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IN THE UNITED STATES DISTRICT COURT

8

FOR THE DISTRICT OF ARIZONA

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12 James A. Monroe and Kimberly)
M. Pirtle,)

13)
14 Plaintiffs)

No. CIV 2:08-CV-0018-PHX-RCB

15 vs.)

O R D E R

16 James L. Gagan, Jane Doe)

17 Gagan, Ross Miljenovich,)
John Does I through X, and)

18 Jane Does I through X,)
Defendants)

19 _____)

20 Ross Miljenovich,)

21 Defendant-Cross-)
Claimant)

22 vs.)

23 James L. Gagan and Jane Doe)

24 Gagan, John and Jane Does I)
through 10 and 11 through 20,)

25 XYZ Corporations 1 through 10,)
ABC Partnerships 1 through 10,)

26 and Black and White)
Unincorporated Associations 1)

27 through 10,)

28 _____)
Cross-Defendants)

1 Currently pending before the court are motions to remand
2 pursuant to 28 U.S.C. § 1447(c) by plaintiffs James A. Monroe and
3 Kimberley Monroe Clark¹ (doc. 7), and by defendant/cross-claimant
4 Ross Miljenovich (doc. 10). The moving parties posit that this
5 action must be remanded to Arizona Superior Court, Maricopa County
6 because this court lacks subject matter jurisdiction.

7 **Background**

8 This is the latest round in a dispute between Messrs. Monroe
9 and Gagan, originating in a business venture which began more than
10 a quarter of a century ago, in 1982. Eventually, Mr. Gagan
11 obtained a judgment in Indiana of roughly \$1.7 million dollars
12 against Mr. Monroe, among others. Thereafter, for more than a
13 decade this court presided over the related action of Gagan v.
14 Sharar, 2:99-cv-1427-RCB ("Gagan"), wherein Mr. Gagan was seeking
15 to enforce that Indiana judgment. The court assumes familiarity
16 with all prior related proceedings. An abbreviated version of this
17 protracted dispute is set forth below as necessary to frame the
18 issues which these remand motions raise.

19 As part of the enforcement efforts in Gagan, eventually the
20 United States Marshal conducted a sale of Mr. Monroe's real
21 property located at 9795 East Caron Street, Scottsdale, Arizona
22 85258. Gagan, (doc. 347). At the time of that sale Mr. Monroe's
23 daughter, Kimberly Monroe Clark, was residing there, but Mr. Monroe
24 was not. See Amended Co. (doc. 5) at 3, ¶ 4. The proceeds of that
25 sale were to be applied toward the satisfaction of the Indiana
26

27 ¹ Since the commencement of this action, Ms. Monroe Clark's marital
28 status has changed so she no longer goes by Kimberly M. Pirtle, as the caption
indicates.

1 judgment. Gagan, (doc. 341) at 1. Defendant James Gagan was the
2 highest bidder at that sale, bidding \$560,000.00. Id. (doc. 341)
3 at 2. On May 15, 2007, a "United States Marshal's Deed" was issued
4 to Mr. Gagan. Id. (doc. 347). Thereafter, "[i]n June, 2007, [Mr.]
5 Gagan entered into a contract with . . . [Mr.] Miljenovich to sell
6 to him for \$750,000 whatever right, title and interest the United
7 States Marshal's Deed had vested in Gagan." Not. of Removal (doc.
8 1) at 3, ¶ 4.

9 Unwilling to concede defeat, on August 31, 2007, Mr. Monroe
10 and his daughter, Kimberley Monroe Clark, filed the present action
11 against Messrs. Gagan and Miljenovich and numerous fictitious
12 individuals. Mr. Monroe now alleges that despite the Marshal's
13 sale, he "is the lawful owner of a fee simple estate" in the
14 subject property. Not. of Rem. (doc. 1), exh. A thereto (doc. 1-4)
15 at 2, ¶2. Mr. Monroe further alleges that the United States
16 Marshal, "act[ing] upon the advice and instructions of Defendants
17 Gagan[,] " refused to pay Mr. Monroe the \$150,000.00 statutory
18 homestead exemption. Id. at 5, ¶ 17. The failure to pay that
19 exemption, Mr. Monroe alleges, renders "invalid[]" Mr. Gagan's May
20 15, 2007 Marshal's deed. Id. at 5, ¶ 19.

21 Mr. Monroe is seeking two forms of declaratory judgment.
22 First, he is seeking a declaration that the "Indiana Judgment
23 against [him], domesticated in Arizona . . . , was not renewed and
24 expired and was, therefore, of no further force or effect and that
25 it was, and is, invalid in the State of Arizona [.]" Id. at 6, ¶
26 A(1). Second, he is seeking a declaration that the May 15, 2007,
27 Marshal's Deed "is void and invalid." Id. at 6, ¶ A(2). Citing to
28 Arizona statutes governing actions to quiet title, Mr. Monroe also

1 seeks a declaration "establishing [his] estate" in the subject
2 property, and "barr[ing] and forever estopp[ing]" defendants from
3 claiming any right or title to that property. Id. at 6, ¶ B.
4 Similarly, he seeking a judgment "barring and forever estopping"
5 defendants from asserting an interest or lien upon the property
6 which is adverse to his. Id. at 6, ¶ C. Plaintiff Monroe Clark
7 seeks unspecified monetary damages based upon alleged "intentional
8 wrongful eviction." Id. at 6, ¶¶ 20 and D.

9 Roughly a week after the Monroes filed their state court
10 action, Mr. Miljenovich filed a separate state court action against
11 "James L. Gagan and Jane Doe Gagan[.]". Doc. 26-2. Mr.
12 Miljenovich alleges that he and the Gagans are residents of
13 Maricopa County, Arizona. Id. at 1-2, ¶¶ 1-2. He further alleges
14 that he entered into a contract with the Gagans to purchase the
15 subject property for \$750,000.00. As that contract required, Mr.
16 Miljenovich deposited \$25,000.00 as earnest money. In the event
17 Mr. Miljenovich did not perform under the contract, that \$25,000.00
18 was non-refundable.

