

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

FSM DEVELOPMENT BANK a/k/a)
FEDERATED STATES OF MICRONESIA)
DEVELOPMENT BANK,)
)
Plaintiffs,)
)
v.)
)
ROBERT ARTHUR and PATRICIA ARTHUR,)
)
Defendants.)

Case No.: 11-CV-05494-LHK

ORDER REMANDING CASE TO
STATE COURT; DENYING PAYMENT
OF ATTORNEYS' FEES AND COSTS

ROBERT ARTHUR and PATRICIA ARTHUR,)
)
Cross-Complainants,)
)
v.)
)
FSM DEVELOPMENT BANK; and)
GOVERNMENT OF THE STATE OF)
POHNPEI, FEDERATED STATES OF)
MICRONESIA; and Roes 1-50 Inclusive,)
)
Cross-Defendants.)

AHPW, INC.,)
)
Complainant-in-Intervention,)
)
v.)
)
FSM DEVELOPMENT BANK; and)
GOVERNMENT OF THE STATE OF)
POHNPEI, FEDERATED STATES OF)
MICRONESIA; and Roes 1-50 Inclusive,)
)
Cross-Defendants.)

1 Before the Court is Defendants and Cross-Complainants Robert and Patricia Arthur's ("the
2 Arthurs") and Complainant-in-Intervention AHPW, Inc.'s ("AHPW") motion to remand the instant
3 action to state court and request for an award of costs and fees resulting from improper removal.
4 See Mem. of P. & A. Supp'g. Pls.' Notice of Mot. for Order Remanding Case to State Ct. and for
5 an Order for Payment of Costs and Att'ys' Fees ("Mot."), ECF No. 11. Cross-Defendant
6 Government of the State of Pohnpei, Federated States of Micronesia ("Pohnpei") and Plaintiffs and
7 Cross-Defendant FSM Development Bank a/k/a Federated States of Micronesia Development Bank
8 ("FSMD Bank") previously removed this action from the Superior Court for the County of Santa
9 Clara ("Superior Court") on November 14, 2011, after the Arthurs and AHPW filed a cross-
10 complaint and complaint-in-intervention, respectively, against FSMD Bank and Pohnpei. See
11 Notice of Removal Action, ECF No. 1; Decl. of Michael A. Mazzocone ("Mazzocone Decl."), ECF
12 No. 12, Exs. 4-5. Pursuant to Civil Local Rule 7-1(b), the Court finds the motion appropriate for
13 determination without oral argument. Accordingly, the hearing on the motion set for April 25,
14 2012, is hereby VACATED.

15 For the reasons set forth below, the Court REMANDS this action to the Superior Court for
16 adjudication on the merits. The Court DENIES Defendants' request for costs and fees resulting
17 from improper removal. The case management conference set for April 25, 2012, is hereby
18 VACATED.

19 **I. BACKGROUND**

20 **A. The Parties**

21 The Arthurs are American citizens who reside in the Federated States of Micronesia
22 ("FSM"). See Mazzocone Decl. Ex. 23 ("Arthurs' First Am. Cross-Compl."), ¶ 1. AHPW is a
23 corporation that the Arthurs formed in the FSM to process and market black pepper and to
24 manufacture trochus¹ shell buttons. See *id.* ¶¶ 6, 18. Pohnpei is a state located in the FSM. See *id.*

25 _____
26 ¹ Webster's dictionary defines "trochus" as "a genus of chiefly Old World tropical marine
27 gastropods (family Trochidae) with beautifully nacreous bluntly conical shells including a large
28 Indo-Pacific species (*T. niloticus*) extensively used in making buttons and ornamental objects."
Webster's Third New International Dictionary of the English Language Unabridged 2450-51 (3d
ed. 2002).

1 ¶ 2. While the parties dispute the exact relationship between FSMD Bank and Pohnpei, the parties
2 agree that FSMD Bank is a financial institution charged with administering, documenting, and
3 securing repayment of loans made by the Federal Development Authority's Investment
4 Development Fund. Arthurs' First Am. Cross-Compl. ¶ 3; Mazzocone Decl. Ex. 1 ("FSMD
5 Bank's Compl."), ¶ 2.

