporting agencies. Additionally, while the FAC alleges that T-Mobile assigned the underlying
21 debt to BCR, Kay, and Enhanced Recovery, FAC ¶ 12, it does not allege that T-Mobile represented
22 to the other Defendants that the debt belonged to Lorianne Watts, as opposed to Loraine Watis, or
23 otherwise made communications likely to defame Plaintiff. *See* § 1788.10(c) (prohibiting certain
24 communications that the debt collector should have known would defame the consumer). Thus,
25 the FAC does not establish any factual basis for finding T-Mobile liable under § 1788.10(c).

26 Second, Plaintiff alleges that Defendants violated California Civil Code § 1788.13(j) by
27 "communicating with plaintiff by false representation that she owed a purported debt incurred by
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1 ‘Lorraine Watis.’” FAC ¶ 16(b). As above, although Plaintiff alleges that BCR and Kay contacted
2 her about the debt in 2008, FAC ¶ 11, and that Enhanced Recovery contacted her about the debt in
3 2009, FAC ¶ 13, the FAC does not allege that T-Mobile ever communicated with Plaintiff about
4 the alleged debt. Nor does the FAC allege that T-Mobile in any way represented, to Plaintiff or to
5 anyone else, that a legal proceeding would be instituted unless the debt was paid. *See* Cal. Civ.
6 Code. § 1788,13(j) (prohibiting attempts to collect a debt through false representation that legal
7 proceedings have been or will be instituted if the debt is not paid). Thus, the FAC does not set
8 forth facts sufficient to state a plausible claim against T-Mobile under § 1788.13(j).

9 Finally, Plaintiff alleges that Defendants violated 15 U.S.C. § 1692g(b) by refusing to cease
10 collection activity on a debt disputed by Plaintiff.² To the extent that Plaintiff intends to allege a
11 violation of federal law, the FAC does not contain any facts suggesting that T-Mobile is a “debt
12 collector” such that Section 1692g(b) of the federal FDCPA would apply. *See* 15 U.S.C. §
13 1692a(6) (defining “debt collector” to include any person who uses interstate commerce or the
14 mails “in any business the principal purpose of which is the collection of any debts, or who
15 regularly collects . . . debts . . . owed or due another”). A creditor is not a “debt collector” under
16 the FDCPA unless it uses a name other than its own so that it appears that a third person is
17 attempting to collect the debt. *Id.*; *see also Rowe v. Educational Credit Management Corp.*, 559
18 F.3d 1028, 1031 (9th Cir. 2009) (“a ‘creditor’ is not a ‘debt collector’ under the FDCPA”).
19 Because Plaintiff has not alleged that T-Mobile is the business of collecting debts or has used a
20 name other than its own in collecting its own debts, the FAC does not state a claim against T-
21 Mobile under the federal FDCPA.

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24 ² As discussed above, it is unclear whether Plaintiff intends to allege a claim directly under the
25 federal FDCPA or whether she means to allege a violation of Cal. Civ. Code § 1788.17, which
26 requires compliance with 15 U.S.C. §§ 1692b – 1692j. The cause of action is labeled “Violation of
27 California’s Fair Debt Collection Practices Act,” but the allegation as to 15 U.S.C. § 1692g(b)
28 simply states “Defendants’ violations included, but were not limited to . . . Violation of 15 U.S.C.
sec. 1692g(b) by refusing to cease collection activity on a debt disputed by plaintiff within 30 days
of receipt of collection notices.” FAC ¶ 16(c). There is no mention of Cal. Civ. Code § 1788.17.
The allegation may have been mistakenly retained from the original Complaint, which alleged both
state and federal causes of action.

1 that defendants “either reported or authorized the reporting to national credit reporting agencies”
2 that Plaintiff owed the debt of “Loraine Watis,” the FAC includes no factual allegations suggesting
3 that T-Mobile authorized or caused the other Defendants to report that the assigned debt was owed
4 by Plaintiff. Nor does the complaint contain allegations suggesting that T-Mobile communicated
5 to the other Defendants that the debt of “Loraine Watis” was actually owed by Lorianne Watts, and
6 that the other Defendants then republished this statement. As Plaintiff failed to oppose T-Mobile’s
7 motion, she has raised no argument as to why, based on the limited allegations in the amended
8 complaint, the court should find it plausible that T-Mobile intentionally published a defamatory
9 statement about Plaintiff. Without factual allegations plausibly suggesting that T-Mobile
10 communicated to the other Defendants that Plaintiff owed the assigned debt or authorized them to
11 report such information to credit reporting agencies, the FAC is insufficient to state a claim for
12 libel against T-Mobile. Accordingly, Plaintiff’s third cause of action for libel is DISMISSED, with
13 leave to amend, as to Defendant T-Mobile only.

14 **3. Invasion of Privacy/False Light**

15 Finally, Plaintiff’s fourth cause of action alleges invasion of privacy/false light against all
16 defendants. The tort of false light invasion of privacy is similar to libel, except that it requires the
17 invasion of some type of privacy interest in addition to reputational harm. *Cort*, 311 F.3d at 987.
18 Aside from this distinction, “California courts have largely collapsed ‘false light’ causes of action
19 into libel.” *Cort*, 311 F.3d at 987; *see also Aisenson v. American Broadcasting Co.*, 220 Cal.
20 App.3d 146, 161 269 Cal. Rptr. 379 (Cal. Ct. App. 1990) (“A ‘false light’ cause of action is in
21 substance equivalent to a libel claim, and should meet the same requirements of the libel claim.”).
22 Thus, Plaintiff’s cause of action for false light against T-Mobile suffers from the same deficiencies
23 as her libel claim. While the FAC includes allegations suggesting that the other defendants may
24 have made statements to credit reporting agencies that Plaintiff owed a debt to T-Mobile, there are
25 no factual allegations suggesting that T-Mobile made any such statements, either to the credit
26 reporting agencies or to the other Defendants. Plaintiff’s allegations are therefore insufficient to
27 state a claim for false light invasion of privacy against T-Mobile. Accordingly, Plaintiff’s fourth
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1 cause of action for invasion of privacy/false light is DISMISSED, with leave to amend, as against
2 T-Mobile only.

3 As the Court has found that the three causes of action asserted against T-Mobile fail to state
4 a claim against T-Mobile, Plaintiff's FAC, as currently pled, does not contain a plausible basis for
5 relief against this particular defendant. Accordingly, the Court GRANTS Defendant T-Mobile's
6 motion to dismiss the entire FAC, with leave to amend, as to T-Mobile only. Because the Court
7 has granted T-Mobile's motion to dismiss, it does not reach T-Mobile's alternative motion for
8 summary judgment.

9 **IV. Conclusion**

10 For the foregoing reasons, the Court DENIES Plaintiff's motion to remand and GRANTS,
11 with leave to amend, Defendant T-Mobile's motion to dismiss the FAC as to T-Mobile only. The
12 Court recognizes that, under the current case schedule, dispositive motions are due this week.
13 Accordingly, if Plaintiff wishes to amend her complaint to cure the deficiencies in the allegations
14 against T-Mobile, she is directed to inform Defendants and work with them to stipulate to a revised
15 case schedule that would permit her to file a Second Amended Complaint without unduly delaying
16 the case. If Plaintiff chooses not to pursue her claims against T-Mobile, the Court encourages the
17 parties to stipulate to the dismissal of T-Mobile from the case pursuant to Rule 41(a).

18 **IT IS SO ORDERED.**

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20 Dated: January 18, 2011

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23 LUCY H. KOH
24 United States District Judge
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