

FILED

MAY 20 AM 10:04

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *QTA* DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RICHARD A. AZHOCAR, SR. and
JOHN PAUL AGUILAR, on their own
behalf and on behalf of all those
similarly situated,

Plaintiffs,

vs.

COASTAL MARINE SERVICES,
INC., and DOES 1 through 20,
inclusive,

Defendants.

CASE NO. 13-CV-155 BEN (DHB)

**ORDER GRANTING PLAINTIFFS'
MOTION TO REMAND**

[ECF No. 5]

Before the Court is Plaintiffs' motion to remand this putative class action to the Superior Court of California, County of San Diego. For the reasons stated below, the motion is **GRANTED**. The Court remands the case on the basis of untimely removal. It declines to award attorney's fees.

BACKGROUND

Plaintiffs performed insulation and decking work on United States Navy ships, aircraft carriers, and barges for Defendant, a government contractor. They assert violations of California wage and hour law and seek to represent a class of insulation and decking workers employed by Defendant.

On October 25, 2012, Plaintiffs filed the initial complaint in state court. (Notice of Removal, Exh. A. ["Compl."]) Plaintiffs alleged that they performed

1 work at locations including but not limited to “the Naval Base Coronado, the Naval
2 Base San Diego, the NASSCO Shipyard, the BAE Systems Shipyard, and the
3 Continental Maritime of San Diego (CMSD) Shipyard.” (Compl. at 2.)

4 On November 27, 2012, Plaintiffs filed a First Amended Complaint. (Notice
5 of Removal, Exh. B. [“FAC”]) The FAC identified the same work sites. (FAC at
6 2.)

7 On January 18, 2013, Defendant removed the case to this Court on federal
8 enclave grounds. (Notice of Removal, ECF No. 1.) It explained that (1) its
9 employees work mostly at the 32nd Street Naval Station in San Diego and the North
10 Island Naval Station in Coronado, that (2) “Plaintiffs plead that they performed
11 work at these same locations,” and that (3) these sites are federal enclaves. (Notice
12 of Removal ¶¶ 10, 13.)¹

13 Plaintiffs moved to remand. (ECF No. 5.)² Defendant filed a supplemental
14 document to its notice of removal, an opposition to Plaintiffs’ motion, and a notice
15 of errata. (ECF Nos. 6, 9 & 10.) Plaintiffs filed a reply, objections to Defendant’s
16 evidence, and its own notice of errata. (ECF Nos. 11, 12 & 13.) The Court took
17 Plaintiffs’ motion under submission and now resolves it without a hearing pursuant
18 to Civil Local Rule 7.1.d.1.

19 LEGAL STANDARD

20 Generally, a defendant may remove an action from state court if the federal
21 court has original jurisdiction. 28 U.S.C. § 1441(a). That jurisdiction may be
22 grounded in the parties’ diversity of citizenship or a federal question. *See* 28 U.S.C.
23 §§ 1331, 1332. “Federal courts have federal question jurisdiction over tort claims
24

25 ¹ North Island Naval Station in Coronado and 32nd Street Naval Station in San Diego appear
26 to be the formal names for “Naval Base Coronado” and “the Naval Base San Diego,” two of the work
sites identified in the pleadings.

27 ² Plaintiffs request judicial notice of two documents: (1) proof of service of the summons and
28 initial complaint; (2) a copy of the state court’s register of actions, showing when that proof of service
was filed. (Pls.’ RJN, ECF No. 5-3 & 13.) The request is **GRANTED**. FED R. EVID. 201(b)(2).

1 that arise on ‘federal enclaves.’” *Durham v. Lockheed Martin Corp.*, 445 F.3d
2 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1331). “A federal enclave is created
3 when a state cedes jurisdiction over land within its borders to the federal
4 government and Congress accepts that cession. These enclaves include numerous
5 military bases, federal facilities, and even some national forests and parks.” *Allison*
6 *v. Boeing Laser Technical Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012); *see also*
7 U.S. Const. art. I, § 8, cl. 17.³

8 The Ninth Circuit “strictly construe[s] the removal statute against removal
9 jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam).
10 “Federal jurisdiction must be rejected if there is any doubt as to the right of removal
11 in the first instance.” *Id.* “The ‘strong presumption’ against removal jurisdiction
12 means that the defendant always has the burden of establishing that removal is
13 proper.” *Id.* (citations omitted).