19 In addition, Mr. Miljenovich alleges that while contracting
20 with Mr. Gagan to purchase the subject property, Mr. Gagan
21 "represented to [him] that the Property was free and clear of all
22 encumbrances except for those listed in the Purchase Contract."
23 Id. at 3, ¶ 13. Mr. Miljenovich subsequently learned, however,
24 that Mr. Monroe has a \$150,000.00 homestead exemption recorded on
25 the subject property. Id. at 3, ¶¶ 14-16. Because allegedly the
26 Gagans have refused to pay that exemption, Mr. Miljenovich claims
27 that he "is unable to complete the purchase of the Property and
28 obtain title to the Property free and clear of all encumbrances[.]"

1 Id. at 4, ¶ 19. Given that his “inability to close on the property
2 is a result of the Gagans['] own actions[,]” Mr. Miljenovich claims
3 an “entitle[ment] to the return of his [\$25,000.00] earnest money.”

4 Id. Mr. Miljenovich sets forth state law claims for breach of
5 contract; fraud; intentional/negligent misrepresentation; and
6 consumer fraud under ARS § 44-1521 *et seq.*

7 The state court consolidated the Monroe and Miljenovich actions
8 on October 26, 2007. Thereafter, Mr. Miljenovich filed a cross-
9 claim against the Gagans on December 6, 2007. Doc. 11, exh. B
10 thereto (doc. 1-4). That cross-claim mirrors his complaint in
11 Miljenovich v. Gagan. Mr. Gagan then removed the matter to this
12 court on January 4, 2008, where it was randomly assigned to the
13 Honorable Earl. H. Carroll. Primarily for reasons of judicial
14 economy, this court granted Mr. Gagan’s motion to transfer that
15 action to the undersigned. Gagan v. Estate of Sharar, 2008 WL
16 2810978 (D.Ariz. July 18, 2008). Prior to that transfer,
17 plaintiffs filed this motion to remand (doc. 7), to which Mr.
18 Miljenovich filed a “joinder” (doc. 10), arguing that this court
19 lacks subject matter jurisdiction. Given that transfer, these
20 remand motions are properly before this court.

21 Discussion

22 I. Governing Legal Standards

23 “A defendant may remove an action originally filed in state
24 court only if the case originally could have been filed in federal
25 court.” In re NOS Communications, MDL No. 1357, 495 F.3d 1052,
26 1057 (9th Cir. 2007) (citing 28 U.S.C. § 1441(a), (b)). Consistent
27 with the foregoing and because “federal courts are court of limited
28 jurisdiction[,]” Vacek v. U.S. Postal Service, 447 F.3d 1248, 1250

1 (9th Cir. 2006) (internal quotation marks and citation omitted),
2 cert. denied, 127 S.Ct. 2122 (2007), “[i]f at any time before final
3 judgment it appears that the district court lacks subject matter
4 jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c).

5 It is beyond peradventure that “[i]n general, removal statutes
6 are strictly construed against removal.” Luther v. Countrywide
7 Home Loans Servicing LP, 533 F.3d 1031, 1034 (9th Cir. 2008)
8 (citing, *inter alia*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S.
9 100, 108-09, 61 S.Ct. 868, 85 L.Ed. 1214 (1941)). Accordingly,
10 “[i]t is to be presumed that a cause lies outside [the] limited
11 jurisdiction [of the federal courts] and the burden of establishing
12 the contrary rests upon the party asserting jurisdiction.” Abrego
13 Abrego v. The Dow Chemical Co., 443 F.3d 676, 685 (9th Cir. 2006)
14 (internal quotation marks and citation omitted). Therefore, “[a]
15 defendant seeking removal has the burden to establish that removal
16 is proper and any doubt is resolved against removability[,]” and,
17 by extension, in favor of remand. Luther, 533 F.3d at 1034
18 (citation omitted).

19 **II. Impact of Consolidation**

20 At the outset it is necessary to address the impact of
21 consolidation on the court’s jurisdictional analysis. Despite
22 consolidation, the Monroe action and the Miljenovich action retain
23 their separate identities. See Continental Airlines v. Goodyear
24 Tire & Rubber Co., 819 F.2d 1519, 1523 n. 1 (9th Cir. 1987) (quoting
25 Johnson v. Manhattan Ry., 289 U.S. 479, 497, 53 S.Ct. 721, 728, 77
26 L.Ed. 1331 (1933)) (“[T]he consolidation of the cases below did not
27 ‘make those who are parties in one suit parties in another.’”) As
28 one court has so picturesquely put it, “[c]onsolidation is not like

1 a marriage, producing one indissoluble union from two distinct
2 cases." Chaara v. Intel Corp., 410 F.Supp.2d 1080, 1094 (D.N.M.
3 2005), aff'd without pub'd opinion, 245 Fed.Appx. 784 (10th Cir.
4 2007). "Instead, consolidation is an artificial link formed by a
5 court for the administrative convenience of the parties; it fails
6 to erase the fact that, underneath consolidation's facade, lie two
7 individual cases." Id. (citations omitted). Given the fundamental
8 nature of consolidation, courts have uniformly held that "[t]here
9 must be *separate jurisdictional bases for each action* prior to any
10 consolidation, and *any case lacking a separate jurisdictional basis*
11 *must be remanded.*" James v. CSX Transportation, Inc., 2007 WL
12 1100503, at *3 (S.D.Ga. April 9, 2007) (citing Johnson, 289 U.S. at
13 496-97, 53 S.Ct. 721); see also Chaara, 410 F.Supp.2d at 1095
14 (treating consolidated actions "[a]s separate actions," so that
15 "each case must satisfy jurisdiction on its own[]") (emphasis
16 added). This is equally true for cases where diversity is the
17 jurisdictional basis. In re Ibasis, Inc. Deriv. Litig., 551
18 F.Supp.2d 122, 125 (D.Mass. 2008) (citing, *inter alia*, Cella v.
19 Toqum Constructeru Ensembleier en Industrie Alimentaire, 173 F.3d
20 909, 913 (3rd Cir. 1999)) ("Courts have recognized that analysis of
21 diversity jurisdiction remains separate for cases even after they
22 have been consolidated.") Thus, in the present case, the court
23 must "analyze[] the jurisdictional basis of [the Monroe action and
24 the Miljenovich action] independently."² See Cella, 173 F.3d at

