

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

SEP 28 2023

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ESA MANAGEMENT LLC,

Plaintiff-Appellee,

v.

TIMOTHY KALER,

Defendant-Appellant.

No. 23-55694

D.C. No.

3:23-cv-01324-RBM-MMP

Southern District of California,  
San Diego

ORDER

Before: BADE, LEE, and VANDYKE, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal of the district court's August 2, 2023 order remanding the action to state court for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1447(d) (order remanding a removed action to state court for lack of subject matter jurisdiction pursuant to § 1447(c) "is not reviewable on appeal or otherwise"); *Acad. of Country Music v. Cont'l Cas. Co.*, 991 F.3d 1059, 1066 (9th Cir. 2021) (review of district court's characterization of remand for lack of subject-matter jurisdiction under § 1447(c) limited to confirming that that characterization was colorable); *Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987).

Consequently, this appeal is dismissed for lack of jurisdiction.

**DISMISSED.**

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ESA MANAGEMENT, LLC,

12 Plaintiff,

13 v.

14 TIMOTHY KALER,

15 Defendant.  
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Case No.: 3:23-cv-01324-RBM-MMP

**ORDER:**

**(1) REMANDING CASE TO STATE  
COURT FOR LACK OF SUBJECT  
MATTER JURISDICTION; AND**

**(2) DENYING DEFENDANT'S  
MOTION TO PROCEED IN FORMA  
PAUPERIS AS MOOT**

**[Doc. 2]**

21 On July 19, 2023, Defendant Timothy Kaler ("Defendant") filed a Notice of  
22 Removal of Case No. 37-2023-00010833-CL-UD-CTL ("Notice of Removal"), which was  
23 initiated in the Superior Court of California, County of San Diego ("San Diego Superior  
24 Court"). (Doc. 1.) Also on July 19, 2023, Defendant filed a Motion for Leave to Proceed  
25 In Forma Pauperis ("IFP Motion"). (Doc. 2.) For the reasons discussed below, the Court  
26 **REMANDS** this action to San Diego Superior Court and **DENIES** Defendant's IFP  
27 Motion as moot.

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1 **I. BACKGROUND**

2 Plaintiff ESA Management, LLC (“Plaintiff”) initiated this action by filing an  
3 unlawful detainer action for residential real property against Defendant in San Diego  
4 Superior Court (“Underlying Action”) on March 15, 2023. (*See* Doc. 1–2.) In the  
5 Underlying Action, Plaintiff seeks unpaid rent from Defendant in the amount of \$19,975.20  
6 and possession of property located at 1050 Grand Avenue, Room 104 in Carlsbad,  
7 California (the “Property”). (*See id.*) Plaintiff alleges that it served Defendant with a  
8 written notice requiring Defendant to pay rent or vacate the Property, and Defendant failed  
9 to do either. (*Id.* at 2–3.) Plaintiff alleges a single claim for unlawful detainer under  
10 California law. (*Id.* at 14.)

11 On July 19, 2023, Defendant a Notice of Removal. (Doc. 1.) In the Notice of  
12 Removal, Defendant explains that the Court has jurisdiction over this matter pursuant to  
13 federal question jurisdiction and diversity jurisdiction. (*Id.* at 6–12.)

14 **II. LEGAL STANDARD**

15 Congress has authorized a defendant to remove a civil action from state court to  
16 federal court. 28 U.S.C. § 1441. However, the removing party “always has the burden of  
17 establishing that removal was proper.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.  
18 1992). The district court must remand any case previously removed from a state court “if  
19 at any time before final judgment it appears that the district court lacks subject  
20 matter jurisdiction.” 28 U.S.C. § 1447(c); *see Allen v. Santa Clara Cnty. Corr. Peace*  
21 *Officers Ass’n*, 400 F. Supp. 3d 998, 1001 (E.D. Cal. 2019), *aff’d*, 38 F.4th 68 (9th Cir.  
22 2022) (“Lack of subject matter jurisdiction may [] be raised by the district court sua  
23 sponte.”); *Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) (“[C]hallenges to  
24 subject-matter jurisdiction may be . . . ‘at any point in the litigation,’ and courts must  
25 consider them *sua sponte*.”) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)).  
26 Moreover, there is a strong presumption against removal jurisdiction. *Gaus*, 980 F.2d at  
27 566 (“The ‘strong presumption’ against removal jurisdiction means that the defendant  
28 always has the burden of establishing that removal is proper.”) (quoting *Nishimoto v.*

