SHER EDLING LLP
PROTECTING PEOPLE AND THE PLANET

January 6, 2020

Via ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *County of San Mateo v. Chevron Corp.*, No. 18-15499, consolidated with *City of Imperial Beach v. Chevron Corp.*, No. 18-15502; *County of Marin v. Chevron Corp.*, No. 18-15503; *County of Santa Cruz v. Chevron Corp.*, No. 18-16376; Plaintiffs-Appellees' Citation of Supplemental Authorities

Dear Ms. Dwyer,

Plaintiffs-Appellees County of San Mateo, et al. write pursuant to Fed. R. App. P. 28(j) to notify the Court of the recent decision in *Pivo Corp., LLC v. Maglione*, No. 19-12744-E, 2019 U.S. App. LEXIS 32171 (11th Cir. Oct. 25, 2019) (unreported) (Ex. A, attached). The decision is relevant to Plaintiffs-Appellees' Motion for Partial Dismissal, Dkt. 41 (June 6, 2018) ("Mot."), and to the scope of this Court's appellate jurisdiction.

The defendants in *Pivo Corp*. removed on multiple grounds, including civil rights removal jurisdiction under 28 U.S.C. §§ 1443 & 1447(d). Ex. A at 2–3. The district court rejected those arguments and remanded. *See id.* After the defendants appealed from the district court's remand order, the plaintiff filed a motion in the Eleventh Circuit to dismiss the appeal except as to the civil rights removal issue. *Id.* at 2.

The appellate court granted the plaintiff's motion, holding that its jurisdiction was limited to the civil rights ground only:

> Where a defendant asserts multiple bases for removal, including § 1443, and the district court remands for lack of subject matter jurisdiction, we may review the district court's decision only to the extent the defendant challenges the district court's conclusion that removal under § 1443 was improper.
>
> Here, § 1447(d) deprives us of jurisdiction to review the district court's determination that it lacked diversity or federal question jurisdiction, but we can review the district court's conclusion that removal under 28 U.S.C. § 1443 was improper.

Id. at 2–3 (citations omitted). The court dismissed the remainder of the appeal. *Id.*

Molly C. Dwyer
Clerk of Court
January 6, 2020

The *Pivo Corp.* decision supports Plaintiffs-Appellees' argument that this Court lacks appellate jurisdiction except as to Defendants-Appellants' assertion of federal officer removal under 28 U.S.C. § 1442, which, like § 1443, is an exception to § 1447(d)'s prohibition against appellate review of district court remand orders. *See* Mot. At 9–22; Plaintiffs-Appellees' Brief at 11–12, Dkt. 88 (Jan. 22, 2019). *Pivo Corp.* is consistent with the law of this Court and the majority of other circuits. *See, e.g.*, *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006).

Respectfully submitted,

/s/ Victor M. Sher
Victor M. Sher
Sher Edling LLP

Counsel for Plaintiffs-Appellees
in Nos. 18-15499, 18-15502, 18-15503,
and 18-16376

cc: All Counsel of Record (via ECF)

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12744-E

PIVO CORPORATION, LLC,

Plaintiff-Appellee,

versus

NICHOLAS MAGLIONE,
SHEENA MAGLIONE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

Before: TJOFLAT, JILL PRYOR, and GRANT, Circuit Judges.

BY THE COURT:

Appellants Nicholas and Sheena Maglione appeal from the district court's order remanding this action to state court. In the notice of removal, they asserted that removal to federal court was proper pursuant to Section 3 of the Civil Rights Act of 1866. *See* Civil Rights Act of 1866, 14 Stat. 27, 27 (1866). The district court remanded the case because the Magliones failed to establish diversity jurisdiction under 28 U.S.C. § 1332(a), federal question jurisdiction under 28 U.S.C. § 1331, or—based on the Magliones' references to the Civil Rights Act of 1866—an equal rights violation under 28 U.S.C. § 1443. The Magliones have moved for leave to proceed *in forma pauperis* ("IFP") on appeal.