6 **B. State Court Proceedings**

7 On January 13, 2011, FSMD Bank filed a complaint against the Arthurs in the Superior
8 Court (the "Superior Court Action"), which asserted only a state law claim for domestication of a
9 foreign judgment. *See generally* FSMD Bank's Compl. FSMD Bank's complaint sought to
10 domesticate a judgment entered by the Trial Division of the Supreme Court of the Federated States
11 of Micronesia on October 5, 2004, in the amount of \$507,496.62, with interest accruing at 9% per
12 year. *See id.* ¶ 6. This judgment was later affirmed by the Appellate Division of the Supreme
13 Court of the Federated States of Micronesia on September 14, 2006. *See id.* ¶ 7.

14 On April 25, 2011, the Arthurs filed a cross-complaint in the Superior Court Action against
15 FSMD Bank and Pohnpei to domesticate and collect on a separate judgment. Mazzocone Decl. Ex.
16 4 ("Arthurs' Cross-Compl."), ¶ 19. The Arthurs sought to domesticate an April 14, 2006 judgment
17 entered by the Trial Division of the Supreme Court of the Federated States of Micronesia against
18 Pohnpei and in favor of the Arthurs and AHPW in the amount of \$713,766, plus attorneys' fees of
19 \$28,338.76 with an interest rate of 9% per year.² *See id.* ¶¶ 12, 19. Additionally, AHPW filed a
20 complaint-in-intervention against FSMD Bank and Pohnpei to domesticate and collect on the same
21 April 14, 2006 judgment that was the object of the Arthurs' cross-complaint. *See* Mazzocone Decl.
22 Ex. 5 ("AHPW's Compl.-in-Intervention"), ¶¶ 12, 17.

23 The Arthurs and AHPW served Pohnpei with the cross-complaint and complaint-in-
24 intervention on June 1, 2011. Mazzocone Decl. Ex. 6. In an Order on Motions to Quash and to
25 Strike and Demurrers issued October 11, 2011, Judge Patricia M. Lucas found that Pohnpei was
26 served with both the cross-complaint and complaint-in-intervention in substantial compliance with
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28 ² The brief does not state whether the interest rate applies to fees or the whole amount.

1 the service requirements under 28 U.S.C. § 1608. *FSM Dev. Bank v. Arthur*, 1-11-CV-191886,
2 (Super. Ct. Oct. 11, 2011), Mazzocone Decl. Ex. 22, at 2 (citing *Straub v. A.P. Green, Inc.*, 38 F.3d
3 448, 453-54 (9th Cir. 1994). Judge Lucas also ordered discovery and further briefing on whether
4 the Superior Court had jurisdiction. *Id.* at 3.

5 **C. Removal to Federal Court**

6 On November 14, 2011, FSMD Bank removed this action to federal court, on the grounds
7 that the Court has “original jurisdiction” under 28 U.S.C. § 1331 based on provisions of the
8 Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1602, *et seq.*, as well as the existence of
9 a federal question presented in the Arthurs’ and AHPW’s cross-complaint and complaint-in-
10 intervention. *See* Notice of Remand, ECF No. 1, ¶ 11 (asserting federal question jurisdiction
11 because “[t]his action arises under the [FSIA], and under US [sic] Public Law 99-239.”).

12 On December 2, 2011, the Arthurs and AHPW filed a motion to remand the action to state
13 court and for an award of costs and fees resulting from improper removal, arguing, among other
14 things, that FSMD Bank failed to file a timely notice of removal pursuant to 28 U.S.C. § 1441(b)’s
15 thirty-day requirement. *See* Mot. 7. Pohnpei filed an opposition on December 16, 2011,
16 (“Pohnpei’s Opp’n”), ECF No. 17, and the FSMD Bank filed an opposition on January 5, 2012,
17 (“FSMD Bank’s Opp’n”), ECF No. 20. The Arthurs and AHPW filed a reply on January 12, 2012.
18 (“Reply”), ECF No. 26.