25
26 ² The fact that these two actions were consolidated in state court, prior
27 to removal, does not change the result. Presumably those actions were consolidated
28 pursuant to ARCP 42(a) which is virtually identical to Fed. R. Civ. P. 42(a).
"[B]ecause Arizona has substantially adopted the Federal Rules of Civil Procedure,
[Arizona courts] give great weight to the federal interpretation of the rules."
Cachet Residential Builders, Inc. v. Gemini Ins. Co., 547 F.Supp.2d 1028, 1030
(D.Ariz. 2007) (quoting Anserv Ins. Servs., Inc. v. Albrecht, 192 Ariz. 48, 960

1 913 (citing Cole v. Schenley Industries, Inc., 563 F.2d 35, 38 (2d
2 Cir. 1977)).

3 **III. Subject Matter Jurisdiction**³

4 **A. Monroe v. Gagan**

5 Defendant Gagan's Notice of Removal identifies what he views
6 as several "uncontested grounds for removal" which alone or
7 together "defeat" remand. Resp. (doc. 15) at 6. Defendant argues
8 that there are four possible jurisdictional bases for the Monroe v.
9 Gagan action: (1) diversity of citizenship pursuant to 28 U.S.C. §
10 1332; (2) federal question jurisdiction under 28 U.S.C. § 1331; (3)
11 supplemental jurisdiction under 28 U.S.C. § 1367; and (4) pursuant
12 to 28 U.S.C. § 1442(a)(2), the federal title dispute statute. The
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14 P.2d 1159, 1160 (1998)). The foregoing "strengthen[s] the Court's conclusion that
15 [Arizona] courts would not reach a different conclusion under the [Arizona] Rules."
16 See Chaara, 410 F.Supp.2d at 1095 (citations omitted).

17 ³ The court is compelled to comment upon two defects in defendant Gagan's
18 removal. First, it violates the rule of unanimity which basically requires that
19 all served defendants join in a notice of removal. Vasquez v. North County Transit
20 Dist., 292 F.3d 1049, 1060 n.5 (9th Cir. 2002) (citation omitted). Obviously,
21 defendant Gagan did not join defendant Miljenovich in his Notice of Removal. This
22 is a procedural defect, however, which is waived where no timely objection is made.
23 Id. (citation omitted). By filing their motion to remand within 30 days of the
24 Notice of Removal, plaintiffs would have been entitled to raise this procedural
25 defect, but they did not. Hence it is waived. Defendant Miljenovich likewise
26 waived his right to waive this procedural defect because he did not file his motion
27 to remand until February 12, 2008, more than 30 days after the filing of Gagan's
28 Notice of Removal.

Removal, to the extent it is based upon diversity of citizenship, also is
defective here because it violates the forum defendant rule. That rule "confines
removal on the basis of diversity jurisdiction to instances where no defendant is
a citizen of the forum state." Lively v. Wild Oats Markets, Inc., 456 F.3d 933,
939 (9th Cir. 2006). Here, according to the Notice of Removal, defendant
Miljenovich is a citizen of Arizona, the forum state. Not. of Rem. (doc. 1) at 4,
¶ 9. Like the unanimity rule, however, the forum defendant rule is procedural.
Lively, 456 F.3d at 942. Thus, a violation of that rule "constitutes a waivable
non-jurisdictional defect subject to the 30-day time limit imposed by § 1447(c)."
Id.

As with the unanimity rule, plaintiffs' timely remand motion is silent as to
the forum defendant rule. Accordingly, they waived the right to object to removal
on that basis. And once again, defendant Miljenovich waived his right to raise
this procedural defect because he did not file his remand motion within 30 days
after the filing of the Notice of Removal.

1 court will address in reverse order whether any of these statutes
2 provide a basis for subject matter jurisdiction in Monroe.

3 **1. Federal Title Dispute**

4 The "rarely invoked" federal title dispute statute, Vanouwerker
5 v. Owens-Corning Fiberglass Corp., 1999 WL 335960, at *13 (E.D.Tex.
6 May 26, 1999), reads in relevant part as follows:

7 A civil action . . . commenced in a State court
8 against any of the following may be removed by
9 them to the district court of the United States
for the district . . . embracing the place wherein
it is pending:

10

11 A property holder whose title is derived from
12 any such officer, where such action or prosecution
affects the validity of any law of the United States.

13 28 U.S.C. § 1442(a)(2) (West 2006). Reliance upon this statute
14 "requires compliance with two prongs[.]" Benitez-Bithorn v.
15 Rossello-Gonzalez, 200 F.Supp.2d 26, 31 (D.P.R. 2002). First, "the
16 property in controversy must derive from an officer of the United
17 States[.]" Id. Second, "the controversy regarding the property
18 must affect the validity of any law of the United States." Id.

19 Mr. Gagan contends that Monroe's claims against him satisfy
20 both prongs; hence, this court has subject matter jurisdiction
21 under section 1442(a)(2). As to the first prong, Gagan asserts
22 that because he obtained the subject property through a sale by the
23 United States Marshal, he is a "property holder whose title derives
24 from an officer of the United States[]" within the meaning of
25 section 1442(a)(2). The court agrees. Indeed, in their complaint,
26 the Monroes explicitly allege that the Gagans "claim an interest in
27 and title to the Property[] . . . through . . . a [United States]
28 Marshal's Deed, dated May 15, 2007[.]" Not. of Rem. (doc. 1), exh.

