

ENTERED

May 14, 2025

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ATLANTIC WAVE HOLDINGS, LLC, <i>et</i>	§	
<i>al.</i> ,	§	
	§	
	§	
Plaintiffs,	§	CIVIL ACTION NO. 25-1689
	§	
v.	§	
	§	
CYBERLUX CORPORATION, <i>et al.</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM AND OPINION

This dispute has a long and winding history across multiple state and federal courts. The plaintiffs, Atlantic Wave Holdings LLC and Secure Community LLC, obtained a judgment in June 2023 in a Virginia state court against the defendants, Cyberlux Corporation and Mark D. Schmidt.¹ Since then, Atlantic Wave has been trying to enforce that judgment. Atlantic Wave sued Cyberlux in July 2024 in the 129th Judicial District Court of Harris County, Texas, trying to collect on the judgment. Cyberlux has resisted. Three months ago, Cyberlux removed the case to federal court. This court remanded because, among other problems, the removal was untimely. (Case No. 25-cv-626, Docket Entry Nos. 15, 16, 18).

Approximately two weeks after this court’s remand order, Cyberlux removed again, and Atlantic Wave moved to remand. (Docket Entry No. 3). Based on the briefing, record, and applicable law, this case is again remanded to the 129th Judicial District Court of Harris County,

¹ The plaintiffs are referred to collectively as “Atlantic Wave.” The defendants are referred to collectively as “Cyberlux.”

Texas. Atlantic Wave’s request for attorney’s fees is granted. The reasons for these rulings are below.

I. The Legal Standard

Under 28 U.S.C. § 1441, a defendant may remove a “civil action brought in a State court of which the district courts of the United States have original jurisdiction.” This includes “civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

Federal statute also allows for removal of a civil action commenced in state court involving “[a] property holder whose title is derived from” an officer of the United States, “where such action . . . affects the validity of any law of the United States.” 28 U.S.C. § 1442(a)(2). The federal-officer removal statute “applies to private persons ‘who lawfully assist’ the federal officer ‘in the performance of his official duty.’” *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 151 (2007) (quoting *Davis v. South Carolina*, 107 U.S. 597, 600 (1883)).

Regardless of the statutory basis for removal, a defendant must follow the removal procedures in 28 U.S.C. § 1446. Generally, a notice of removal must be filed within 30 days after the defendant receives a copy of the initial pleading or service of summons. 28 U.S.C. § 1446(b)(1). However,

if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

Id. § 1446(b)(3). The “other paper,” *see id.*, “must result from the voluntary act of a *plaintiff*.” *Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362, 373 (5th Cir. 2021) (quoting reference omitted).

II. Analysis

Atlantic Wave's original petition, filed in July 2024, made clear that Atlantic Wave sought to collect money from Cyberlux or levy and sell Cyberlux's property located in a Texas Cyberlux facility towards satisfying the Virginia state-court judgment. (Case No. 25-cv-626, Docket Entry No. 3-3).² Cyberlux's motion to quash filed on January 6, 2025, shows that Cyberlux knew at that time that there was U.S. government property in its Texas facility. *See* (Case No. 25-cv-626, Docket Entry No. 4-1 at 14). Cyberlux has used the presence of some government property to attempt to delay and frustrate Atlantic Wave's right to collect on its judgment. Cyberlux was aware of the alleged federal issues raised by the presence of some federal government property in Cyberlux's facility by January 6, 2025, at the latest.³ Cyberlux did not remove for more than 30 days after January 6, 2025. *See* (Case No. 25-cv-626, Docket Entry Nos. 1, 3). That removal was clearly untimely. *See* (Docket Entry No. 1-1 at 24).

