NO. ____

In the Supreme Court of the United States

SEBHAT AFEWORK, M.D.,
Petitioner,

V.

VELANTA MONIQUE BABBITT, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is the same as that presented in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (to be argued Jan. 19, 2021):

Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removal to federal court was premised in part on the federal officer removal statute, 28 U.S.C. 1442, or the civil rights removal statute, 28 U.S.C. 1443.

PARTIES TO THE PROCEEDING

Petitioner Sebhat Afework is a defendant in the district court and the appellant in the court of appeals.

Respondent Velanta Monique Babbitt is the plaintiff and representative of her minor child in the district court and an appellee in the court of appeals.

Respondent Dignity Health is a defendant in the district court and an appellee in the court of appeals.

The United States is an interested party and movant in the district court and an appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Velanta Monique Babbitt et al. v. Dignity Health, et al., Civ. No. 18-06258 (Nov. 19, 2018)

United States Court of Appeals (9th Cir.):

Velanta Babbitt v. Sebhat Afework, M.D., et al., No. 18-56576 (Aug. 8, 2020)

Velanta Babbitt v. Sebhat Afework, M.D., et al., No. 18-56576 (Nov. 10, 2020) (order granting motion to stay mandate)

Velanta Babbitt v. Sebhat Afework, M.D., et al., No. 18-56576 (Nov. 19, 2020) (order granting motion to extend stay mandate)

State Court (Los Angeles Cnty. Sup. Ct.):

Velanta Monique Babbitt v. Dignity Health, et al., Case No. BC 610296 (Feb. 16, 2016).

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PETITION FOR A WRIT OF CERTIORARI

Sebhat Afework ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 5a) is unpublished but reported at 81 Fed. Appx. 111. The decision of the district court (App. 10a) is unpublished but reported at 2018 WL 6040472.

JURISDICTION

The judgment of the Ninth Circuit was entered on August 10, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1447(d) of Title 28 of the United States Code provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT

This case presents an issue that will be resolved by the Court's disposition of *BP p.l.c. v. Mayor & City Council of Baltimore,* No. 19-1189. As in *BP*, petitioner removed this action to federal court pursuant to 28 U.S.C. 1442, among other bases for federal jurisdiction. Likewise, as in *BP*, the court of appeals here determined that its review was limited to the Section 1442 ground for removal.

In addition to invoking federal jurisdiction under Section 1442, petitioner Sebhat Afework also removed this case pursuant to 42 U.S.C. 233(*l*)(2), another federal officer removal statute. Petitioner's employer, Eisner Pediatric Family Medical Center ("Eisner"), is a community health center that receives federal funding under Section 330 of the Public Health Service ("PHS") Act, 42 U.S.C. 254b, to provide health care and related services to a "medically underserved" area or population, regardless of its patients' insurance status or ability to pay for services. *Id.* at 254b(a).

For purposes of such federally-funded activities, and to stretch scarce federal resources, the Secretary of the United States Department of Health and Human Services ("HHS") deemed Eisner and its employees (including petitioner) to be federal PHS employees under 42 U.S.C. 233(g) and (h). App. 7a. Deemed PHS employees enjoy an absolute immunity from any civil action or proceeding arising out of their performance of medical, surgical, dental, or related functions undertaken within the scope of their deemed federal employment. *See* 42 U.S.C. 233(a), (g); *see also* H.R. Rep. No. 104–398, at 5–7, (1995), *as reprinted in* 1995

U.S.C.C.A.N. 767, 769–71 (extending immunity to allow federally-funded health centers to redirect funds spent on malpractice insurance premiums toward improving or expanding services).

In February 2016, Velanta Monique Babbitt filed a malpractice action in California Superior Court alleging that petitioner and other defendants were negligent in rendering obstetrical services. App. 11a.