1 *Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n. 3 (9th Cir.1990)). Thus, doubts as  
2 to whether the federal court has subject matter jurisdiction must be resolved in favor of  
3 remand. *See Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *see also Gaus*, 980  
4 F.2d at 566 (“Federal jurisdiction must be rejected if there is any doubt as to the right  
5 of removal in the first instance.”)

### 6 III. DISCUSSION

#### 7 A. Federal Question Jurisdiction

8 District courts have original jurisdiction over “all civil actions that arise under the  
9 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “A case ‘arises  
10 under’ federal law either where federal law creates the cause of action or ‘where the  
11 vindication of a right under state law necessarily turn[s] on some construction of federal  
12 law.’” *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088–89 (9th Cir. 2002)  
13 (modification in original) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*,  
14 463 U.S. 1, 8–9 (1983)).

15 Defendant argues that:

16 [t]his Court possesses federal question jurisdiction over this action pursuant  
17 to 28 U.S.C. § 1331 because . . . Defendant alleges a cognizable claim arising  
18 under, (1) Violations of the Federal CARES Act; and (2) Breach of Fiduciary  
19 Duty indicating potential fraud against the Unites States of America; and (3)  
20 Violation of the 6th amendment under the US Constitution; and (4) Violation  
21 of Defendant’s right fur due process under the 14th amendment of the US  
22 Constitution.

22 (*Id.* at 6.)

23 The Court notes “[f]ederal jurisdiction cannot be predicated on an actual or  
24 anticipated defense . . . or rest upon an actual or anticipated counterclaim.” *Vaden v.*  
25 *Discover Bank*, 556 U.S. 49, 49 (2009). Rather, “the federal question must ‘be disclosed  
26 upon the face of the complaint, unaided by the answer.’” *Provincial Gov’t of Marinduque*  
27 *v. Placer Dome, Inc.*, 582 F.3d 1083, 1086 (9th Cir. 2009) (quoting *Phillips Petroleum Co.*  
28 *v. Texaco, Inc.*, 415 U.S. 125, 127–28 (1974)).

1 Here, Court finds there is no federal question jurisdiction because the Underlying  
2 Action invokes an unlawful detainer proceeding pursuant to California law. (See Doc. 1–  
3 2); see also *Aurora Loan Servs., LLC v. Montoya*, No. 2:11-cv-2485-MCE-KJN-PS, 2011  
4 WL 5508926, at \*3 (E.D. Cal. Nov. 9, 2011) (“[P]laintiff filed its Complaint in Superior  
5 Court asserting a single claim for unlawful detainer premised solely on California law.  
6 Because a claim for unlawful detainer does not by itself present a federal question or  
7 necessarily turn on the construction of federal law, no basis for federal question jurisdiction  
8 appears on the face of the Complaint.”); see also *U.S. Bank Nat’l Ass’n v. Bilbaeno*, No.  
9 C–12–01707, 2012 WL 3987317, at \*1 (N.D. Cal. Sept. 7, 2012) (finding that an unlawful-  
10 detainer claim *not* based upon any federal statute cannot establish federal-question  
11 jurisdiction). While Defendant’s Notice of Removal asserts various federal causes of  
12 action, they have not been formally raised and, in any event, are not asserted in Plaintiff’s  
13 complaint. See *Am. Vantage Companies v. Table Mountain Rancheria*, 103 Cal. App. 4th  
14 590, 595 (2002) (“[F]ederal jurisdiction exists only when a federal question is presented  
15 on the face of the plaintiff’s properly pleaded complaint.”) Therefore, the Court finds no  
16 federal question jurisdiction.