1 B thereto (doc. 1-4) at 4, ¶ 13.

2 Nonetheless, Mr. Gagan cannot satisfy the second prong of
3 section 1442(a)(2). Gagan baldly contends that the Monroes'
4 allegations "affect the validity of a law of the United States"
5 because they are "attack[ing] . . . the Marshal's fulfillment of
6 [his] express statutory duties" under 28 U.S.C. § 566. Not. of
7 Rem. (doc. 1) at 6, ¶ 12.; see also Resp. (doc. 15) at 5-6 (same).
8 That statute delineates the "powers and duties" of the United
9 States Marshal. 28 U.S.C. § 566 (West 2006 & West Supp. 2008).
10 Additionally, Gagan argues that this matter affects the validity of
11 a law of the United States because it "draw[s] into issue the
12 validity of Gagan's federal RICO Judgment as well as the validity
13 of various Orders" by this court in Gagan. Id. at 6, ¶ 12.

14 Mr. Gagan too broadly construes the second prong of section
15 1442(a)(2). The Marshal's supposed failure to comply with his
16 duties under federal law does not transform this action into one
17 affecting the validity of a law of the United States. This is not
18 a situation, for example, where the Monroes are arguing that
19 section 566 is constitutionally infirm. Likewise, questioning the
20 validity of a judgment and federal court orders does not transform
21 this into a controversy affecting the validity of any law of the
22 United States. See Town of Stratford v. City of Bridgeport, 434
23 F.Supp. 712, 715 (D.Conn. 1977) (citation omitted) ("None of the
24 provisions of federal law cited in support of [defendant's] removal
25 petition meets the § 1442 standard, since [plaintiff's] suit does
26 not attack the validity of any of them.") In short, reciting that
27 a controversy affects the validity of a law of the United States
28 does not make it so. Because Monroe's claims do not affect the

1 validity of any federal law, Gagan improperly relied upon the
2 federal title dispute statute as a basis for removal here.

3 **2. Supplemental Jurisdiction**

4 Defendant Gagan relies upon 28 U.S.C. § 1367(a) as another
5 possible jurisdictional basis. That statute states in pertinent
6 part as follows:

7 [I]n any civil action of which the district courts
8 have original jurisdiction, the district courts shall
9 have supplemental jurisdiction over all other
10 claims that are so related to claims in *the action*
within such original jurisdiction that they form part
of the same case or controversy under Article III of the
United States Constitution.

11 28 U.S.C. § 1367(a) (West 2006) (emphasis added). Gagan argues
12 that pursuant to that statute this case is within the court's
13 supplemental jurisdiction in Gagan. Gagan misconceives the scope
14 of section 1367(a).

15 "Supplemental jurisdiction must be exercised in *the same*
16 *action* that furnishes the basis for exercise of supplemental
17 jurisdiction." Ortolf v. Silver Bar Mines, 111 F.3d 85, 86 (9th
18 Cir. 1991) (emphasis added). As the Ninth Circuit explained in
19 Ortolf, "[t]he phrases 'in any civil action' and 'in the
20 action[,]' " as employed in section 1367(a), "require that
21 supplemental jurisdiction be exercised in the *same case, not a*
22 *separate or subsequent case.*" Id. (emphasis added). Thus, Gagan
23 cannot form the basis for the exercise of this court's supplemental
24 jurisdiction in this separate, subsequent action. See Brummer v.
25 Iasis Healthcare of Arizona, Inc., 2007 WL 2462174, at *1 (D.Ariz.
26 Aug. 24, 2007) (and cases cited therein) (rejecting argument that
27 removal was proper based upon supplemental jurisdiction because the
28 state claims were related to federal claims pending in another

1 district court); see also In re Enron Corp. Sec., 2002 WL 32107216,
2 at *2 (S.D.Tex. Aug. 12, 2002) (citations omitted) (There can be no
3 supplemental jurisdiction without the existence initially of
4 original subject matter jurisdiction over at least some of the
5 claim in the *same* suit, at the point it is either filed in or
6 removed to federal court.") Accordingly, Gagan is improperly
7 relying upon section 1367(a) as a basis for removal.

8 **3. Federal Question Jurisdiction**

9 The court will next examine whether Monroe v. Gagan raises a
10 federal question so as to confer jurisdiction upon this court
11 pursuant to 28 U.S.C. § 1331.

12 **a. Well-Pleaded Complaint Rule**

13 "The presence or absence of federal-question jurisdiction is
14 governed by the 'well-pleaded complaint rule,' which provides that
15 federal jurisdiction exists *only* when a federal question is
16 presented on the face of the plaintiff's properly pleaded
17 complaint.'" NOS Communications, 495 F.3d at 1047 (emphasis added)
18 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct.
19 2425, 96 L.Ed.2d 318 (1987)). "The well-pleaded complaint rule is
20 a 'powerful doctrine [that] severely limits the number of cases in
21 which state law 'creates the cause of action' that may be initiated
22 in or removed to federal district court[.]'" Lippitt v. Raymond
23 James Financial Services, Inc., 340 F.3d 1033, 1039-40 (9th Cir.
24 2003) (quoting Franchise Tax Bd. of California v. Construction
25 Laborers Vacation Trust, 463 U.S. 1, 9-10, 103 S.Ct. 2841, 77
26 L.Ed.2d 420 (1983)). As the Supreme Court long ago explained:

27 whether a case is one arising under the Constitution
28 or a law or treaty of the United States . . . must
be determined from what necessarily appears in the
plaintiff's statement of his own claim . . . ,

1 unaided by anything alleged in anticipation of
2 avoidance of defenses which it is thought the
 defendant might interpose.

3 Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S.Ct. 724, 58 L.Ed. 1218
4 (1914). As the foregoing makes clear, the court's first task is
5 to determine whether on its face the Monroe complaint "contains
6 any allegations that would render [their] cause of action one that
7 'arises' under federal law." See Lippitt, 340 F.3d at 1040
8 (citation omitted).

9 Here, the parties disagree as to which complaint the court
10 should look - the original consolidated state court complaint, or
11 the amended complaint which was filed and served post-removal. In
12 terms of alleged federal question jurisdiction, the complaints are
13 identical. Thus, at this juncture, it matters not whether the
14 court focuses on the original Monroe v. Gagan complaint or on the
15 amended complaint.