After removing this case to the district court via 28 U.S.C. 1442(a)(1) and 42 U.S.C. 233(*l*)(2), petitioner moved that court to stay the proceedings and to vindicate his absolute federal immunity by substituting the United States as the only proper defendant in his place. App. 11a. Rather than substitute the United States, the district court—without considering petitioner's deemed federal status in applying Section 1446—granted the United States' motion to remand, finding petitioner's invocation of Section 1442 too late under 28 U.S.C. 1446(b). *See* App. 11a, 16a, n.4. Next, the district court found petitioner's Section 233(*l*)(2) removal too early. App. 17a–19a. Accordingly, the district court declined to conduct the hearing or make the threshold immunity determination mandated by that section. *See* 42 U.S.C. 233(*l*)(2).

Petitioner timely appealed the district court's remand order. The United States, insisting that petitioner's Section 1442 removal—despite his deemed federal status—was "wholly insubstantial," moved to dismiss.[1] The appeals court (1) affirmed the district

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[1] Paradoxically, the United States has, on numerous occasions, invoked § 1442(a)(1) *on behalf of* deemed PHS employees to

court's remand order to the extent it declared petitioner's Section 1442 removal untimely and (2) dismissed the remainder of the appeal for lack of jurisdiction. Citing binding precedent—*County of San Mateo v. Chevron Corp.,* 960 F.3d 586, 598 (9th Cir. 2020) *en banc reh'g denied* (Aug. 4, 2020)—the court of appeals noted it was "unable" to reach or address petitioner's 42 U.S.C. 233 basis for removal.[2] App. 9a.

After the court of appeals agreed to stay its mandate pending this petition, App. 4a, the United States requested the court publish its decision, asserting the decision provides "persuasive guidance" for other courts as to how Section 1447(d) "correctly" bars appellate review of "section 233's removal provisions." U.S. Request for Publication, ECF No. 54 (Sept. 11, 2020) (citing now pending cases presenting the same issue). But less than three months later—following this Court's grant of review in *BP*—the United States, via the Acting Solicitor General, urged the adoption of petitioner's reading of the Section 1447(d), a position that, if accepted, would invariably reverse *County of San Mateo*, 960 F.3d 586, as well as the court of appeals' decision in this case. *See* U.S. Br. as Amicus

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remove cases to federal court. *See, e.g.*, *Nichols v. Sabzwari*, 2017 WL 6389634 at *1 (D.S.C. Nov. 13, 2017); *Gabriel v. Alger*, 2015 WL 1042507 at * 1 (D. Colo. Mar. 5, 2015); *Rosenblatt v. St. John's Episcopal Hosp.*, 2012 WL 294518 at * 1 (E.D.N.Y. 2012); *Kidder v. Richmond Area Health Center*, 595 F. Supp. 2d 139, 140 (D. Me. 2009).

[2] The court of appeals in this case issued its decision on August 10, 2020, less than four business days after the Ninth Circuit denied rehearing in *County of San Mateo*. A petition for a writ of certiorari was filed on January 4, 2020 to review the Ninth Circuit's decision in *County of San Mateo*. *See Chevron Corp., et al. v. County of San Mateo, et al.*, No. 20-884.

Curiae in Supp. of Pet., *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, at 10–31.

REASONS FOR GRANTING THE PETITION

This case presents the identical question presented in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189: whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removal to federal court was premised in part on the federal officer removal statute, 28 U.S.C. 1442.

Because this Court already granted review in *BP* to resolve this important and recurring question—on which the courts of appeals are undeniably divided and on which petitioner and the United States now appear to agree—the petition for a writ of certiorari in this case should be held pending a decision in *BP*.

The court of appeals in this case was constrained by circuit precedent on one side of the circuit split, namely *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) (cert. pet. filed Dec. 30, 2020). App. 9a. In *County of San Mateo*, the Ninth Circuit not only acknowledged a conflict with *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 812 (7th Cir. 2015)—in which the Seventh Circuit held that Section 1447(d) authorizes appellate review of the entire remand order in cases removed pursuant to Sections 1442 or 1443—but suggested that, "[w]ere we writing on a clean slate, we might have concluded that *Lu Junhong* provides a more persuasive interpretation of § 1447(d)" than *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006), which held that Section 1447(d)

restricts appellate review to Section 1443 when a case was removed on multiple grounds. *County of San Mateo*, 960 F.3d 586 at 597. But because circuit precedents do not "cease to be authoritative" merely because a later litigant advances new or more persuasive arguments, *County of San Mateo*—and in turn the court of appeals in this case—"remain[ed] bound" by precedent. 960 F.3d at 597–98. A petition for a writ of certiorari is now also pending in *County of San Mateo*. *Chevron Corp., et al. v. County of San Mateo, et al.*, No. 20-884 (question presented identical to that presented in *BP*).