19 On June 9, 2011, in a different case involving the same parties here, the Ninth Circuit
20 affirmed the U.S. District Court for the Northern Mariana Islands’ dismissal with prejudice for lack
21 of subject matter jurisdiction. *See AHPW, Inc. v. Pohnpei*, 437 F. App’x 565 (9th Cir. June 9,
22 2011). On April 23, 2012, the undersigned judge ordered further briefing on whether the Court has
23 subject matter jurisdiction and why relitigation of that issue was not barred by the collateral
24 estoppel doctrine as a result of the Ninth Circuit’s decision in *AHPW, Inc. v. Pohnpei*. *See* ECF
25 No. 40. The parties filed their supplemental briefing on April 25, 2012. ECF Nos. 42, 43.

1 **II. DISCUSSION**

2 **A. Compliance with the Removal Procedures**

3 The Court may consider the timeliness of the removal before considering whether it has
4 subject matter jurisdiction. *See Barbour v. Int’l Union*, 640 F.3d 599, 618-19 (4th Cir. 2011)
5 (Agee, J., concurring) (“The threshold issue to consider is whether the notice of removal was
6 timely If the . . . notice of removal was timely, we must then consider whether the district
7 court possessed subject matter jurisdiction”) (citing *Fakouri v. Pizza Hut of Am., Inc.*, 824
8 F.2d 470, 472 (6th Cir. 1987); *Takeda v. Nw. Nat’l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir.
9 1985)); *see also McPhatter v. Sweitzer*, 401 F. Supp. 2d 468, 477 (M.D.N.C. 2005) (“Because
10 Defendants did not comply with the thirty-day removal period required by § 1446(b), the court is
11 not required to address Defendants’ substantive grounds for removal.”) (citing *Link Telecomms.,*
12 *Inc. v. Sapperstein*, 119 F.Supp.2d 536, 544 (D. Md. 2000)). *Cf. Sinochem Int’l Co. Ltd. v.*
13 *Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (“[F]ederal court has leeway to choose
14 among threshold grounds for denying audience to a case on the merits.”) (internal quotations
15 omitted).

16 A Plaintiff may bring a motion to remand to challenge removal of an action to federal court,
17 either for lack of subject matter jurisdiction or for a defect in the removal procedure. 28 U.S.C. §
18 1447(c). “The removal statute is strictly construed, and any doubt about the right of removal
19 requires resolution in favor of remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241,
20 1244 (9th Cir. 2009) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). A party
21 opposing removal on the basis of a procedural defect must make a motion to remand within thirty
22 days of the filing of the notice of removal. 28 U.S.C. § 1447(c). Pursuant to 28 U.S.C. § 1147(c),
23 a court may award “just costs and any actual expenses, including attorney fees, incurred as a result
24 of the removal.”

25 The Arthurs and AHPW argue that: (1) Pohnpei’s notice of removal is untimely pursuant to
26 28 U.S.C. § 1441(b); (2) Pohnpei failed to file all of the papers required under 28 U.S.C. § 1446(a);
27 and (3) FSMDBank’s complaint, the Arthur’s cross-complaint, and AHPW’s complaint-in-

1 intervention are based solely on state law and do not arise under federal law. Plaintiffs thus request
2 that the action be remanded to the Superior Court and that this Court award fees and costs under 28
3 U.S.C. § 1447(c).

4 Pohnpei and FSMMD Bank argue that under section 1441(d), Pohnpei, as a foreign state, has
5 an absolute right of removal, subject to a liberal time limitation. Pohnpei's Opp'n 5; FSMMD Bank
6 Opp'n 9-11. FSMMD Bank and Pohnpei argue that Pohnpei was never properly served, and
7 therefore, the time to remove was not triggered. Pohnpei's Opp'n 6-8; FSMMD Bank's Opp'n 6, 12-
8 17. Moreover, Pohnpei and FSMMD Bank argue that the following factors militate in favor of
9 expanding the time for removal: (1) Pohnpei's difficulty in locating a California attorney; (2) the
10 defective and misleading nature of the service of the cross-complaint and the complaint-in-
11 intervention; (3) confusion as to whether Pohnpei had been dismissed from the Superior Court
12 Action; and (4) limited activity in the Superior Court Action, such that the Arthurs and AHPW
13 cannot be prejudiced if the action is not remanded. Pohnpei's Opp'n 5; FSMMD Bank's Opp'n 18-
14 20. Finally, FSMMD Bank argues that Pohnpei's failure to file a complete Notice of Removal may
15 be and has been cured. FSMMD Bank's Opp'n 6, 19-20. FSMMD Bank opposes the award of fees and
16 costs on the grounds that: (1) Pohnpei had an objectively reasonable basis for removal; and (2) fees
17 and costs may not be awarded against a party that joins another party's removal. FSMMD Bank's
18 Opp'n 21-22.