17 B. Diversity Jurisdiction

18 Diversity jurisdiction under title 28 of the United States Code, section 1332, gives  
19 district courts original jurisdiction of civil actions that are between citizens of different  
20 states where the amount in controversy exceeds \$75,000. *Louie v. BFS Retail & Com.*  
21 *Operations, LLC*, 178 Cal. App. 4th 1544, 1554 (2009). For purposes of citizenship, a  
22 limited liability company is a citizen of every state in which its owners are citizens.  
23 *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006).

24 Defendant argues diversity jurisdiction exists because Defendant is a resident of  
25 California, and Plaintiff “is not a citizen of the State of California.” (Doc. 1 at 8.)  
26 Additionally, Defendant explains that “[i]n this case the record contains offers which  
27 [Plaintiff’s] counsel and representatives sent to [Defendant] which will, when combined  
28 with requests at trial, will exceed \$80,000 . . . .” (*Id.* at 12.)

1 The Court finds Defendant has failed to overcome the “strong presumption” against  
2 removal jurisdiction. *See Gaus*, 980 F.2d at 566. As previously noted, “the defendant  
3 always has the burden of establishing that removal is proper.” *Id.* Here, Defendant does  
4 not show there is complete diversity among the parties and simply states Plaintiff “is not a  
5 citizen of the State of California.” (*See* Doc. 1 at 8.) Since Plaintiff is an LLC, Plaintiff’s  
6 citizenship is determined by the citizenship of its owners. *See Johnson*, 437 F.3d at 899.  
7 However, Defendant fails to identify the specific citizenship of the owners.

8 Even assuming there was complete diversity, Defendant fails to show the amount in  
9 controversy exceeds \$75,000. It is well established that “[w]here it is not facially evident  
10 from the complaint that more than \$75,000 is in controversy, the removing party must  
11 prove, by a preponderance of the evidence, that the amount in controversy meets the  
12 jurisdictional threshold.” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090  
13 (9th Cir. 2003). Conclusory allegation as to the amount in controversy are insufficient. *Id.*  
14 at 1090–91; *see Gaus*, 980 F.2d at 567. Here, Defendant argues “[t]he amount in  
15 controversy requirement of the diversity statute is easily met in this case” and explains  
16 there are “settlement demand letters and other relevant evidence of the amount in  
17 controversy that appears to reflect a reasonable estimate of [Plaintiff’s] claim in excess of  
18 \$80,000.[] This will be further explored at trial with witnesses.” (Doc. 1 at 11–12.) The  
19 Court notes Plaintiff’s initial March 15, 2023 filing in San Diego Superior Court identifies  
20 this action as a “limited civil case” which “exceeds \$10,000 but does not exceed \$25,000.”  
21 (Doc. 1–2 at 1.) Additionally, Plaintiff seeks “possession of the premises” and costs  
22 incurred in the proceeding including “past-due rent of \$19,975.20” and “reasonable  
23 attorney fees.” (*Id.* at 4.) It appears Plaintiff’s request is limited and, based on the  
24 foregoing, unlikely to exceed \$75,000. While Defendant mentions an \$80,000 estimate,  
25 the origins of that estimate are unclear. *See Garza v. Bettcher Indus., Inc.*, 752 F. Supp.  
26 753, 763 (E.D. Mich. 1990) (holding that defendant’s assertion that “the amount in  
27 controversy exceeds \$50,000,” without identifying any specific factual allegations or  
28 provisions in the complaint which might support that proposition, should provoke *sua*

1 *sponte* remand). Therefore, the Court concludes Defendant has failed to prove by a  
2 preponderance of the evidence that the amount in controversy exceeds \$75,000.

3 **IV. CONCLUSION**

4 In conclusion, it appears the Court lacks subject matter jurisdiction over this action  
5 and, because Defendant cannot establish this Court has jurisdiction, removal was improper.  
6 Therefore, the Court **REMANDS** this action to San Diego Superior Court and **DENIES**  
7 Defendant's IFP Motion as moot.

8 **IT IS SO ORDERED.**

9 DATE: August 2, 2023

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12 HON. RUTH BERMUDEZ MONTENEGRO  
13 UNITED STATES DISTRICT JUDGE  
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