

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jul 14, 2020**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DANIEL MORGAN, an individual, and  
all those similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

NO. 2:20-CV-00157-SAB

**ORDER DENYING  
DEFENDANT’S MOTION TO  
DISMISS AND REMANDING  
TO SUPERIOR COURT**

Before the Court is Defendant’s Fed. R. Civ. P. 12(b)(1) and 12(b)(6) Motion to Dismiss, ECF No. 3. Having considered the parties’ briefs and oral arguments and the relevant caselaw, the Court **DENIES** Defendant’s Motion to Dismiss and **GRANTS** Plaintiff’s Construed Motion to Remand the case to the Spokane County Superior Court.

**BACKGROUND**

This case stems from a credit card debt Plaintiff incurred with FIA Card Services, N.A., which initiated a collection action against Plaintiff in the Spokane County District Court in 2012. While the action was ongoing, FIA Card Services merged into Defendant in 2014, and Defendant continued to litigate under FIA’s name “for more than half a decade.” ECF No. 5 at 8. Plaintiff alleges that Defendant’s collection activities violated the Fair Debt Collection Practices Act 15 U.S.C. § 1692 *et seq.* (“FDCPA”) in three ways. First, on or about February 23, 2015, the Spokane County District Court issued a Notice for Dismissal for Want of

1 Prosecution, effective after 30 days, unless Defendant undertook timely action as  
2 specified in the Notice. Defendant did not undertake timely action as specified, but  
3 instead filed two Motions for Summary Judgment on or about June 19, 2017 and  
4 October 31, 2019, respectively. Plaintiff alleges that Defendant attempted to collect  
5 money from Plaintiff more than 30 days after the Spokane County District Court's  
6 February 23, 2015 Notice, in violation of 15 U.S.C. §§ 1692e(2) and 1692e(5).  
7 Second, in the debt collection complaint, Defendant claimed that Plaintiff owed  
8 \$13,559.85 and Plaintiff's last payment was on October 4, 2010. But in its October  
9 31, 2019 Motion for Summary Judgment, Defendant averred that Plaintiff's last  
10 payment was made on October 18, 2013 in the amount of \$50. Plaintiff argues that  
11 Defendant did not credit any payments to the \$13,559.85 debt since October 4,  
12 2010. Plaintiff alleges that Defendant violated 15 U.S.C. § 1692f(1) by attempting  
13 to collect \$13,559.85, the full amount alleged due on October 4, 2010, even as  
14 Defendant acknowledged Plaintiff's last payment was on October 18, 2013 in the  
15 amount of \$50. Third, Plaintiff alleges Defendant violated 15 U.S.C. § 1692e(14)  
16 by using the name "FIA Card Services," a name other than its own true name, in  
17 debt collection proceedings.

18 Plaintiff filed his Complaint in the Spokane County Superior Court on  
19 March 18, 2020. On April 16, Defendant removed this case to federal court on the  
20 basis of federal question jurisdiction. On May 4, Defendant moved to dismiss  
21 Plaintiff's claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6),  
22 arguing that Plaintiff lacks Article III standing, that Defendant was not a "debt  
23 collector" under the FDCPA, and that Plaintiff's claims are time-barred by the  
24 FDCPA's one-year statute of limitations. In response, Plaintiff conceded that he  
25 "allege[d] nowhere that he suffered an injury that would satisfy Article III," which  
26 was "precisely why Plaintiff filed his case in state court, rather than in this Court."  
27 Instead, Plaintiff requested the Court to deny the Motion, remand the case to state  
28

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1 court, and award attorney fees and costs for work performed in response to  
2 Defendant’s removal.

### 3 STANDARD OF REVIEW

4 When reviewing a motion to dismiss, a district court must accept as true all  
5 material allegations in the complaint and must construe the complaint in the  
6 nonmovant’s favor. *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 867 (9th Cir.  
7 2002). A plaintiff needs only to plead “general factual allegations” of injury to  
8 survive a motion to dismiss, as opposed to the “specific facts” needed to survive a  
9 motion for summary judgment. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561  
10 (1992).