19 For the reasons set forth below, the Court finds that removal was not timely and that
20 Pohnpei has not shown cause to enlarge the time to remove. Accordingly, this matter is remanded
21 to state court. The Court need not reach the Arthurs' and AHPW's other arguments in support of
22 remand. The Court declines to award fees and costs.

23 **1. Pohnpei's Removal was Not Timely**

24 As an initial matter, the Court considers when the time for removal was triggered. Pursuant
25 to 28 U.S.C. § 1446(b), the notice of removal "shall be filed within thirty days after the receipt by
26 the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim
27 for relief upon which such action or proceeding is based." The "thirty-day requirement is triggered
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1 by defendant’s receipt of an ‘initial pleading’ that reveals a basis for removal.” *Harris v. Bankers*
2 *Life & Casualty Co.*, 425 F.3d 689, 694 (9th Cir. 2005).

3 Pohnpei and FSM Bank argue that Pohnpei was never properly served, and thus, the time
4 to remove was never triggered. The Court is not persuaded. The authority FSM Bank and
5 Pohnpei cites, applying a “strict compliance” test for 28 U.S.C. § 1608(a), is not binding on this
6 Court. FSM Opp’n 12 (citing *Magness v. Russian Federation*, 247 F.3d 609, 614 (5th Cir. 2001)).
7 Under the Ninth Circuit’s “substantial compliance” test, which *is* binding on this Court, “the
8 pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of
9 compliance with the FSIA.” *Straub*, 38 F.3d at 453; *accord Peterson v. Islamic Republic Of Iran*,
10 627 F.3d 1117, 1129 (9th Cir. 2010) (applying “substantial compliance” test to service on a foreign
11 state). The proofs of service show that Pohnpei was served with the cross-complaint and
12 complaint-in-intervention on June 1, 2011. Mazzocone Decl. Ex. 6. Judge Lucas found that
13 Pohnpei was served with the cross-complaint and complaint-in-intervention in substantial
14 compliance with 28 U.S.C. § 1608. Moreover, Pohnpei admits that the office of the Governor of
15 Pohnpei received the cross-complaint and complaint-in-intervention before Pohnpei filed a Motion
16 to Quash Service of Summons on July 29, 2011. Pohnpei’s Opp’n 3. Therefore, the Court finds
17 that Pohnpei received actual notice and was not prejudiced by the lack of compliance with the
18 FSIA. Accordingly, this Court finds no reason to disturb the Superior Court’s finding that Pohnpei
19 was properly served, or to question that service was properly effected as of June 1, 2011.

20 Furthermore, Pohnpei’s Notice of Removal states that the purported bases for removal, the
21 FSIA and Pub. Law 99-239, were evident “as alleged in the Cross-Complaint and in the
22 Complaint-in-Intervention.” Notice of Removal ¶ 11. Thus, Pohnpei’s receipt of these initial
23 pleadings that stated the bases for removal on their face triggered the thirty-day requirement for
24 filing a notice of removal. *See Harris*, 425 F.3d at 694 (“thirty-day requirement is triggered by
25 defendant’s receipt of an ‘initial pleading’ that reveals a basis for removal”). Accordingly, under
26 28 U.S.C. § 1446(b), the notice of removal should have been filed on July 1, 2011. *Id.* The notice
27 of removal was not filed until November 14, 2011, more than 130 days after the deadline under 28
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1 U.S.C. § 1446(b).³ The Arthurs and AHPW timely moved to remand on December 1, 2011, well
2 within the 30 day window provided by 28 U.S.C. § 1447(c).