On January 16, 2025, the Texas state court stated that it was going to appoint a receiver for Cyberlux's property and instructed Atlantic Wave to file a proposed order. (Case No. 25-cv-626, Docket Entry No. 4-1 at 141, 152). The court did not authorize the receiver to attempt to collect Cyberlux's judgment debt to Atlantic Wave by seizing any of the federal government property in the Cyberlux facility. Nor did Atlantic Wave or the receiver seek to seize federal government property to satisfy Cyberlux's judgment debt. As this court previously held, neither the proposed receivership order filed by Atlantic Wave on January 20, 2025, nor the letter to the state-court judge from the receiver, Robert Berleth, dated February 3, 2025, provided any basis, new or

² As Cyberlux states: "On July 30, 2024, [Atlantic Wave] filed a Petition to Enforce in Texas state court, seeking to levy and sell various Cyberlux property, including Cyberlux's property in a Spring, Texas facility . . . leased by Cyberlux." (Case No. 25-cv-626, Docket Entry No. 5 at 7).

³ Atlantic Wave requested an inspection of Cyberlux's Texas facility on January 9, 2025, (Docket Entry No. 3-1 at 5-7), which was also more than 30 days before Cyberlux filed its first notice of removal.

otherwise, for federal jurisdiction or removal. *See* (Case No. 25-cv-626, Docket Entry Nos. 16, 18). That conclusion was bolstered by Mr. Berleth’s representations to the state court that he had “no intention” of selling government property or infringing on government property interests if appointed receiver. (Case No. 25-cv-626, Docket Entry No. 4-1 at 148, 150). Atlantic Wave’s counsel similarly represented to this court that it had “no interest in selling assets that belong to the federal government.” (Docket Entry No. 1-1 at 15). This court issued these findings before remanding. (Case No. 25-cv-626, Docket Entry Nos. 16, 18).

Two weeks later, Cyberlux removed yet again. (Docket Entry No. 1). Cyberlux justified this removal on Atlantic Wave’s filing of a new proposed receivership order in the Texas state court on April 1, 2025. *See* (Docket Entry No. 1-7).⁴ Cyberlux characterizes the proposed order as “excessively broad,” “extreme and improper,” and “unconscionable.” (Docket Entry No. 1 at 7–9). It is clearly none of those things. More importantly, it is not an “other paper from which it may first be ascertained that the case is one which is or has become removable.” *See* 28 U.S.C. § 1446(b)(3).

The proposed order does not mention U.S. government property, much less give the state-appointed receiver power to seize and sell U.S. government property. To the contrary, the proposed order defines the “Receivership assets” as “*Debtor’s* non-exempt property.” (Docket Entry No. 1-7 at ¶ 14) (emphasis added); *see also* (*id.* at ¶ 25) (granting the receiver the power to “take possession of *Debtor’s* non-exempt property” (emphasis added)).

Cyberlux objects to three paragraphs of the proposed order. (Docket Entry No. 9 at 7–8) (citing Docket Entry No. 1-7 at ¶¶ 21(h), 28, 31). But these paragraphs simply give Cyberlux

⁴ Cyberlux removed before the Texas state court issued an order on the receivership.

recourse through the state courts if the receiver were to violate the order (which he disavowed any intent to do) by seizing U.S. government property. *See* (Docket Entry No. 1-7 at ¶ 21(h)) (If Cyberlux “believes that the Receiver’s demands are inappropriate,” it “must first comply, then *seek protection from the Court*” and “*must set the matter for the earliest possible hearing date.*” (emphasis added)); (*id.* at ¶ 28) (In disputes about “whether an asset . . . belongs to a Debtor,” the Receiver “may take custody of the asset *until the Court determines the rights of those claiming an interest in the asset*”); (*id.* at ¶ 31) (same). Again, both Mr. Berleth and Atlantic Wave have repeatedly represented to this court and the state court that they do not intend to seize or sell U.S. Government property. *See, e.g.,* (Case No. 25-cv-626, Docket Entry No. 4-1 at 148, 150); (Docket Entry No. 1-1 at 15); (Docket Entry No. 1-6 at 2).

There is no basis for Cyberlux’s statement that the order, “if signed by the state court judge, would have given the receiver authority to take the Federal Government Property and sell it.” (Docket Entry No. 9 at 15). Rather, the proposed order reiterates what has been clear since the original petition was filed: the state court will be the ultimate determiner of which of Cyberlux’s assets can lawfully be seized to satisfy the Virginia state-court judgment. The proposed order does not provide a newly discovered basis for removal.