14 DISCUSSION

15 Plaintiffs assert that (1) removal was not timely, and (2) Defendant has not
16 shown that the sites where Plaintiffs worked are in fact federal enclaves. Because
17 the Court agrees with the first argument—that removal was untimely—it need not
18 reach the second.⁴

19 I. Timeliness of Removal

20 The time for removal of an action from state to federal court is limited by
21 statute. “After a defendant learns that an action is removable, he has thirty days to
22

23 ³ Art. I, sec. 8, clause 17, of the United States Constitution “grants to the United States
24 ‘exclusive legislation over forts, magazines, arsenals, dockyards and other needful buildings, when
25 lands therefor are acquired with the consent of the legislature of the state of their situs. Exclusive
26 ‘legislation’ has been construed to mean exclusive ‘jurisdiction’ in the sense of exclusive sovereignty.”
Mater v. Holley, 200 F.2d 123, 123 (5th Cir. 1952) (citing *Surplus Trading Co. v. Cook*, 281 U.S. 647,
652 (1930)).

27 ⁴ In opposition to Plaintiffs’ motion, Defendant submits evidence pertaining to the enclave
28 status of certain work sites. Plaintiffs object on the grounds that new evidence developed by the
defendant after removal is improper. (ECF No. 12.) As Defendant’s evidence is immaterial to the
Court’s decision regarding the timeliness of removal, the Court need not resolve the objections.

1 remove the case to federal court.” *Durham*, 445 F.3d at 1250 (citing 28 U.S.C. §
2 1446(b)). The “thirty day time period [for removal]. . . starts to run from the
3 defendant’s receipt of the initial pleading only when that pleading affirmatively
4 reveals on its face’ the facts necessary for federal court jurisdiction.” *Harris v.*
5 *Bankers Life & Cas. Co.*, 425 F.3d 689, 690-91 (9th Cir. 2005) (quoting *Chapman*
6 *v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992). “Otherwise, the thirty-day
7 clock doesn’t begin ticking until a defendant receives ‘a copy of an amended
8 pleading, motion, order or other paper’ from which it can determine that the case is
9 removable.” *Durham*, 445 F.3d at 1250 (citing 28 U.S.C. § 1446(b)). The thirty
10 day time limit is mandatory and a timely objection will defeat removal. *Fristoe v.*
11 *Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980) (per curiam).

12 It is Defendant’s position that the case was not removable until it accepted
13 service of the FAC on December 20, 2012. Accordingly, Defendant contends that
14 removal was timely. Plaintiffs say the clock started earlier. They argue that all the
15 factual allegations that Defendant cites as a basis for removal were present in the
16 original complaint. Consequently, they contend that service of that pleading on
17 November 12, 2012⁵ started the clock. If Plaintiffs are right, Defendant’s removal
18 on January 18, 2013 was defective.

19 The Court agrees with Plaintiffs. From the initial complaint, Defendant
20 learned that Plaintiffs had worked at Naval bases and that Plaintiffs were seeking
21 certification of a class of insulation and decking workers. (Compl. at 1-4.)
22 Defendant premised its removal on the broad assertion that “[t]he Naval property
23 and ships where defendant conducts its work are federal enclaves.” (Notice of
24 Removal ¶ 13.) Assuming that Defendant is right, then the factual basis for removal
25

26 ⁵ Judicially noticed documents show that Plaintiffs left a copy of the initial complaint and
27 summons at Defendant’s office on November 1, 2012, and mailed another copy on November 2, 2012.
28 (Pls.’ RJN, ECF No. 5-3 & 13; Luetto Decl., Exh. 1.) Pursuant to California Code of Civil Procedure
§ 415.20(a), this form of substitute service is deemed complete ten days after mailing—November 12,
2012.

1 was apparent in the initial complaint. *See Krank v. Asbestos Defendants*, No. 03-
2 3655 PJH, slip op. at 2 (N.D. Cal. 2003) (“[T]he fact that [Plaintiff] claimed
3 possible exposure [to asbestos] on a federal U.S. Air Force base was sufficient to
4 put all defendants on notice that federal enclave jurisdiction was potentially
5 implicated in the case”); *Hines v. AC and S, Inc.*, 128 F. Supp. 2d 1003, 1008-09
6 (N.D. Tex. 2001) (holding that the removal clock started ticking when Defendants
7 became aware of the specific location of events, even if the “relative rarity of
8 federal enclave jurisdiction may have clouded the legal significance of those facts”);
9 *Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992) (finding a basis for
10 removal when the complaint alleged injuries as a consequence of working on Naval
11 vessels under the supervision of defendant.).