16 The court hastens to add, however, that in ascertaining
17 federal question jurisdiction, it will not consider defendant
18 Miljenovich's cross-claim. That pleading does not come into play
19 here because "[r]emoval, . . ., cannot be based on a counter-claim
20 or cross-claim raising a federal question." Redevelopment Agency
21 of the City of San Bernardino v. Alvarez, 288 F.Supp.2d 1112, 1114
22 (C.D.Cal. 2003) (citation omitted). Therefore, the court will
23 limit its federal question inquiry to the Monroe plaintiffs'
24 complaint.

25 When it does that, the court easily concludes that on its face
26 the Monroe complaint does not arise under federal law. Rather,
27 plaintiffs have cast their claims strictly in terms of Arizona
28 state law. For example, plaintiffs argue, as they have repeatedly

1 in related actions, that the Indiana judgment expired under Arizona
2 law. Then, even assuming the validity of that judgment, plaintiffs
3 accurately state that the issue of the validity of Gagan's sale of
4 the subject property without paying the Arizona homestead exemption
5 is solely a matter of state law. Finally, they point out that
6 plaintiff Kimberley Monroe Clark's wrongful eviction claim also is
7 strictly a creature of state law.

8 **b. Artful Pleading Doctrine**

9 Defendant Gagan does not dispute any of the foregoing.
10 Instead, relying exclusively upon Sparta Surgical v. Nat. Ass'n of
11 Sec. Dealers, 159 F.3d 1209 (9th Cir. 1998), he rejoins that
12 plaintiffs are impermissibly omitting the "essentially federal
13 underpinnings of their claims." Mot. (doc. 15) at 8. Those
14 essential underpinnings, from defendant Gagan's standpoint, are
15 plaintiffs' "attack[s] . . . [on a] federal Court Judgment[,] . . .
16 numerous federal Court Orders, and the conduct of the United States
17 Marshal[.]" Id. at 7. Had plaintiffs included the foregoing in
18 their complaint, then federal question jurisdiction is
19 "inevitable[.]" Gagan asserts. Id. at 8.

20 Plaintiffs counter that their claims do not "arise under"
21 federal law because there are no applicable federal laws at issue,
22 much less "complete preemption" of such laws. See Reply (doc. 16)
23 at 4-5. Plaintiffs reiterate that there is no federal question
24 jurisdiction because their right to relief under Arizona State law
25 does not "necessarily depend[] on resolution of a substantial
26 question of federal law." Id. at 4 (internal quotation marks and
27 citations omitted).

28 Although not explicitly, defendant Gagan is invoking the

1 artful pleading doctrine. Under that doctrine, a plaintiff "may
2 not avoid federal jurisdiction by omitting from the complaint
3 allegations of federal law that are essential to the establishment
4 of his claim." Lippitt, 340 F.3d at 1041 (internal quotation marks
5 and citations omitted). "The artful pleading doctrine allows
6 courts to delve beyond the face fo the state court complaint and
7 find federal question jurisdiction by recharacteriz[ing] a
8 plaintiff's state-law claim as a federal claim." Id. (internal
9 quotation marks and citations omitted). The Ninth Circuit has
10 cautioned, however, that "[c]ourts should invoke the doctrine only
11 in limited circumstances as it raises difficult issues of state and
12 federal relationships and often yields unsatisfactory results."
13 Id. (internal quotation marks and citations omitted).

14 Courts employ the artful pleading doctrine in two situations:
15 (1) complete preemption cases; and (2) substantial federal question
16 cases. Id. (citations omitted). Only the latter s a possibility
17 here because this is not a case of complete preemption where a
18 federal statute "provides the exclusive cause of action for the
19 claim asserted and also set[s] forth procedures and remedies
20 governing that cause of action[.]" See id. at 1042 (internal
21 quotation marks and citations omitted) (emphasis omitted). And,
22 indeed, Gagan is not making this argument.

23 Mindful, as the Lippitt Court put it, that the court is
24 "treading in a doctrinal minefield," it must next determine whether
25 plaintiffs' complaint raises a substantial federal question. See
26 id. at 1041. If plaintiffs' state law claims "implicate a
27 substantial federal question[.]" then this federal court may retain
28 jurisdiction over such claims. See id. at 1042. A substantial

1 federal question exists where “a substantial, disputed question of
2 federal law is a *necessary* element of . . . the well-pleaded state
3 claim[.]” Id. (internal quotation marks and citation omitted)
4 (emphasis in original). Or, a substantial federal question can
5 exist where “the right to relief depends on the resolution of a
6 substantial, disputed federal question[.]” Id. (internal quotation
7 marks and citation omitted). Neither exists here; and, tellingly,
8 defendant Gagan did not address either of these possibilities in
9 his motion.

10 Federal law is not intrinsic to any of plaintiffs’ claims.
11 Clearly federal law is not a necessary “element” of plaintiffs’
12 claim that the Indiana judgment expired under Arizona state law.
13 While defendant Gagan may intend to rely upon the preclusive effect
14 of this court’s judgment in Gagan or orders issued in connection
15 therewith, or both, such reliance does not transform this otherwise
16 state law claim into one arising under federal law. See Lighting
17 Science Group Corp. v. Koninklijke Philips Electronics N.V., 2008
18 WL 2917602, at *5 n.1 (E.D.Cal. June 3, 2008) (citing Metcalf v.
19 City of Watertown, 128 U.S. 586, 9 S.Ct. 173, 32 L.Ed. 543 (1888))
20 (“That a defense may implicate federal law does not suffice to
21 confer jurisdiction to the court.”) Nor is federal law a “necessary
22 element” of plaintiffs’ claim that Gagan purportedly failed to
23 comply with Arizona’s statutory homestead exemption. Likewise,
24 plainly, federal law is not an element of plaintiff Kimberley
25 Monroe Clark’s Arizona state law claim for wrongful eviction.

