
No. 17-55939

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COOPER TRUST DTD 10-05-2000, by
its Trustee Letitia M. Cooper, an individual,

Plaintiff-Appellee,

v.

JOHN L. PARMIGIANI,

Defendant-Appellant.

On Appeal From an Order of the United States District Court for the
Central District of California, Western Division
Case No. 2:17-cv-04379-PA-AGR

**APPELLANT'S RESPONSE TO JULY 13, 2007 ORDER TO SHOW CAUSE
WHY APPEAL SHOULD NOT BE DISMISSED**

EVANS & KOB, PC
Brett G. Evans (Bar No. 244213)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Telephone: (619) 522-0797 / Facsimile: (888) 956-7890
Attorneys for Defendant-Appellant [REDACTED]

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Appellant [REDACTED] (“Appellant”) hereby respectfully submits this response to the Court’s July 13, 2017 order directing that Appellant either move for voluntary dismissal of this appeal or show cause why it should not be dismissed for lack of jurisdiction, along with the Declaration of Brett G. Evans filed concurrently with this Response. As provided herein, this Court should not dismiss the appeal as the Court has jurisdiction.

I. INTRODUCTION

This Court has jurisdiction to hear this appeal. This appeal concerns the district court’s *sua sponte* order concluding that Appellant’s “Notice of Removal [was] procedurally defective” and remanding the case back to state court. Prior to the remand, Appellee never objected to any procedural defect, filed a motion to remand or filed brief in support of the proposed *sua sponte* remand.

As a district court lacks authority to remand *sua sponte* for non-jurisdictional procedural defects under 28 U.S.C. § 1447(c), “section 1447(d) interposes no jurisdictional barrier to review” by this Court. *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1193 (9th Cir. 2003). Thus, despite the broad language of 28 U.S.C. § 1447(d), it “does not preclude review if the district court lacked authority to remand under § 1447(c) in the first instance.” *Smith v.*

Mylan Inc., 761 F.3d 1042, 1044 (9th Cir. 2014).¹

Kelton Arms is singularly dispositive on the both the show cause order and the appeal. The district court's remand of the case below undisputedly was *sua sponte*, and by its own admission, predicated on the non-jurisdictional procedural defects. A straightforward application of *Kelton Arms* demonstrates that this Court has jurisdiction over the appeal, should discharge the order to show cause, and eventually vacate the district court's *sua sponte* remand to state court and remand this lawsuit to the district court for further proceedings. *See Kelton Arms*, 346 F.3d at 1193.²

II. BACKGROUND AND SUMMARY OF PROCEDURAL HISTORY

A. No Motion to Remand Filed by Appellee

At no time did Plaintiff-Appellee Cooper Trust dtd 10-05-2000, by its trustee Letitia M. Cooper ("Appellee") file a motion to remand the June 13, 2017 removal of the action from Los Angeles Superior Court ("State Court") to the United States District Court for the Central District of California, Western Division

¹ In other words, the remand order was not based on the grounds specified in 28 U.S.C. § 1447(c), which are the "only remands...immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995).

² Pursuant to CTA9 Rule 27-1, Appellant's counsel contacted Appellee's counsel to determine Appellee's position on this Response, but due to time urgency, counsel was limited to only one email on August 1, 2017, which no response was provided prior to filing this Response.

(“District Court”). Nor did Appellee file a brief opposing the removal, supporting the proposed *sua sponte* remand, identify any procedural defects in the removal, object to the remand or file any election to remain in the District Court. *See* Declaration of Brett G. Evans (“Evans Decl.”), Exhibit A (Docket Report in the below case in the District Court styled *Cooper Trust Dtd 10-05-2000 v. John L. Parmigiani et al.*, Case No. 2:17-cv-04379-PA-AGR, the “District Court Case”).

B. Relevant Procedural History

On June 13, 2017, Appellant filed a notice of removal based on diversity of citizenship pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1441 (the “Notice of Removal”). *See* District Court Case, Dkt. 1.

On June 16, 2017, the District Court *sua sponte* ordered Appellee “to file on or before June 23, 2017, a notice informing the Court of when defendant [REDACTED] was served with the Complaint.” *See* Evans Decl., Exhibit B (District Court Case, Dkt. 8).

On June 21, 2017, Appellee filed an alleged proof of service on Appellant. The alleged proof of service was the **sole filing by Appellee in the District Court**. *See* Evans Decl., Exhibit C (District Court Case, Dkt. 9).³

On June 21, 2017, **without any motion to remand filed by Appellee**, the

³ On June 27, 2017, Appellant filed an objection to the Proof of Service. *See* District Court Case, Dkt. 11.

District Court *sua sponte* ordered that the action remanded back to the State Court concluding that Appellant's "Notice of Removal is **procedurally defective**" based on the following analysis:

A defendant seeking removal must file a notice of removal "containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served" on the defendant. 28 U.S.C. § 1446(a). Here, though the Notice of Removal includes a copy of the state court Complaint, a Financial Industry Regulatory Authority award, and a notice to be filed in state court and sent to Plaintiff, it is not clear that these exhaust "all process, pleadings, and orders served." Nor does Defendant allege that this is so.