Appellee Pivo Corporation, LLC ("Pivo") has moved to dismiss this appeal for lack of jurisdiction and as frivolous, and for sanctions, under Fed. R. App. P. 38.

For the following reasons, Pivo's motion to dismiss this appeal for lack of subject matter jurisdiction is GRANTED IN PART. Over the remaining part of the appeal, IFP status is DENIED and Pivo's motion to dismiss this appeal as frivolous is GRANTED. Pivo's motion for Rule 38 sanctions is DENIED.

I.

Generally, we lack jurisdiction to review a district court's order remanding a case to state court for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(d), (c); *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1095 (11th Cir. 1997) (noting that this Court lacks jurisdiction to review an order remanding a case to the state court from which it was removed, if the basis for the remand is a ground listed in § 1447(c)); *see also Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317, 1319 (11th Cir. 2001) (stating that Section 1447(c) remands, for which review is barred, are remands based on (1) a lack of subject matter jurisdiction, or (2) a motion to remand, filed within 30 days of the notice of removal, alleging a defect in the removal procedure). An exception to § 1447(d)'s review-bar exists for remand orders in cases removed pursuant to 28 U.S.C. § 1443, which are reviewable on appeal. *See* 28 U.S.C. § 1447(d); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001). Where a defendant asserts multiple bases for removal, including § 1443, and the district court remands for lack of subject matter jurisdiction, we may review the district court's decision only to the extent the defendant challenges the district court's conclusion that removal under § 1443 was improper. *See Conley*, 245 F.3d at 1293 n.1.

Here, § 1447(d) deprives us of jurisdiction to review the district court's determination that it lacked diversity or federal question jurisdiction, but we can review the district court's conclusion that removal under 28 U.S.C. § 1443 was improper. *See* 28 U.S.C. § 1447(d); *Whole Health Chiropractic & Wellness, Inc.*, 254 F.3d at 1319, 1321; *Alabama*, 245 F.3d at 1293 n.1; *New*, 114 F.3d at 1095. Therefore, Pivo's motion to dismiss this appeal for lack of jurisdiction is GRANTED IN PART, and this appeal may proceed only to the extent that the Magliones challenge the portions of the district court's remand order related to whether removal was proper under § 1443.

II.

As to the remaining portions of the remand order, the Magliones have no nonfrivolous arguments regarding the district court's conclusion that removal under § 1443 was improper because their removal action, of a state court dispossessory action, does not pass the test announced by the Supreme Court in *Georgia v. Rachel*, 384 U.S. 780 (1966). "First, the petitioner must show that the right upon which the petitioner relies arises under a federal law 'providing for specific civil rights stated in terms of racial equality.' Second, the petitioner must show that he has been denied or cannot enforce that right in the state courts." *Ala. v. Conley*, 245 F.3d 1292, 1295 (11th Cir. 2001) (*quoting Rachel*, 384 U.S. at 792, 794).

A petitioner must meet both parts of *Rachel*, and the Magliones plainly fail under the second, so we do not need to consider the first prong. *See id.* The Magliones have not shown that the dispossessory action would deny them federal civil rights based on racial equality, and have no nonfrivolous argument regarding the district court finding that they did not qualify for removal under § 1443. *See id.*; *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (providing that an action is frivolous if it is without arguable merit in law or fact). Accordingly, IFP status is DENIED and Pivo's motion to dismiss this appeal as frivolous is GRANTED.

III.

Pivo's motion for sanctions is DENIED. Under Rule 38, sanctions and costs may be imposed if this Court determines that the appeal is frivolous. *See* Fed. R. App. P. 38. Although this appeal is frivolous, this Court generally is reluctant to impose these sanctions on *pro se* appellants. Here, the Magliones are proceeding *pro se* and the circumstances of this appeal are not such that Rule 38 sanctions are warranted.

The Clerk is DIRECTED to close the file on this appeal.