For the reasons asserted by the petitioners in their merits brief in *BP,* and by the United States as amicus curiae in that case, the Court should hold in *BP* that Section 1447(d) authorizes a court of appeals to review the district court's entire remand order, including all grounds for removal asserted, in a case removed in part on federal-officer or civil-rights grounds. *See* Pet. Br. at 16–37, *BP*, *supra*; Amicus Curiae Br. of U.S. in Support of Pet. at 10–31.

Additionally, the basis for removal jurisdiction in this case—other than Section 1442—provides a statutory guarantee to a federal forum to ascertain the availability of a federal defense for those the HHS Secretary has deemed to be federal PHS employees. Those individuals, like petitioner, provide medical and related services to underserved areas and populations throughout the United States and its territories. The continued operation of the health care safety net of which petitioner is part requires a uniform approach to appellate review of federal immunity claims. *Cf. Hui v. Castaneda,* 559 U.S. 799 (2010) (resolving conflict between Second and Ninth Circuits as

to the breadth of Section 233(a) immunity). Just as deemed PHS personnel need certainty as to the meaning and scope of the immunity that protects them for such activities, they need uniformity across circuit lines as to the availability of appellate review.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, and then disposed of accordingly.

Respectfully submitted.

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JANUARY 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 10 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VELANTA MONIQUE BABBITT, in her individual capacity and as parent and guardian of B. D., a minor,
Plaintiff-Appellee,

v.

DIGNITY HEALTH, a California corporation,
Defendant-Appellee,

v.

SEBHAT AFEWORK, M.D.,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Movant-Appellee.

No. 18-56576
D.C. No. 2:18-cv-06528-DMG-FFM
Central District of California,
Los Angeles

ORDER

Before: KLEINFELD and NGUYEN, Circuit Judges, and PAULEY,[*] District Judge.

Appellant's motion to extend the stay of the mandate pending filing of a petition for writ of certiorari is GRANTED. The mandate shall be stayed until January 8, 2021, and if a petition for writ of certiorari is filed by that date, the mandate shall be stayed for such further time until the Supreme Court acts on the petition. If the petition is denied, the mandate shall be issued forthwith.

[*] The Honorable William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 31 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VELANTA MONIQUE BABBITT, in her individual capacity and as parent and guardian of B. D., a minor,
Plaintiff-Appellee,

v.

DIGNITY HEALTH, a California corporation,
Defendant-Appellee,

v.

SEBHAT AFEWORK, M.D.,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Movant-Appellee.

No. 18-56576
D.C. No. 2:18-cv-06528-DMG-FFM
Central District of California,
Los Angeles

ORDER

Before: KLEINFELD and NGUYEN, Circuit Judges, and PAULEY,[*] District Judge.

Appellant's motion to stay the mandate pending filing of a petition for writ of certiorari is GRANTED. The mandate shall be stayed for 90 days and if a petition for writ of certiorari is filed within that period, the mandate shall be stayed for such further time until the Supreme Court acts on the petition. If the petition is denied, the mandate shall be issued forthwith.

[*] The Honorable William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 10 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

K. C., a minor by and through his Guardian ad Litem Dana K. Dunmore,
Plaintiff-Appellee,

v.

AHMAD KHALIFA, M.D.,
Defendant-Appellant,

v.

CALIFORNIA HOSPITAL MEDICAL CENTER; et al.,
Defendants-Appellees,

v.

UNITED STATES OF AMERICA,
Movant-Appellee.

No. 18-56520
D.C. No. 2:18-cv-06619-RGK-AS

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

MEMORANDUM[*]

VELANTA MONIQUE BABBITT, in her individual capacity and as parent and guardian of B. D., a minor,
Plaintiff-Appellee,

v.