26 Sparta, the sole basis for Gagan’s argument that this court
27 has federal question jurisdiction is readily distinguishable, and
28 hence does not compel a different result here. In Sparta, although

1 plaintiffs' claims were "carefully articulated in terms of state
2 law," the Ninth Circuit held that the district court had subject
3 matter jurisdiction because those claims were predicated upon a
4 violation of federal securities law. Sparta, 159 F.3d at 1212
5 (internal quotation marks and citation omitted). A similar federal
6 law predicate is conspicuously absent from plaintiffs' claims.
7 Thus, notwithstanding defendant Gagan's depiction of plaintiffs'
8 claims, those claims are not federal claims disguised as state law
9 causes of action. Consequently, Gagan cannot rely upon section
10 1331 - the federal question statute - as a jurisdictional basis for
11 removal. Having found that there is no federal question
12 jurisdiction as to Mr. Monroe's claims, Gagan's assertion that 28
13 U.S.C. § 1441(c)⁴ provides a jurisdictional basis for the claims of
14 Ms. Monroe Clark is unavailing.

15 **4. Diversity Jurisdiction**

16 The only remaining possible basis for jurisdiction here is
17 28 U.S.C. § 1332. That statute provides in relevant part that
18 district courts "shall have original jurisdiction of all civil
19 actions where the matter in controversy exceeds the sum or value of
20 \$75,000, exclusive of interest and costs, and is between ...
21 citizens of different States[.]" 28 U.S.C. 1332(a)(1) (West 2006)
22 (emphasis added). To establish federal jurisdiction under that

24 ⁴ That statute provides in relevant part:

25 Whenever a separate and independent claim or cause
26 of action within the jurisdiction conferred by section
27 1331 of this title is joined with one or more other non-removable
claims or causes of action, the entire case may be removed
and the district court may determine all issues therein[.]

28 28 U.S.C. § 1441(c) (West 2006).

1 statute, two requirements must be met. First, "each defendant
2 [must be] a citizen of a different state from each plaintiff."
3 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S.Ct.
4 2396, 57 L.Ed.2d 274 (1978) (emphasis in original). Second, the
5 complaint must include allegations that the amount in controversy
6 "exceeds" \$75,000.00. 28 U.S.C. § 1332(a).

7 For removal purposes, diversity "is determined (and must
8 exist) as of the time the complaint is filed and removal is
9 effected." Stroter Corp. v. Air Transport Ass'n. of America, 300
10 F.3d 1129, 1131 (9th Cir. 2002) (citations omitted). "A party
11 invoking diversity jurisdiction must allege the actual citizenship
12 of the relevant parties and the existence of complete diversity
13 must be confirmable." Kanaan v. Freescale Semiconductor, Inc.,
14 2007 WL 420241, at *2 (N.D.Cal. Feb. 5, 2007) (citing Kanter v.
15 Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001)). Defendant
16 Gagan's Notice of Removal is facially deficient because, as
17 explained below, he does not "show . . . affirmatively and
18 distinctly, the existence of what is essential to federal
19 [diversity] jurisdiction" - complete diversity of citizenship. See
20 Smith v. McCullough, 270 U.S. 456, 459, 46 S.Ct. 338, 339 (1926).

21 In his Notice of Removal, Gagan indicates that when this
22 action was originally filed in state court, plaintiff James A.
23 Monroe "was a citizen of the State of Texas." Not. of Rem. (doc.
24 1) at 7, ¶ 13 (citation omitted). To support this statement, Gagan
25 cites to a "Notice of Change of Address" which Mr. Monroe filed in
26 Gagan (doc. 346), on April 10, 2007, roughly four months prior to
27 the commencement of his state court action. In that Notice, Mr.
28 Monroe lists his "new mailing address" as follows:

1 Salt River Cablevision
2 San Carlos Cablevision
3 James A. Monroe,
P.O. Box 461264
Garland, TX 75046-1264

4 Gagan (doc. 346) at 1.

5 Gagan's Notice of Removal further states that he is a citizen
6 of Indiana, whereas Mr. Miljenovich is a citizen of Arizona. Not.
7 of Rem. (doc. 1) at 7, ¶ 13. Then, although there is no mention of
8 Ms. Monroe Clark's citizenship in his Notice of Removal, Gagan
9 urges the court to "disregard" her citizenship. Id. Gagan reasons
10 that the court should disregard her citizenship because supposedly
11 she was "fraudulently joined as a plaintiff[]" in that her wrongful
12 eviction claim is barred by *res judicata* or waiver. Id.

13 There is no need to determine whether or not Ms. Clark was
14 fraudulently joined at this point. Likewise, there is no need to
15 become mired down in whether, as Gagan also contends, Mr. Monroe
16 has made a "transparent attempt to defeat diversity by changing his
17 citizenship" from Texas to Arizona in his amended complaint,⁵ which
18 was filed after removal. See Resp. (doc. 15) at 10. Delving into
19 those issues now is not necessary because Gagan's Notice of Removal
20 is deficient in that the existence of complete diversity is *not*
21 confirmable given the lack of any affirmative statement as to the
22 citizenship of Ms. Monroe Clark. See Kanter, 265 F.3d at 857-58

23
24 ⁵ It is impossible to ascertain whether or not there is complete
25 diversity of citizenship from either the original Monroe v. Gagan complaint or from
26 the amended complaint in this removed action. As to the former, there are
27 allegations as to the parties' residences, but not as to their citizenship
28 (although it is alleged that Mr. Monroe is domiciled in Texas). Allegations of
residency are do not suffice to show diversity jurisdiction though because section
1332 "speaks of citizenship, not of residency[.]" See Kanter v. Warner-Lambert Co.,
265 F.3d 853, 857-58 (9th Cir. 2001). Similarly, while the amended complaint
alleges that both of the Monroe plaintiffs are Arizona citizens, it does not allege
the citizenship of Messrs. Gagan and Miljenovich. It only alleges their place of
residence. Thus, there is no way of knowing from the face of that complaint
whether there is complete diversity of citizenship.