See Evans Decl., Exhibit D (District Court Case, Dkt. 10) (the "Remand Order") (emphasis added). However, the District Court stayed the Remand Order until June 28, 2017 providing Appellee the option "to remain in federal court and thereby waive the procedural defect[.]" *Id.*

On June 30, 2017, after Appellee filed no objections "to the remand [or] waive the procedural defects" raised by the District Court *sua sponte* (or made any filing other than the proof of service previously filed), therefore the District Court remanded the action to the State Court "for the reasons stated in the June 21 Order[.]" *See* Evans Decl., Exhibit E (District Court Case, Dkt. 15) (the "Second Remand Order").⁴

⁴ The District Court acknowledged the objections filed by Appellant on June 27, 2017 to the alleged proof of service in a footnote, but stated that "[e]ven if

III. ARGUMENT

A. Section 1447(d) Bars Review of Only Those Orders Issued Within the Scope of the Court's Authority Under Section 1447(c)

28 U.S.C. § 1447(d) provides that “[a]n order remanding a case... is not reviewable on appeal or otherwise.” 28 U.S.C. § 1447(d). However, the United States Supreme Court has “interpreted § 1447(d) to cover less than its words alone suggest.” *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007). Specifically, the Supreme Court has “cabined this broad language by construing § 1447(d)’s bar on appellate review as applicable only to remand orders issued pursuant to § 1447(c).” *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 937 (9th Cir. 2006). This means that “only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).” *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (“§ 1447(d) must be read *in pari materia* with § 1447(c)”) (citations omitted).

In significantly limiting the seemingly absolute prohibition imposed by Section 1447(d), the Supreme Court explained:

[W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem

defendant is asserting that he did not file the Summons with the Notice of Removal because he was not served with it, the **procedural defect identified in the June 21 Order remains uncured.**” *Id.* (emphasis added).

justifiable to them but which are not recognized by the controlling statute...[T]his Court has not yet construed the present or past prohibition against review of remand orders so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal. We decline to construe s 1447(d) so woodenly as to reach that result now.

Thermtron Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 351–52 (1976) abrogated on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Thus, the Supreme Court concluded that “[b]ecause the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).” *Id.* at 351.

The grounds for remand specified in Section 1447(c) are: (1) a timely motion to remand raising defects in removal procedure; or (2) lack of subject matter jurisdiction. 28 U.S.C. § 1447(c) (“A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal...). Thus, Section 1447(d) bars review of a remand order only if the order was issued on the basis of a timely motion to remand raising defects in removal procedure or a lack of subject matter jurisdiction, pursuant to Section 1447(c). *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (citing *Things Remembered*, 516 U.S. at 127-28).

B. A *Sua Sponte* Remand Order for Procedural Defects Does Not Fall Within the Authority of Section 1447(c)

The Ninth Circuit holds that “district courts have no authority to remand a case *sua sponte* for procedural defects.” *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003). In *Kelton Arms*, the “district court gave no specific reason for its decision and remanded the case without notice to the parties.” *Id.* at 1192.⁵

Directly addressing this issue for the first time, the Ninth Circuit explained that “if the district court lacked authority to remand under section 1447(c), section 1447(d) would not preclude review.” *Id.* at 1191.⁶ The Ninth Circuit noted that “five other circuits have addressed the question” and “[e]ach has held that the district courts have no authority to remand a case *sua sponte* for procedural defects.” *Id.* at 1192 (citing *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317 (11th Cir. 2001); *In re FMC Corp. Packaging Sys. Div.*, 208 F.3d 445 (3d Cir. 2000); *Page v. City of Southfield*, 45

⁵ The Ninth Circuit surmised that the procedural defect was an untimely removal. *Id.* at 1192-93 (“Because [defendant] failed to identify the date of service in its removal papers, the district court likely assumed that removal was untimely and therefore procedurally defective... Yet not even [plaintiff] argues that [defendant’s] removal was actually untimely.”)

⁶ However, if “the district court had the power to remand *sua sponte* under section 1447(c), section 1447(d) would apply, and we would have no jurisdiction to review even if the remand was erroneous.” *Id.*

F.3d 128 (6th Cir. 1995); *Matter of Cont'l Cas. Co.*, 29 F.3d 292 (7th Cir. 1994); *In re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir. 1993)).⁷ Thus, “[r]ecognizing that every other circuit has concluded that the district court has no such authority, and that there are good and sufficient reasons to reach this conclusion, we **hold that the district court cannot remand *sua sponte* for defects in removal procedure.**” *Kelton Arms*, 346 F.3d at 1193 (emphasis added).