3 Pohnpei’s Notice of Remand listed “28 U.S.C. § 1441(b) (federal question)” as the basis for
4 removal.⁴ 28 U.S.C. 1446(b) applies a strict 30-day filing requirement to matters removed under
5 28 U.S.C. § 1441(b). Thus, under 28 U.S.C. § 1446(b), Pohnpei’s and FSM Bank’s removal was
6 untimely. However, 28 U.S.C. § 1441(d) provides an alternative basis for political subdivisions of
7 foreign states to remove a civil action. 28 U.S.C. § 1441(d) states that when removal is based upon
8 28 U.S.C. § 1441(d), “the time limitations of section 1446(b) . . . may be enlarged at any time for
9 cause shown.” The Arthurs and AHPW do not contest that Pohnpei is a political subdivision of the
10 FSM. Accordingly, the Court turns to whether Pohnpei has shown cause for untimely removal
11 pursuant to 28 U.S.C. § 1441(d).

12 2. Pohnpei Has not Shown Cause for Enlargement of Time to Remove

13 “The decision of whether to enlarge the deadline for removal pursuant to § 1441(d) is one
14 committed to the discretion of the court.” *State Farm Mut. Auto. Ins. Co. v. Ins. Co. of British*
15 *Columbia*, CV 09-762-ST, 2010 WL 331786 (D. Or. Jan. 25, 2010) (citing *Big Sky Network*
16 *Canada v. Sichuan Provincial Gov’t*, 533 F3d 1183, 1186 (10th Cir. 2008)). In the exercise of this
17 discretion, courts consider the following factors: (1) “the danger of prejudice to the nonmoving
18 party;” (2) “the length of the delay and its potential impact on judicial proceedings;” (3) “the
19 reason [or cause] for the delay;” and (4) “whether the movant acted in good faith.” *Id.* (citing *Big*
20 *Sky*, 533 F3d at 1187) (other internal citations omitted; alteration added).

21 Pohnpei and FSM Bank argue that the following factors militate in favor of enlarging the
22 time for removal: (1) Pohnpei’s difficulty in locating a California attorney; (2) confusion as to
23 whether Pohnpei had been dismissed from the Superior Court Action; (3) the defective and
24 misleading nature of the service of the cross-complaint and the complaint-in-intervention; and (4)

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27 ³ Even if July 29, 2011 were the effective date of service, Pohnpei’s Notice of Removal would still
be untimely.

28 ⁴ Removal based on federal question is governed in fact by 28 U.S.C. § 1441(a).

1 limited activity in the Superior Court Action, such that the Arthurs and AHPW cannot be
2 prejudiced if the action is not remanded. Pohnpei's Opp'n 5; FSMD Bank's Opp'n 18-20.

3 The Court agrees with the Arthurs and AHPW that these reasons are not persuasive. FSMD
4 Bank argues that *Big Sky* stands for the proposition that "taking time to locate an attorney is
5 sufficient cause to expand time for a political subdivision of a foreign country to remove a suit."
6 FSMD Bank's Opp'n 20 (citing *Big Sky*, 553 F.3d at 1188). However, this proposition does not
7 appear either explicitly or by implication in the Tenth Circuit's *Big Sky* decision. The Tenth
8 Circuit did note that, unlike here, the Sichuan Provincial Government was a first time litigant in
9 U.S. courts and that "seeking removal was the very first act the governments took in this
10 litigation." *Big Sky*, 533 F.3d at 1188 & n.1. Here, Pohnpei is not a first time litigant in federal
11 court. The state of Pohnpei was a party to a federal action that previously went up to the Ninth
12 Circuit. *See, e.g., AHPW, Inc.*, 437 F. App'x 565. Moreover, even if it is true that it took Pohnpei
13 two months to obtain counsel, Pohnpei could have removed the action in August 2011. Instead,
14 Pohnpei, through its counsel, engaged in the Superior Court Action on July 29, 2011, by moving to
15 quash service of the cross-complaint and the complaint-in-intervention. Mazzocone Decl. Ex. 11.
16 Pohnpei also filed a reply in support of its motion to quash on September 22, 2011. *Id.* Ex. 17.
17 Pohnpei argued its motion to quash on September 27, 2011. *Id.* ¶ 12. Unlike Sichuan Provincial
18 Government in *Big Sky*, Pohnpei was no stranger to the federal courts and engaged in extensive
19 litigation in the State Court Action for months before filing its notice of removal. Pohnpei waited
20 until Judge Lucas issued an adverse ruling on October 11, 2011, before filing its notice of removal
21 on November 14, 2011. In the circumstances of this case, Pohnpei's delay in obtaining counsel is
22 not a persuasive reason to enlarge the time for removal.