### 11 DISCUSSION

#### 12 1. Standing and Subject Matter Jurisdiction

13 At issue here is whether Plaintiff has standing to proceed in federal court—a  
14 forum this Court notes Plaintiff did not choose and which he is in against his will.  
15 “Standing to sue is a doctrine rooted in the traditional understanding of a case or  
16 controversy” under Article III of the Constitution. *Spokeo, Inc. v. Robins*, 136 S.  
17 Ct. 1540, 1549 (2016). “The doctrine developed in our case law to ensure that  
18 federal courts do not exceed their authority as it has been traditionally understood.”  
19 *Id.* The “irreducible constitutional minimum of standing” consists of three  
20 elements, all of which the party invoking federal jurisdiction bears the burden of  
21 establishing: first, the plaintiff must have suffered an “injury in fact”; second, there  
22 must be a causal connection between the injury and the conduct complained of;  
23 and third, the injury will likely be “redressed by a favorable decision.” *Lujan*, 504  
24 U.S. at 560-561.

25 Relevant here is the injury-in-fact element. To establish this element, the  
26 plaintiff must have suffered “an invasion of a legally protected interest” that is  
27 “concrete and particularized” and “actual or imminent, not conjectural or  
28 hypothetical.” *Id.* at 560. A plaintiff does not “automatically satisf[y] the injury-in-

1 fact requirement whenever a statute grants a person a statutory right and purports  
2 to authorize that person to sue to vindicate that right.” *Spokeo*, 136 S. Ct. at 1549.  
3 In other words, “Article III standing requires a concrete injury even in the context  
4 of a statutory violation.” *Id.* For that reason, a plaintiff cannot “allege a bare  
5 procedural violation, divorced from any concrete harm, and satisfy the injury-in-  
6 fact requirement of Article III.” *Id.*

7 Here, both parties agree that Plaintiff alleges no concrete injury and thus  
8 lacks Article III standing. ECF No. 3 at 7-10; ECF No. 5 at 3-4. The Court has no  
9 reason to find otherwise. As the party invoking federal jurisdiction, the burden was  
10 on Defendant, not Plaintiff, to prove that all the elements of federal jurisdiction  
11 were satisfied upon removal. Defendant’s attempt to invoke federal jurisdiction for  
12 purposes of removal and then argue for dismissal based on the lack of standing—a  
13 fundamental element of this Court’s jurisdiction—does not satisfy its burden.  
14 Accordingly, the Court finds that it lacks jurisdiction to consider this case.

## 15 2. Dismissal or Remand

16 In absence of standing, the Court next considers whether this case should be  
17 dismissed or remanded to state court.

18 Where standing is absent in a removed case, “the case shall be remanded.”  
19 28 U.S.C. § 1447(c). The Court may remand a case either on a party’s motion or  
20 *sua sponte*. Historically, there was a futility exception to the remand rule—a  
21 district court could dismiss a case without remand to state court if it had “absolute  
22 certainty” that the state court would inevitably dismiss the case, rendering a  
23 remand “futile.” *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1999)  
24 (quoting *M.A.I.N. v. Comm’r, Maine Dept. of Human Servs.*, 876 F.2d 1051, 1054  
25 (1st Cir.1989)). However, the Supreme Court declined to apply the futility  
26 exception in *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S.  
27 72, 88-89 (1991), and thereafter a number of circuits expressly rejected the futility  
28 doctrine. *Polo v. Innoventions Int’l, LLC*, 833 F.3d 1193, 1197-1198 (9th Cir.

1 2016) (citing *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1225-26  
2 (10th Cir. 2012) (collecting cases)). Defendant argues that the futility doctrine is  
3 still prevalent since the Ninth Circuit did not overrule *Bell in Polo*. ECF No. 7 at 4.  
4 However, the only reason the Ninth Circuit did not overrule *Bell in Polo* was  
5 because the plaintiff in that case failed to raise that argument, and the Circuit was  
6 unwilling to explicitly overrule its precedent *sua sponte*. *Polo*, 833 F.3d at 1198.  
7 That is not the case here. The Court notes that many district courts within this  
8 circuit have joined the trend of abandoning the futility doctrine and remanding  
9 removed cases to state courts on either the plaintiffs’ or their own motion. *See, e.g.*,  
10 *Gordon v. Healthy Halo Ins. Serv. Inc.*, No. 2:19-CV-0387-TOR, 2020 WL  
11 1317446, at \*1 (E.D. Wash. Mar. 20, 2020); *Williamson v. Genentech, Inc.*, No.  
12 19-cv-01840-JSC, 2020 WL 1281532, at \*3 (N.D. Cal. Mar. 18, 2020); *Terrell v.*  
13 *Costco Wholesale Corp.*, No. C16-1415JLR, 2017 WL 2169805, at \*2 (W.D.  
14 Wash. May 16, 2017). “Remand is the correct remedy because a failure of federal  
15 subject matter jurisdiction means only that the federal courts have no power to  
16 adjudicate the matter. State courts are not bound by the constraints of Article III.”  
17 *Polo*, 833 F.3d at 1196 (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)).