The Ninth Circuit explained the rationale for the rule: “[P]rocedural requirements exist primarily for the protection of the parties” and “can be waived.” *Id.* at 1192. “The first sentence of section 1447(c) [regarding procedural defects] ‘consigns procedural formalities to the care of the parties.’ The second sentence [regarding substantive jurisdiction] ‘assigns to the court concern for its jurisdictional prerequisites.’” *Id.* (citations omitted). Thus, for instance, “[a] plaintiff may wish to remain in federal court even though he or she originally filed in state court,” and choose to waive the procedural defect. *Id.* It is not for the courts to intervene *sua sponte* to enforce procedural rights that a party may not wish to enforce. The Fourth Circuit discussed the rule and rationale in similar terms:

Section 1447(c) effectively assigns *to the parties* the responsibility of policing non-jurisdictional questions regarding the propriety of removal, permitting them to assert a procedural defect or to waive the defect if they choose to remain in the federal forum. Because the

⁷ See also *Hamilton v. Aetna Life & Cas. Co.*, 5 F.3d 642, 644 (2d Cir. 1993); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 198 (4th Cir. 2008).

parties are given the right to police non-jurisdictional questions, it follows that this right would be destroyed by the district court's exercising it on behalf of the parties *sua sponte*.

Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 198 (4th Cir. 2008).

The Ninth Circuit recognized that precluding *sua sponte* remands for procedural defects “decreases the likelihood of unreviewable error.” *Kelton Arms*, 346 F.3d at 1192. Here, “[t]his case illustrates the problem.” *Id.* Similarly, the Seventh Circuit pointed out that *sua sponte* remands “increase the risk of error”:

Sua sponte remands...pose dangers of their own. By acting without any motion, district judges increase the risk of error—both legal error and error in understanding the parties’ desires. Ours is an adversarial system, and courts rely on lawyers to identify the pertinent facts and law...[T]he district court should have solicited the parties’ submissions before acting, to avoid what has happened in this case—extended disputation, potentially leading to another change of forum. If the district judge should entertain the parties’ views before remanding a case, then he also ought to wait for a motion, because, as we have stressed, the plaintiff may forgive the procedural defect and accept the defendant’s preference for a federal forum.

Matter of Cont'l Cas. Co., 29 F.3d 292, 295 (7th Cir. 1994).

C. Section 1447(d) Interposes No Jurisdictional Barrier to Review

Because the District Court Lacked Authority to Remand *Sua Sponte*

Under Section 1447(c)

Accordingly, “because the district court lacked authority to remand *sua sponte* under section 1447(c), section 1447(d) interposes no jurisdictional barrier to review.” *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d

1190, 1193 (9th Cir. 2003). *See also Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 942 (9th Cir. 2006) (vacating remand order issued *sua sponte* based on lack of diversity); *Smith v. Mylan Inc.*, 761 F.3d 1042, 1046 (9th Cir. 2014) (vacating *sua sponte* remand order based on one-year time limit for diversity removal under 28 U.S.C. § 1446(c)); *Corona-Contreras v. Gruel*, 857 F.3d 1025, 1030 (9th Cir. 2017) (vacating *sua sponte* remand order even if removal was untimely under 28 U.S.C. § 1446(b)); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 197 (4th Cir. 2008) (“Because § 1447(c) provides that a remand based on a defect other than lack of subject matter jurisdiction must be effected by granting a timely filed motion, an order granting an untimely motion or **entered without a motion at all does not fall within the scope of § 1447(c) and therefore is not barred from review by § 1447(d).**”) (emphasis added).⁸

Kelton Arms is singularly dispositive on the both the show cause order and the issue that will be presented in this appeal. The district court’s remand of the

⁸ Alternatively, the Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See generally, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712-15 (1996) (“abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure[,]” but appealable under the collateral order doctrine. The Court noted that “the remand order is clearly more ‘final’ than a stay order [as] [w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court’s docket.”).

case below undisputedly was *sua sponte*. See Section II(B) of this Response, *supra* (Appellee filed no motion, objection or other relevant briefing). The District Court’s *sua sponte* remand of the case below was, by its own admission, predicated on the non-jurisdictional procedural defects, concluding that Appellant’s “Notice of Removal is procedurally defective.” See Evans Decl., Exhibit D (District Court Case, Dkt. 10). A straightforward application of *Kelton Arms* requires the Court to vacate the district court’s *sua sponte* remand to state court and remand this lawsuit to the district court for further proceedings. See *Kelton Arms*, 346 F.3d at 1193. Simply put, “[b]ecause the district court remanded for a procedural defect, and because procedural defects are waivable, the district court lacked authority to remand in the absence of a timely motion by [Appellee]. [Appellee] did not file a motion to remand, timely or otherwise. Therefore, the district court exceeded its authority under § 1447(c) by remanding *sua sponte* based on a non-jurisdictional defect.” *Corona-Contreras*, 857 F.3d at 1029–30 (internal citations omitted).

IV. CONCLUSION

For the foregoing reasons, Appellant [REDACTED] respectfully requests that the Court find that it has jurisdiction to hear Appellant's appeal, discharge the Order to Show Cause dated July 13, 2017 and proceed with the appeal.

EVANS & KOB, PC



DATED: August 2, 2017

Brett G. Evans (Bar No. 244213)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Telephone: (619) 522-0797

Facsimile: (888) 956-7890

Attorneys for Defendant-Appellant [REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing, along with the Declaration of Brett G. Evans, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 2, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Brett G. Evans