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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Henry Carter Metcalf,

10 Plaintiff,

11 vs.

12 Southwest Gas Corporation,

13 Defendant.

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No. CV-11-0455-PHX-JAT

ORDER

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Pending before the Court is Plaintiff’s Motion to Remand to State Court. (Doc. 43). Defendant filed a response on February 27, 2012 (Doc. 47), and Plaintiff replied on March 5, 2012. (Doc. 48). For the reasons that follow, the Court now grants the Motion.

I. BACKGROUND

Plaintiff initially filed suit against Defendant in state court, alleging that Defendant caused a gas leak near his house that resulted in injury to Plaintiff. On March 8, 2011, Defendant removed the case to this Court, alleging that the amount in controversy exceeded \$75,000 and that diversity of citizenship existed between Plaintiff and Defendant. (Doc. 1 at 2). Defendant filed a Motion to Dismiss (Doc. 24), which was denied. Thereafter, the parties proceeded to discovery and engaged in pre-trial litigation. On February 10, 2012, Plaintiff moved to remand the case to state court, asserting that Defendant failed to carry its legal burden to show that the amount in controversy more than likely exceeded \$75,000.

1 **II. LEGAL STANDARD**

2 **A. The Diversity Jurisdiction Statute**

3 Pursuant to 28 U.S.C. § 1332, “district courts shall have original jurisdiction of all
4 civil actions where the matter in controversy exceeds the sum or value of \$75,000,
5 exclusive of interests and costs, and is between . . . citizens of different States[.]”
6 28 U.S.C. § 1332(a)(1).

7 **B. The Removal Statute**

8 The removal statute, 28 U.S.C. § 1441, provides, in pertinent part: “[A]ny civil action
9 brought in a State court of which the district courts of the United States have original
10 jurisdiction, may be removed by the defendant . . . to the district court of the United States
11 for the district and division embracing the place where such action is pending.” 28 U.S.C.
12 § 1441(a); *see Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“Only . . . actions that
13 originally could have been filed in federal court may be removed to federal court by the
14 defendant.”). Courts strictly construe the removal statute against removal jurisdiction. *See*
15 *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Gaus v. Miles, Inc.*, 980
16 F.2d 564, 566 (9th Cir. 1992); *see also Mesa Indus., Inc. v. Eaglebrook Prods., Inc.*, 980
17 F. Supp. 323, 324 (D. Ariz. 1997).

18 There is a “strong presumption” against removal, and “[f]ederal jurisdiction ‘must be
19 rejected if there is any doubt as to the right of removal in the first instance.’” *Duncan v.*
20 *Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Gaus*, 980 F.2d at 566); *see Mesa*
21 *Indus.*, 980 F. Supp. at 324. “The ‘strong presumption’ against removal jurisdiction means
22 that the defendant always has the burden of establishing that removal is proper.” *Gaus*, 980
23 F.2d at 566; *see Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999)
24 (“The burden of establishing federal jurisdiction is on the party seeking removal, and the
25 removal statute is strictly construed against removal jurisdiction.”) (citing *Emerich v. Touche*
26 *Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988)); *Duncan*, 76 F.3d at 1485 (stating that
27 “defendant[] has the burden of establishing that removal was proper”); *Lew v. Moss*, 797 F.2d
28 747, 749 (9th Cir. 1986) (“[T]he party asserting diversity jurisdiction bears the burden of

1 proof.”).

2 **C. The Removing Defendant Has the Burden of Establishing the**
3 **Amount in Controversy Requirement by a Preponderance of the**
4 **Evidence**

4 “In a removed case, . . . the plaintiff chose a state rather than federal forum. Because
5 the plaintiff instituted the case in state court, ‘there is a strong presumption that the plaintiff
6 has not claimed a large amount in order to confer jurisdiction on a federal court[.]’” *Singer v.*
7 *State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 375 (9th Cir. 1997) (quoting *St. Paul Mercury*
8 *Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290 (1938)). “Where the complaint does not
9 demand a dollar amount, the removing defendant bears the burden of proving by a
10 preponderance of the evidence that the amount in controversy exceeds [\$75,000].” *Id.* at 376
11 (citing *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996); see *Gibson v.*
12 *Chrysler Corp.*, 261 F.3d 927, 933 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 903 (2002)
13 (internal citations omitted); see also *Gaus*, 980 F.2d at 566-67 (“If it is *unclear* what amount
14 of damages the plaintiff has sought, . . . then the defendant bears the burden of actually
15 proving the facts to support . . . the jurisdictional amount.”) (emphasis in original).

16 “Under this burden, the defendant must provide evidence establishing that it is ‘more
17 likely than not’ that the amount in controversy exceeds [\$75,000].” *Sanchez*, 102 F.3d at
18 404. “[R]emoval ‘cannot be based simply upon conclusory allegations’ where the
19 [complaint] is silent” as to the dollar amount of damages the plaintiff seeks. *Singer*, 116 F.3d
20 at 377 (citing *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995)). However,
21 the inquiry into the amount in controversy is not confined to the face of the complaint. See
22 *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004) (endorsing the Fifth Circuit’s
23 practice of considering facts presented in the removal petition as well as any “summary-
24 judgment-type evidence relevant to the amount in controversy at the time of removal.”).

25 **III. Analysis**

26 It is undisputed that Plaintiff and Defendant are citizens of different states as required
27 by 28 U.S.C. § 1332. Accordingly, the Court must determine whether the amount in
28 controversy exceeds \$75,000.