DIGNITY HEALTH, a California corporation,
Defendant-Appellee,

v.

SEBHAT AFEWORK, M.D.,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Movant-Appellee.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

No. 18-56576
D.C. No. 2:18-cv-06528-DMG-FFM

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted March 6, 2020
Pasadena, California

Before: KLEINFELD and NGUYEN, Circuit Judges, and PAULEY,[**] District Judge.

These two cases, consolidated for purposes of oral argument, were removed from state court to federal district court, and then ordered remanded. They are materially similar. Patients sued their physicians, Dr. Khalifa and Dr. Afework, for medical malpractice. Both physicians were employed by Eisner Pediatric & Family Medical Center. The Eisner facility and its employees were "deemed" to be Public Health Service employees pursuant to 42 U.S.C. § 233(g). Section 233 provides for removal from state court to federal court of cases against deemed persons, substitution of the United States for those persons deemed to be Public Health Service employees, and exclusiveness of the remedy against the United States, much like Westfall Act cases. Both physicians sought to avail themselves of section 233, but the district

[**] The Honorable William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

court remanded their cases back to state court. They appeal the remand orders.

Section 233 speaks to removal, but not to appeals from remands. A remand order is generally not reviewable on appeal, under 28 U.S.C. § 1447(d), if the defect in removal fell within section 1447(c) and the case was not removed pursuant to 28 U.S.C. §§ 1442 or 1443. Section 1443 speaks to civil rights actions and has no applicability to the cases before us. Section 1442 provides for removal of actions against federal officers relating to acts performed under color of their federal office. Even assuming the physicians here could qualify as federal officers for purposes of section 1442, both remand orders were proper because the removals were untimely. Dr. Afework's notice of removal, filed on July 27, 2018, was untimely given the proof of service of summons indicating service on March 26, 2018, and Dr. Afework did not prove by a preponderance of the evidence that service occurred on a later date that would have rendered removal timely. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014). And it is undisputed that Dr. Khalifa was served on April 15, 2018, but did not file his notice of removal until August 1, 2018.

Both cases were also remanded on the ground that the removals were not authorized under section 233. If the agencies and the district court erred in treating the physicians as not being deemed to be Public Health Service employees, we would need appellate jurisdiction to correct the error, but we lack it under section 1447(d). The district courts'

determinations that they were not entitled to removal under section 233 was at least "a ground that is colorably characterized as subject-matter jurisdiction," *Powerex Corp. v. Reliant Energy Services*, 551 U.S. 224, 234 (2007), so it falls within section 1447(c). *See DeMartini v. DeMartini*, 964 F.3d 813, 821 (9th Cir. 2020). Remands of cases removed pursuant to section 233 are therefore unreviewable under section 1447(d).

Accordingly, we affirm the district courts to the extent they held the section 1442 removals were untimely, and we dismiss the remainder of the appeals for lack of jurisdiction under section 1447(d). We do not, because we lack jurisdiction, reach the question whether the district courts were correct to dismiss under section 233. *See DeMartini*, 964 F.3d at 820; *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598 (9th Cir. 2020). As such, we are unable to address appellants' arguments.

DISMISSED in part and AFFIRMED in part.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

JS-6 / REMAND

Case No.	CV 18-6528-DMG (FFMx)
Date	November 19, 2018
Title	***Velanta Monique Babbitt v. Dignity Health, et al.***
Present:	The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiff(s)
None Present

Attorneys Present for Defendant(s)
None Present

Proceedings: **IN CHAMBERS - ORDER RE MOTION TO REMAND ACTION [34], AND MOTION FOR STAY OF PROCEEDINGS AND SUBSTITUTION OF THE UNITED STATES [33]**

On February 16, 2016, Plaintiff Velanta Monique Babbitt, in her individual capacity and as a parent and guardian of B.D., a minor, filed a complaint in Los Angeles County Superior Court alleging medical malpractice against Defendants Dignity Health and Dr. Sebhat Afework. Removal Notice, Ex. 1 [Doc. # 1-1]. On March 27, 2018, Plaintiff filed proofs of service of summons for each Defendant. [Doc. ## 1-14, 1-15.]