1 (citation omitted) (because "neither Plaintiffs' complaint nor
2 [defendant's] notice of removal made any allegation regarding
3 Plaintiffs' state citizenship[,] " and "[s]ince the party asserting
4 diversity bears the burden of proof, . . . , [defendant's] failure
5 to specify Plaintiff' state citizenship was fatal to [the]
6 assertion of diversity jurisdiction[]").

7 Further frustrating the diversity inquiry is the fact that
8 Gagan's claim that Mr. Monroe is a Texas citizen is based upon a
9 change of address form which on its face lists what appear to be
10 the name of two businesses, as well as a post office box in Texas.
11 However, "[c]hanging the location of one's residence or work does
12 not necessarily result in a change of domicile." Franco v. Empire
13 Southwest Holdings, Inc., 2007 WL 951841, at *3 (S.D.Cal. March 12,
14 2007). Therefore, Mr. Monroe's citizenship likewise is not
15 "affirmatively and distinctly" shown on the face of Gagan's Notice
16 of Removal. See McCullough, 270 U.S. at 459, 46 S.Ct. 338. In
17 short, on the record as presently constituted, defendant Gagan has
18 not overcome the "strong presumption" against removability. See
19 Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

20 At the same time, however, because these citizenship
21 allegations could potentially be cured, in accordance with 28
22 U.S.C. § 1653, the court will allow defendant Gagan fifteen (15)
23 days from the date hereof in which to cure these pleading
24 deficiencies. The court will proceed in that way because "[a]n
25 inadequate pleading does not in itself constitute an actual defect
26 of federal jurisdiction." Kanter, 265 F.3d at 858 (internal
27 quotation marks and citation omitted). Failure to timely comply
28 with this order shall result in remand of this action for lack of

1 subject matter jurisdiction without further notice.

2 **B. Miljenovich v. Gagan**

3 The court is now free to turn to the issue of whether, as Mr.
4 Miljenovich argues, it must remand his action because there is
5 neither diversity jurisdiction under § 1332, nor federal question
6 jurisdiction under § 1331. Gagan responds that “Miljenovich’s case
7 is properly removed . . . on diversity grounds *alone*.” Resp. (doc.
8 15) at 4 (emphasis added). Because that is the only jurisdictional
9 basis which Gagan, the removing party, is asserting, the court will
10 limit its analysis accordingly.

11 **1. Diversity Jurisdiction**

12 As just discussed, to establish federal jurisdiction under
13 section 1322(a)(1), two requirements must be met. First, “each
14 defendant [must be] a citizen of a different state from each
15 plaintiff.” Owen Equip., 437 U.S. at 373, 98 S.Ct. 2396 (emphasis
16 in original). Second, the complaint must include allegations that
17 the amount in controversy “exceeds” \$75,000.00. 28 U.S.C. §
18 1332(a)(1).

19 **a. Citizenship**

20 Mr. Miljenovich contends that due to the “alignment of the
21 parties[,]” diversity jurisdiction is not extant. Mot. (doc. 10)
22 at 3:3. In making this argument, Mr. Miljenovich improperly takes
23 into account the citizenship of Mr. Monroe. In particular, Mr.
24 Miljenovich believes that like himself Mr. Monroe is an Arizona
25 citizen, thus destroying diversity. As previously explained
26 though, irrespective of consolidation, the Miljenovich action is
27 separate and distinct from the Monroe action. Hence, as Mr. Monroe
28 is not a party in the Miljenovich action, his citizenship has no

1 bearing on the issue of existence of diversity jurisdiction in that
2 action.

3 Gagan responds that he is an Indiana citizen and Miljenovich
4 is an Arizona citizen. Gagan accurately states that in accordance
5 with section 1441(a), the court must disregard the citizenship of
6 defendants sued under fictitious names.⁶ When that is done, Gagan
7 validly asserts that, as the notice of removal shows, there is
8 complete diversity between plaintiff Miljenovich and defendant
9 Gagan.

10 **b. Amount in Controversy**

11 Evidently confident that he would prevail on his lack of
12 diversity of citizenship argument, Miljenovich did not address the
13 second element of section 1332 jurisdiction - the amount in
14 controversy. Because there cannot be diversity under that statute
15 without satisfying the amount in controversy set forth therein, the
16 court must next address that element.

17 As defendant Gagan interprets Mr. Miljenovich's action, he is
18 refusing to perform the contract, which he had with Mr. Gagan, to
19 purchase the subject property for \$750,000.00 "until a \$150,000
20 homestead claim by Monroe has been resolved." Resp. (doc. 15) at 4
21 (citation omitted); see also Not. of Removal (doc. 1) at 5, ¶ 9.
22 Relying solely upon those allegations, in his Notice of Removal and
23 in his response to these remand motions, Gagan contends that the
24 amount in controversy exceeds the \$75,000.00 statutory minimum,
25 thereby conferring original jurisdiction on this court pursuant to
26 section 1332(a).

27
28 ⁶ That section provides in relevant part that "[f]or purposes of removal . . . , the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(a) (emphasis added) (West 2006).

1 Carefully parsing the Miljenovich complaint reveals that in
2 his prayers for relief, despite Gagan's contrary suggestion, there
3 are no specific allegations of an amount in controversy. At one
4 point, Mr. Miljenovich alleges that he is "entitled to the return
5 of his earnest money" from Mr. Gagan. Not. of Removal (doc. 1),
6 exh. B thereto (doc. 1-4) at 21, ¶ 20. Earlier he alleges that in
7 accordance with the terms of the purchase contract, he deposited
8 \$25,000.00 in earnest money, which is non-refundable in the event
9 he breaches that contract. Id. at 19-20, ¶¶ 10 and 11. Throughout
10 the remainder of his complaint, Mr. Miljenovich seeks unspecified
11 damages in varying forms, *i.e.* "compensatory[,]" "actual[,]"
12 "consequential[,]" and "punitive[.]" See, e.g., Not. of Removal
13 (doc. 1), exh. B thereto (doc. 1-4) at 21; and at 23, ¶¶ (B)-(C).
14 He also is seeking statutory attorneys' fees in an unspecified
15 amount, as well as pre-judgment and post-judgment interest "at the
16 maximum legal rate[.]" Id. at 22, ¶ (C).