12 The only difference between the two iterations of the complaint is that the
13 FAC contains an express *disclaimer* of any claims arising at a federal enclave.
14 Plaintiffs assert in paragraph 7 of the FAC that they seek relief only for work
15 performed where California law governs, and that they “do not seek relief arising
16 from any work performed on land classified as a federal enclave.” In Defendant’s
17 view, this amounts to a concession that some work, at least, occurred on federal
18 enclaves—a concession that made the case removable. (Notice of Removal ¶ 17.)
19 This is reaching. First, the initial complaint contained a similar statement, even if it
20 didn’t use the phrase “federal enclave.” It stated: “Jurisdiction is proper as to all
21 conduct alleged herein because the United States holds only proprietary
22 jurisdiction over the Naval Base San Diego and the Naval Base Coronado, thus,
23 California law applies.” (Compl. ¶ 7.) Second, paragraph 7 in the FAC adds no
24 facts; it simply reveals more clearly Plaintiffs’ intent to head off a federal enclave
25 defense. That this marks the first appearance of the phrase “federal enclave” is of
26 no moment. *Hines*, 128 F. Supp. 2d at 1008 (“Defendants’ argument that Plaintiffs
27 have a duty to disclose possible federal enclave jurisdiction [before the removal
28 clock starts] is wrong. Nothing requires Plaintiffs to take the step of adding a

1 footnote, parenthetical, or caveat stating that the . . . locale happened to be a federal
2 enclave.”).

3 In sum, if the FAC revealed a factual basis for federal enclave jurisdiction,
4 then the initial complaint did as well. The Court finds that the thirty day clock
5 started to run on November 12, 2012 with service of the initial complaint. The
6 deadline for removal was December 12, 2013. Defendant’s removal on January 18,
7 2013 was untimely. The Court must remand this case.⁶

8 **II. Attorney’s Fees**

9 Plaintiffs’ also request attorney’s fees incurred by Defendant’s removal. The
10 request is denied.

11 Pursuant to 28 U.S.C. § 1447(c), a remand order “may require payment of just
12 costs and any actual expenses, including attorney fees, incurred as a result of the
13 removal.” Attorney’s fees are not awarded as a matter of course in removal cases.
14 *Durham*, 445 F.3d at 1250. “[A]bsent unusual circumstances, attorney’s fees should
15 not be awarded when the removing party has an objectively reasonable basis for
16 removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). Because
17 the Court granted Plaintiffs’ motion on procedural grounds, it declines to award
18 fees.

19 //
20 //
21 //

22
23

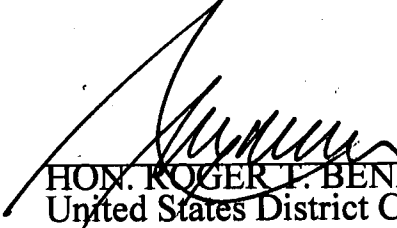
24 ⁶ To the extent Defendant argues that only federal courts can resolve claims arising from
25 conduct on federal enclaves, it is mistaken. *See Taylor v. Lockheed Martin Corp.*, 78 Cal. App. 4th
26 473 (2000) (adjudicating in state court a wrongful termination suit brought by an employee of a
27 civilian contractor operating on a federal military enclave); *see also Mater*, 200 F.2d at 123-24 (“[A]n
28 action for personal injuries suffered on a reservation under the exclusive jurisdiction of the United
States, being transitory, may be maintained in a state court which has personal jurisdiction of the
defendant.”) (citing *Ohio River Contract v. Gordon*, 244 U.S. 68 (1917)); *Willis v. Craig*, 555 F.2d
724, 726 n.4 (9th Cir. 1977) (observing that even if enclave jurisdiction is proper, “state courts may
have concurrent jurisdiction”).

1 **CONCLUSION**

2 Defendant's removal of this action was untimely. Plaintiffs' motion to
3 remand is **GRANTED** and the case is **REMANDED** to the Superior Court of
4 California, County of San Diego. The Court declines to award fees.

5 **IT IS SO ORDERED**

6
7 DATED: May 17, 2013


8 HON. ROGER T. BENITEZ
United States District Court Judge

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28