On July 27, 2018, Defendant Afework removed this action pursuant to 28 U.S.C. section 1442 and 42 U.S.C. section 233(l)(2). *See* Removal Notice at 2–4 [Doc. # 1].[1] Afework asserts that removal is timely because he first became aware of the state action via a letter from Dignity that was dated June 27, 2018. *See id.* at 3. Afework alleges that he has absolute immunity from Plaintiff's claims of medical malpractice pursuant to the Federally Supported Health Centers Assistance Act ("FSHCAA") because he acted within the scope of his "deemed" federal employment at all times relevant to Plaintiff's claims. *See id.* at ¶¶ 4–5, 15.

On August 24, 2018, the United States ("the Government") filed a Motion to Remand ("MTR") on the ground that removal under both 28 U.S.C. section 1442 and 42 U.S.C. section 233(l)(2) was procedurally improper. [Doc. # 34]. On the same day, Defendant Afework filed a Motion for Stay of the Proceedings and

[1] All page references herein are to page numbers inserted by the CM/ECF system.

Substitution of the United States as a Defendant. [Doc. # 33.] Both motions have since been fully briefed. [Doc. ## 39, 40, 41, 42, 47, 48.] Having duly considered the parties' written submissions, the Court **GRANTS** the Government's MTR and **DENIES as moot** Defendant Afework's Motion for Stay and Substitution.

I.
LEGAL STANDARD

"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 . . . ." 28 U.S.C. § 1447(c). One such defect is the failure to file a notice of removal "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ." *See id.* § 1446(b)(1). Under that statute, "[e]ach defendant . . . ha[s] 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal." *See id.* § 1446(b)(2)(B). "[I]f the complaint is filed in court prior to any service, the removal period [under the statute] runs from the service of the summons." *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999).

"[A] party seeking to remove a case to federal court has the burden of proving that all the requirements of removal have been met. That burden goes not only to the issue of federal jurisdiction, but also to questions of compliance with statutes governing

the exercise of the right of removal." *See Parker v. Brown*, 570 F. Supp. 640, 642 (S.D. Ohio 1983); *accord Riggs v. Plaid Pantries, Inc.*, 233 F. Supp. 2d 1260, 1264 (D. Or. 2001). If only written materials are submitted for the district court's consideration, then the removing defendant need only establish a *prima facie* case to survive a motion to remand. *See Parker*, 570 F. Supp. at 642–43; *cf. Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014) (a motion to remand for lack of subject matter jurisdiction is governed by Rule 12(b)(1) standards); *ActiveVideo Networks, Inc. v. Trans Video Elecs., Ltd.*, 975 F. Supp. 2d 1083, 1085–86 (N.D. Cal. 2013) ("When a factual [Rule 12(b)(1)] motion to dismiss is made and only written materials are submitted for the court's consideration, a plaintiff need only establish a *prima facie* case of jurisdiction."). Furthermore, "the question whether service of process was sufficient [in a case that was removed from state court] is governed by state law." *See Whidbee v. Pierce Cty.*, 857 F.3d 1019, 1023 (9th Cir. 2017).

II.
DISCUSSION

As discussed below, the Court concludes that Afework has not shown that he properly removed this case under either 28 U.S.C. section 1442 or 42 U.S.C. section 233(l)(2). Removal Notce at 1 [Doc. # 1].

A. Removal Under 28 U.S.C. § 1442

On March 27, 2018, Plaintiff filed a signed proof

of service in state court, which indicates that Shiran Moretsqi personally delivered the summons, complaint, and other case-related documents to Afework at 6:55 p.m. on March 26, 2018 at 11343 Abana Street in Cerritos, California. Removal Notice, Ex. 6 at 1–2 [Doc. # 1-15]. If Plaintiff served Afework with a copy of the complaint and summons on March 26, 2018 as the proof of service claims, then Afework's removal of the case under Section 1442 was untimely because he did not file the Removal Notice until well after April 25, 2018. *See* 28 U.S.C. § 1446(b). Afework nonetheless insists that he first learned of the complaint via the June 27, 2018 letter mentioned *supra*, and that he promptly retained counsel and removed the action within 30 days of receiving that letter. *See* Opp'n re MTR at 21–22