17 Mr. Miljenovich's complaint can easily be read to support a
18 finding that he is seeking at least \$25,000.00 in damages - the
19 amount of the purportedly non-refundable earnest money deposit.
20 Obviously, that \$25,000.00 falls far short of the \$75,000.00
21 statutory minimum. As a general proposition, "[t]he amount-in-
22 controversy requirement may be satisfied by claims of general and
23 specific damages, punitive damages, and attorney's fees (if
24 authorized by statute or contract." Colvin, 2007 WL 3306746 at *2
25 (citing, *inter alia*, Kroske v. U.S. Bank Corp., 432 F.3d 976, 980
26 (9th Cir. 2005)). Given the lack of specificity in the Miljenovich
27 complaint, however, defendant Gagan cannot avail himself of such
28 damage claims to meet the statutory threshold of \$75,000.00.

1 First, because section 1332(a) specifically excludes interest
2 from the amount in controversy, the court declines to consider any
3 possible interest award in deciding whether the amount in
4 controversy is met here. See Home Buyers Warranty Corp. v.
5 Leighty, 2007 WL 4616687, at *7 (D.Ariz. Dec. 28, 2007) (declining
6 to take into account claimed statutory interest due to § 1332(a)'s
7 exclusion of interest from the amount in controversy calculation).
8 Second, as this court thoroughly explained in Leighty, "the mere
9 possibility of a punitive damage award is insufficient to prove
10 that the amount in controversy requirement has been met[.]" Id. at
11 *8 (internal quotation marks and citation omitted). Third, as in
12 Leighty, the court will not include attorneys' fees in determining
13 the amount in controversy here because it would be speculative
14 given the complaint's silence as to the amount of any such award.
15 See id. (citing cases).

16 As the foregoing shows, because the Miljenovich complaint is
17 "unclear or fails to specify a total amount in controversy[.]" it
18 is not apparent on the face of that complaint that the amount in
19 controversy is above \$75,000.00. See Colvin v. Conagra Foods,
20 Inc., 2007 WL 3306746, at *2 (W.D.Wash. Nov. 5, 2007) (citing
21 Guglielmino v. McKee Foods Corp., 506 F.3d 696(9th Cir. 2007)).
22 Therefore, as the removing defendant, Mr. Gagan has the burden of
23 "establishing, by a preponderance of the evidence, that the amount
24 in controversy requirement has been met." Id. Gagan has not met
25 that burden, however. At most his Notice of Removal contains
26 "conclusory allegations" as to the amount in controversy. See
27 Albano v. Shea Homes Ltd. Partnership, 2008 WL 2941279, at *3
28 (D.Ariz. July 25, 2008) (citing Singer v. State Farm Mut. Auto.

1 Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997)). Mr. Gagan has not, as
2 he "must[,] provide[d] some facts to support [hi]s claim that the
3 amount in controversy requirement is satisfied." See id. Stated
4 somewhat differently, Gagan has not met his burden of establishing
5 by a preponderance of the evidence "that it is more likely than not
6 that the amount in controversy exceeds that [\$75,00.00] amount."
7 Guglielmino, 506 F.3d at 699 (internal quotation marks and citation
8 omitted). Thus, because defendant Gagan has not met his burden of
9 proof in terms of satisfying the amount in controversy requirement
10 in the Miljenovich action, jurisdiction over this action is not, as
11 Gagan believes "obvious[.]" Mot. (Doc. 15) at 4.

12 **2. Supplemental Jurisdiction**

13 Even though the diversity statute cannot provide a basis for
14 jurisdiction over the Miljenovich action, that does not necessarily
15 mean that jurisdiction is lacking. If ultimately the court finds
16 that it has jurisdiction over the Monroe action, then it will
17 exercise supplemental jurisdiction over the Miljenovich action in
18 accordance with 28 U.S.C. § 1367. The exercise of such
19 jurisdiction would be proper if the court has jurisdiction over the
20 Monroe action because Miljenovich is part of "the same case or
21 controversy" as the Monroe action. By the same token, though, if
22 the court eventually determines that it lacks subject matter
23 jurisdiction over Monroe, clearly the exercise of supplemental
24 jurisdiction over Miljenovich would be improper. Accordingly, the
25 court conditionally denies defendant Miljenovich's motion to
26 remand. However, if defendant Gagan fails to file an amended
27 Notice of Removal within fifteen (15) days from the date of entry
28 of this order, then the court will remand the Miljenovich action to

1 Arizona Superior Court, Maricopa County without further notice.

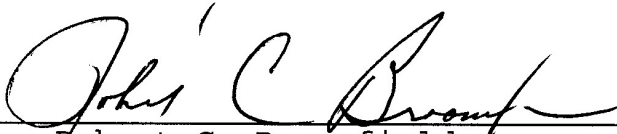
2 For all of these reasons, the court hereby ORDERS that:

3 (1) plaintiffs' motion to remand (doc. 7) is DENIED
4 without prejudice;

5 (2) defendant Ross Miljenovich's motion to remand (doc.
6 10) is DENIED on the condition that defendant James L.
7 Gagan files an amended Notice of Removal within fifteen
8 (15) days of the date hereof; if defendant Gagan does not
9 timely file such notice, the court will GRANT defendant
10 Ross Miljenovich's motion to remand for lack of subject
11 matter jurisdiction; and

12 (3) defendant James L. Gagan has fifteen (15) days from
13 the date of entry of this order in which to file an
14 amended Notice of Removal. Failure to comply with this
15 order shall result in the remand of Monroe v. Gagan
16 without further notice for lack of subject matter
17 jurisdiction.

18 DATED this 29th day of September, 2008.

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Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record