Contrary to Cyberlux’s representation, there is also no evidence that the plaintiffs “have trampled over the line they repeatedly represented to [this court] they would not tread.” *See* (Docket Entry No. 1 at 2). In a cover letter to the proposed order filed in the state court, Atlantic Wave’s attorney expressly reiterated: “To be clear, the focus of Plaintiffs’ collection efforts is not to seize personal property on which the United States has or claims a mortgage or other lien as established by competent evidence, but rather to seize personal property of Judgment-Debtors as set forth in the proposed receivership order.” (Docket Entry No. 1-6 at 2). As detailed above, the

proposed order does not state, or even suggest, that Atlantic Wave or Mr. Berleth intend to seize U.S. government property. And Atlantic Wave's letter to the court on April 9, 2025, does not provide a new or different perspective. Atlantic Wave's actions since this case was removed, remanded, and removed again are consistent with its representations to this court and to the state court.

In short, Cyberlux's second notice of removal is based on an unjustified reading of two letters and a proposed receivership order filed by Atlantic Wave. None of these documents present a new or valid basis for removal. There is still no reason to think that U.S. government property will be seized and sold as a part of the state-court case. But even if there were, Cyberlux knew on January 6, 2025, that its Texas facility contained government property. To the extent that this raises a federal question, the notice of removal must have been filed within 30 days of January 6, 2025, at the latest, to be timely. *See* 28 U.S.C. § 1446. It was not. All of this was true when this court previously remanded this case, and it remains true today.

This case is remanded, again, to the 129th Judicial District Court of Harris County, Texas.

III. Attorney's Fees and Costs

Atlantic Wave requests "the opportunity to submit a separate motion seeking an award of reasonable attorneys' fees" incurred as a result of Cyberlux's multiple removals. (Docket Entry No. 3 at 29). Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin*

Cap. Corp., 546 U.S. 132, 141 (2005). “Conversely, when an objectively reasonable basis exists, fees should be denied.” *Id.*

This court denied Atlantic Wave’s request for fees incurred as a result of Cyberlux’s first removal, finding that there was at least a colorable basis for removing. (Docket Entry No. 1-1 at 24). Given that almost nothing has changed since the court remanded this case just a few weeks ago, Atlantic Wave’s current request for fees has more merit. Cyberlux responds that its second notice of removal “sought to comply with this Court’s reasoning that if Plaintiffs took further action to take and sell the Federal Government Property, then that may be a basis to remove.” (Docket Entry No. 9 at 15). In support, Cyberlux cites the following interaction at the hearing on Atlantic Wave’s first motion to remand:

Cyberlux’s Counsel: ... If this is remanded and the receiver moves on those assets [belonging to the federal government] and tries to liquidate them, we have an issue where U.S. Government property prepared for the military is being put out on the open market.

The court: Well, if the receiver did that, then you might have a trigger for removal.

(Docket Entry No. 1-1 at 15). The court went on to clarify that, even then, federal-officer removal may not apply. (*Id.*).

Cyberlux argues that the proposed order brought this case within the hypothetical raised at the hearing. (Docket Entry No. 9 at 15). Not so. There is no evidence that the receiver tried to seize and sell U.S. government property, or that the state court would allow him to do so. Cyberlux had no objectively reasonable basis to remove again. Atlantic Wave must submit documents showing its “just costs and actual expenses, including attorney fees, incurred as a result of the removal.” *See* 28 U.S.C. § 1447(c). Cyberlux may object if it has a good faith basis to do so.

IV. Conclusion

Because Cyberlux did not timely remove, Atlantic Wave's motion to remand, (Docket Entry No. 3), is granted. Atlantic Wave's request for an award of the attorney's fees and costs incurred in responding to the second removal is granted. Atlantic Wave must submit documents showing its costs and expenses, including attorney fees, by May 19, 2025. Cyberlux may file objections, if any, by May 26, 2025.

SIGNED on May 14, 2025, at Houston, Texas.



Lee H. Rosenthal
Senior United States District Judge

Unofficial Copy Office of Marilyn Burgess District Clerk