"The filing of a proof of service creates a rebuttal presumption that the service was proper. However, the presumption arises only if the proof of service complies with the applicable statutory requirements."[2] *Floveyor Int'l Ltd. v. Superior Court of L.A. Cty.*, 59 Cal. App. 4th 789, 795 (1997) (citing *Dill v. Berquist Constr. Co.*, 24 Cal. App. 4th 1426, 1441–42 (1994)). The applicable statute in this case is California Code of Civil Procedure section 415.10, which governs service via personal delivery. *See* Cal. Civ. Proc. Code § 415.10. Proof of personal service must comply with California Code of Civil Procedure section 417.10, which provides in pertinent part that "proof that a summons was

[2] As noted *supra* Part I, the adequacy of service is governed by state law.

served on a person within this state shall be made: . . . [i]f served under Section 415.10, . . . by the affidavit of the person making the service showing the time, place, and manner of service[.]" *See* Cal. Civ. Proc. Code § 417.10(a). The proof of service in the instant case satisfied these requirements. *See* Removal Notice, Ex. 6 at 1–2 [Doc. # 1-15].

Afework fails to rebut the presumption of proper service. Afework attests that he has never been formally served, but sheds no light on where he was at 6:55 p.m. on March 26, 2018. *See* Afework Decl. at ¶¶ 4–5 [Doc. # 39-1]. This conclusory, self-serving, and uncorroborated declaration falls far short of rebutting the presumption of proper service. *See Yolo Cty. Dep't of Child Support Servs. v. Myers*, 248 Cal. App. 4th 42, 47–48 (2016) (affirming a trial court's rejection of a defendant's self-serving declaration that he was not properly served). Furthermore, his attorney's allegation that the person effectuating service may have been biased is not competent evidence that can rebut this presumption.[3] *See* Resp. to OSC at 3 [Doc. # 29]; *Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D.

[3] Attached to Afework's Response to the OSC appears to be a printout from the website "FastPeopleSearch[,]" which seems to indicate that the person who effectuated service is in some vague way "[r]elated to" Plaintiff's counsel. *See* Resp. to OSC, Ex. B at 1 [Doc. # 29-2]. This printout likewise fails to rebut the presumption of valid service because Afework failed to: properly authenticate this document, *see* Fed. R. Evid. 901, describe how "FastPeopleSearch" obtains such information, or acknowledge the obvious alternative explanation that the server is merely Plaintiff's employee and not his relative.

276, 286 (N.D. Cal. 2015) ("[A]ttorney argument is not evidence on which the court can rely."). His attorney's assertions regarding the precise timing of the filing of the proof of service (*i.e.*, two years after the action was initiated and following the state court's issuance of an order to show cause for failure to file a proof of service) are undisputed, but they do not establish that the proof of service is invalid. *See* Resp. to OSC at 3 [Doc. # 29]. Accordingly, removal under 28 U.S.C. section 1442 was untimely.[4]

B. Removal Under 42 U.S.C. § 233(l)(2)

Title 42 U.S.C. section 233(l)(2) provides in pertinent part that, "[i]f the Attorney General fails to appear in State court within the time period prescribed under [section 233(l)(1)], upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court." 42 U.S.C. § 233(l)(2). In turn, Section 233(l)(1) requires the Attorney General to "make an appearance" in the state court and "advise such court as to whether the Secretary [of the Department of Health and Human Services ('HHS')] has determined . . . that [an] entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service" within "15 days after being

[4] Because Afework's Removal Notice was untimely, the Court need not address whether Afework is a federal employee for the purposes of Section 1442.

notified" of that civil action. *See id.* § 233(l)(1).