23 Second, Pohnpei's alleged confusion as to whether Pohnpei had been dismissed by the
24 August 18, 2011 order to show cause, Pohnpei's Opp'n 5, is also not persuasive. The deadline for
25 Pohnpei to file its notice of removal was July 1, 2011. The alleged erroneous dismissal occurred
26 on August 18, 2011, more than a month after the deadline for filing the notice of removal had
27 passed, and almost three weeks after Pohnpei had already obtained counsel. Accordingly, the
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1 confusion as to Pohnpei’s dismissal from the Superior Court Action cannot explain Pohnpei’s
2 untimely removal or provide cause to enlarge the time for removal.

3 Third, the alleged defective and misleading nature of the service of the cross-complaint and
4 the complaint-in-intervention is also unpersuasive. Judge Lucas found that the service of process
5 was not defective here. Moreover, the Commentary on the 1988 revisions of 28 U.S.C. § 1446
6 recommends removal “within the 30 days following whatever papers the defendant first receives”
7 rather than challenging the service in state court. *See* David D. Siegel, Commentary on 1988
8 Revision of Section 1446, 28 U.S.C.A. § 1446 (West 2012). The commentator warns, “If the
9 defendant instead decides to raise the jurisdictional point in the state court before removing, and
10 does not prevail on the point (service being upheld), the defendant is likely to find that the time
11 used up in getting the service-of-process objection adjudicated in the state court passed the 30-day
12 removal time, thus forfeiting whatever access the defendant would earlier have had to a federal
13 court.” *Id.* Thus, as the commentator notes, the prudent course would have been for Pohnpei to
14 remove immediately, rather than to file a motion to quash, as it did, on July 29, 2011. By filing a
15 motion to quash, Pohnpei assumed the risk that the Superior Court would uphold service and that
16 the time adjudicating the service of process issue in Superior Court would count against the
17 timeliness of Pohnpei’s notice of removal. Accordingly, Pohnpei’s alleged confusion as to service
18 is not cause for enlarging the time for removal here.

19 Finally, the Court disagrees with FSM D Bank’s argument that “little activity has taken
20 place” in the Superior Court Action, such that the Arthurs and AHPW cannot be prejudiced if the
21 action is not remanded. On the contrary, Judge Lucas has ruled on motions to quash and to strike
22 and demurrers, and has ordered additional briefing as to the jurisdictional issues the parties raise
23 before this Court. Thus, unlike the state court action underlying the removal action in *Big Sky*, the
24 Superior Court here would have its “efforts effectively canceled by a delayed removal.” *Cf. Big*
25 *Sky*, 533 F.3d at 1188. Moreover, the Arthurs and AHPW do face prejudice given that Pohnpei and
26 FSM D Bank effectively seek to relitigate issues, such as whether service was properly effected
27 under 28 U.S.C. § 1608, which the Superior Court has already decided in the Arthurs’ and
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1 AHPW’s favor. Thus, the prejudice to the Arthurs and AHPW and the impact on the litigation
2 weigh against enlarging the time for removal.

3 In summary, the Court does not find that any of Pohnpei’s and FSMDBank’s asserted
4 reasons to enlarge the time for removal persuasive, either individually or in their totality. Thus,
5 Pohnpei and FSMDBank have failed to meet their burden of showing cause to enlarge the time for
6 service. Accordingly, the Court remands the action to the Superior Court for the County of Santa
7 Clara.