18 Therefore, the Court denies Defendant’s Motion to Dismiss and grants  
19 Plaintiff’s Construed Motion to Remand to state court for further proceedings. The  
20 Court need not—and indeed cannot—address Defendant’s arguments on the merits  
21 of Plaintiff’s FDCPA claims.

### 22 3. Attorney’s Fees

23 Lastly, the Court turns to Plaintiff’s request for attorney fees and costs for  
24 work performed in response to Defendant’s removal.

25 “An order remanding the case may require payment of just costs and any  
26 actual expenses, including attorney fees, incurred as a result of the removal.” 28  
27 U.S.C. § 1447(c). The statute “strikes a balance that effectuates Congress’s intent  
28 of allowing removal in appropriate circumstances while reducing ‘the

1 attractiveness of removal as a method for delaying litigation and imposing costs on  
2 the plaintiff.” *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 914-915 (N.D.  
3 Ill. 2016) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005)).  
4 “Absent unusual circumstances, courts may award attorney’s fees under § 1447(c)  
5 only where the removing party lacked an objectively reasonable basis for seeking  
6 removal.” *Martin*, 546 U.S. at 141. *See Mocek*, 220 F. Supp. 3d at 914 (holding the  
7 defendant lacked an objectively reasonable basis for seeking removal and the  
8 plaintiff was entitled to attorney’s fees, where the defendant removed the case on  
9 the basis of federal jurisdiction, only to turn around and seek dismissal with  
10 prejudice on the ground that federal jurisdiction was lacking). *Contra Siglin v. Sixt*  
11 *Rent A Car, LLC*, No. 20-cv-503-DMS, 2020 WL 3468220, at \*4 (S.D. Cal. June  
12 25, 2020) (declining to award attorney’s fees, where the defendant sought  
13 dismissal for improper claim splitting, not lack of federal jurisdiction, following  
14 removal); *Ybarra v. Universal City Studios, LLC*, No. CV-13-4976-PSG, 2013 WL  
15 5522009, at \*6-7 (C.D. Cal. Oct. 2, 2013) (declining to award attorney’s fees,  
16 where the case was remanded on the plaintiff’s, not the defendant’s, motion for  
17 lack of federal jurisdiction).

18 Here, Defendant pursued the same avenue as the defendant in *Mocek* did.  
19 The Court has no trouble concluding that Defendant lacked “an objectively  
20 reasonable basis for seeking removal” where it is acknowledged by both parties  
21 that this Court lacks jurisdiction over this case. *Martin*, 546 U.S. at 141. Therefore,  
22 Plaintiff is entitled to recover his attorney fees and costs incurred as a result of the  
23 removal.

24 Accordingly, **IT IS HEREBY ORDERED:**

25 1. Defendant’s Motion to Dismiss, ECF No. 3, is **DENIED**.

26 2. Plaintiff’s Construed Motion to Remand, ECF No. 5, is **GRANTED**.

27 3. The above-captioned case is **REMANDED** to the Spokane County  
28 Superior Court.

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1 4. Plaintiff's Motion for Attorney's Fees, ECF No. 5, is **GRANTED**.

2 5. Plaintiff is **ORDERED** to submit a fee/cost summary within **ten days** of  
3 entry of this Order.

4 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
5 this Order and provide copies to counsel.

6 **DATED** this 14th day of July 2020.



10 *Stanley A. Bastian*

11 Stanley A. Bastian

12 United States District Judge  
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