Afework concedes that his attorney provided a copy of the complaint to HHS on July 16, 2018, *see* Opp'n re MTR at 21, and that he filed the Removal Notice eleven days later— *i.e.*, on July 27, 2018, Removal Notice at 1 [Doc. # 1]. Under the plain text of Section 233(l)(2), removal was improper because the Attorney General did not "fail to appear" within "15 days after being notified" of the state court action. *See* 42 U.S.C. § 233(l)(1)–(2); *see also Allen v. Christenberry*, 327 F.3d 1290, 1294–95 (11th Cir. 2003) (concluding that removal was procedurally improper because defendants did not comply with Section 233(l)(2)'s 15-day rule). Afework nonetheless claims that the purported underlying purposes of the statute (*e.g.*, to ensure that certain defendants have access to federal court) and its legislative history demonstrate that Congress did not intend for the 15-day period to "operate as a bar on removals . . . ." *See* Opp'n re MTR at 12–19. Yet, Section 233(l)(2) unambiguously provides that, "*[i]f* the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), . . . the civil action or proceeding shall be removed . . . ." *See* 42 U.S.C. § 233(l)(2) (emphasis added). Accordingly, Afework's policy arguments and resort to legislative history are inapposite.[5] *See*

[5] Afework also argues that the Government cannot cut off his right to remove the case under Section 233(l)(2) by merely appearing in state court. *See* Opp'n re MTR at 12–18. Specifically, he argues that such a holding would insulate from judicial review the Government's decision not to certify that a defendant acted

Avendano-Ramirez v. Ashcroft, 365 F.3d 813, 816 (9th Cir. 2004) ("Canons of statutory construction dictate that if the language of the statute is clear, we look no further than that language in determining the statute's meaning. Therefore, we look[] to legislative history only if the statute is unclear." (alteration in original) (quoting *Ore. Nat. Res. Council, Inc. v. Kantor*, 99 F.3d 334, 339 (9th Cir. 1996)).

Afework further contends that he had to remove the action before the expiration of the 15- day period in order to avoid the risk of a default being entered against him in state court. *See* Opp'n re MTR at 17. The text of Section 233(l)(2) does not contain any such exception to the 15- day rule. *See* 42 U.S.C. § 233(l)(2). Furthermore, this argument is belied by the evidence in the record, as the Court has already found that Afework was served on March 26, 2018—*i.e.*, long before he notified HHS of the suit. *See supra* Part II.A. Additionally, he does not explain why he failed to simply file an answer in the state court proceedings, wherein he presumably could have preserved his defense that the Government should be substituted in his place. *See* Opp'n re MTR at 17.

Afework also claims that even if violating the 15-day rule rendered removal improper, that error was harmless and therefore excusable under Federal Rule

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within the scope of employment for the purposes of the FSHCAA. *See id.* Since Afework removed the action before the Government's 15-day window for appearing had elapsed, however, the Court need not reach that issue.

of Civil Procedure 61 because the 15-day period ultimately elapsed without the Government making any appearance in the state court proceedings. *See* Opp'n re MTR at 17–18. Afework cites virtually no authority for the truly remarkable proposition that Rule 61 can excuse defects in a statutorily-mandated removal procedure. Further, Afework has not discharged his burden of showing that he could have filed a proper notice of removal after the 15-day period elapsed. *See Parker*, 570 F. Supp. at 642 ("It is clear that a party seeking to remove a case to federal court has the burden of proving that all the requirements of removal have been met."). Even courts holding that Section 1446(b)'s 30-day limit does not apply to removals under Section 233(l)(2) have acknowledged the possibility that laches may bar such removals. *See Estate of Booker v. Greater Phila. Health Action, Inc.*, 10 F. Supp. 3d 656, 665–66 (E.D. Pa. 2014). Afework does not explain why laches would not apply here, even though he failed to remove the action until four months after he was served. *See id.* (observing that laches in this context concerns whether the defendant "delayed unreasonably in filing a notice of removal"). Accordingly, the Court will remand this matter to state court.

III.
CONCLUSION

In light of the foregoing, the Court **GRANTS** the Government's MTR and **DENIES as moot** Defendant Afework's Motion for Stay and Substititon. The Court **REMANDS** this action to the Los Angeles

County Superior Court

IT IS SO ORDERED.