8 3. Costs and Fees

9 Following remand of a case upon unsuccessful removal, the district court may award “just
10 costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28
11 U.S.C. § 1447(c). The award of fees and costs is in the discretion of the district court. *Lussier v.*
12 *Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008). Nonetheless, “[a]bsent unusual
13 circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party
14 lacked any objectively reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*,
15 546 U.S. 132, 141 (2005) (citations omitted).

16 If the law in the Ninth Circuit is “not so clear as to make [the removing party’s] endeavor
17 entirely frivolous,” a court will deny the request for attorney’s fees. *Lion Raisins, Inc. v. Fanucchi*,
18 788 F. Supp. 2d 1167, 1175 (E.D. Cal. 2011); *see Doe v. Bolkia*, 74 F. Supp. 2d 969, 974-75 (D.
19 Haw. 1998) (denying plaintiff’s motion for costs and fees because it was a “somewhat close
20 question” as to whether defendant was a “foreign state” under FSIA); *but see World Sav. Bank,*
21 *FSB v. Wu*, No. 08-CV-00887, 2008 WL 1994881, at *3 (N.D. Cal. May 5, 2008) (awarding costs
22 and fees as a result of improper removal because removal motion rested on “shaky grounds both
23 legally . . . and factually,” and was likely to have been made in bad faith).

24 The Ninth Circuit’s decision in *AHPW, Inc. v. Pohnpei*, 437 F. App’x 565, which rejected
25 the very same arguments that Pohnpei and FSMDBank now make in support of federal
26 jurisdiction—and in which FSMDBank and Pohnpei were also parties—indicates that the
27 removing parties in this case lacked any objectively reasonable basis for requesting removal. *See*
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1 *Martin*, 546 U.S. at 141. However, Judge Lucas’s October 11, 2011 Order did not explicitly
2 consider the collateral estoppel effect of *AHPW, Inc. v. Pohnpei*, 437 F. App’x 565. Moreover
3 Judge Lucas’s October 11, 2011 suggested that it was not clear whether “the [Superior] Court lacks
4 jurisdiction over Pohnpei” and stated that “the Bank has not shown that this fact would bar [the
5 Arthurs] from proceeding against it, either as an agent of Pohnpei or as a third party in possession
6 of property in which Pohnpei has an interest.” *FSM Dev. Bank v. Arthur*, 1-11-CV-191886,
7 (Super. Ct. Oct. 11, 2011), Mazzocone Decl. Ex. 22, at 4. Thus, in light of Judge Lucas’s October
8 11, 2011 decision ordering further jurisdictional discovery, the Court finds that the parties had at
9 least some objectively reasonable basis to believe that this Court had subject matter jurisdiction.
10 The Court therefore declines to award costs and fees as a result of improper removal. *See Lion*
11 *Raisins*, 788 F. Supp. 2d at 1175.

12 Furthermore, although it must have been apparent to Pohnpei that the time for removal had
13 passed when it filed its Notice of Removal, FSMD Bank’s and Pohnpei’s arguments that Pohnpei
14 had shown cause under 28 U.S.C. § 1441(d), albeit unpersuasive, were not frivolous. The cases the
15 Arthurs and AHPW cite, *Things Remembered Inc. v. Petrarca*, 516 U.S. 124, 128 (1995), and
16 *Durham v. Lockheed Martin Corporation*, 445 F.3d 1247, 1254 (9th Cir. 2006), for the proposition
17 that untimeliness of removal is sufficient for an award of fees and costs under 28 U.S.C. § 1447(c),
18 did not involve foreign states and the attendant relaxed time period for removal under 28 U.S.C. §
19 1441(d). Accordingly, the Court declines to award costs and fees as a result of improper removal.
20 *See Lion Raisins*, 788 F. Supp. 2d at 1175.

21 **III. CONCLUSION**

22 For the foregoing reasons, the Court GRANTS the Arthurs’ and AHPW’s motion and
23 REMANDS this case to the Superior Court for Santa Clara County. The Court DENIES the
24 Arthurs’ and AHPW’s request for attorneys’ fees and costs. The Clerk shall close the file.

25 **IT IS SO ORDERED.**

26 Dated: April 25, 2012



LUCY H. KOH
United States District Judge