1 **A. Motion to Remand**

2 Plaintiff does not demand a particular dollar amount in his complaint. Thus, it is
3 Defendant’s burden to prove by a preponderance of the evidence that the amount in
4 controversy exceeds \$75,000. *Singer*, 116 F.3d at 376. This requires that Defendant submit
5 evidence to show it is more likely than not that the amount in controversy exceeds \$75,000.
6 *Sanchez*, 102 F.3d at 404. Defendant may submit summary-judgment-type evidence relevant
7 to the amount in controversy at the time of removal, but may not rely upon conclusory
8 allegations. *Valdez*, 372 F.3d at 1117.

9 Defendant submitted the following evidence to prove that the amount in controversy
10 exceeds \$75,000: (1) the certificate regarding compulsory arbitration from Pinal County
11 Superior Court stating that Plaintiff sought more than \$40,000 (Def. Ex. 2); (2) a letter from
12 Plaintiff’s counsel indicating a belief that Plaintiff’s damages would be a “big number” and
13 a willingness to settle for a “big number” (Def. Ex. 1); (3) the lack of response to
14 Defendant’s assumption in their letter of March 8, 2011, that Plaintiff was seeking more than
15 \$75,000 in damages (Def. Ex. 3); (4) Plaintiff’s ‘stipulation’ that the case was a diversity
16 case in the parties’ Joint Case Management Plan (the “Plan”) (Doc. 9 at 4); and (5) Plaintiff’s
17 failure to previously raise the amount in controversy issue. As discussed below, this evidence
18 is not sufficient to prove by a preponderance of the evidence that the amount in controversy
19 in this case exceeded \$75,000 at the time of removal.

20 First, the certificate regarding compulsory arbitration does nothing more than establish
21 that the amount in controversy is likely more than \$40,000. *See Super. Ct. Local Rules--Pinal*
22 *County, Rule 2.20* (requiring arbitration for claims under \$40,000). The Court may consider
23 this certificate as a concession by Plaintiff of the amount that they are seeking for their claim.
24 *See Ansley v. Metro. Life Ins. Co.*, 215 F.R.D. 575, 578 (D. Ariz. 2003) (citing *Singer*, 116
25 F.3d at 376). However, while the certificate establishes that Plaintiff is seeking an amount
26 that is more than \$40,000 for their claim, the certificate does not prove that the amount in
27 controversy is greater than \$75,000.

28 Second, the letter from Plaintiff’s counsel does not establish that the amount in

1 controversy exceeds \$75,000. “A settlement letter is relevant evidence of the amount in
2 controversy if it appears to reflect a reasonable estimate of the plaintiff’s claim.” *Cohn v.*
3 *Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (internal citations and footnote omitted).
4 However, a “big number” need not be more than \$75,000. Indeed, by using the term,
5 Plaintiff avoided the need to place a dollar value on his claim. Accordingly, the assertion that
6 Plaintiff’s claim is worth “a big number” is not specific enough to provide a reasonable
7 estimate of Plaintiff’s claim sufficient to support a finding that it is more likely than not that
8 Plaintiff’s claim exceeds \$75,000.

9 Third, Plaintiff’s failure to respond to Defendant’s assumption that Plaintiff was
10 seeking more than \$75,000 in damages is not persuasive. Defendant cites two cases from this
11 district as authority for considering the refusal to agree that Plaintiff will not obtain an award
12 more than the amount in controversy as evidence of the actual amount in controversy. *See*
13 *Ansley v. Metropolitan Life Ins. Co.*, 215 F.R.D. 575, 578 (D. Ariz. 2003); *Del Real v.*
14 *Healthsouth Corp.*, 171 F. Supp. 2d 1041, 1043 (D. Ariz. 2001). “Plaintiffs, however, are
15 under no . . . obligation to announce, on their own accord, the amount in controversy.”
16 *Gordon v. Allstate Ins. Co.*, CV-09-1828-PHX-MHM, 2010 WL 1949164 at *2 (D. Ariz.
17 May 13, 2010); *see, e.g., Conrad Assocs. v. Hartford Acc. & Indem. Co.*, 994 F.Supp. 1196,
18 1199 (N.D. Cal. 1998) (“Defendant’s assertion that it is ‘conclusively established’ that the
19 amount in controversy in this case exceeds \$75,000 by plaintiff’s refusal to stipulate that the
20 case is not worth \$75,000 is not convincing.”). Defendant only argues that Plaintiff has not
21 affirmatively stated that he seeks less than \$75,000, and fails to show any evidence that
22 Plaintiff refused to agree that he sought more. As such, Plaintiff’s lack of response to
23 Defendant’s assumption does not establish that the amount in controversy exceeds \$75,000.

24 Fourth, Defendant argues that Plaintiff stipulated that the amount in controversy
25 exceeded \$75,000 in the Plan. (Doc. 9 at 4). The Plan states “[t]his is a diversity case
26 pursuant to 38 [sic] U.S.C. § 1332.” *Id.* “[Factual stipulations are] binding and conclusive .
27 . . ., and the facts stated are not subject to subsequent variation.” *Christian Legal Soc’y*
28 *Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971,

1 2983 (2010) (quoting 83 C.J.S. *Stipulations* § 93 (2000)). However, the stipulation here is
2 legal, rather than factual; Plaintiff did not stipulate that he sought damages greater than
3 \$75,000. Rather, he stipulated that there was “diversity” jurisdiction, which is a legal
4 conclusion based on underlying facts. “[A] defect in subject matter jurisdiction cannot be
5 stipulated to or waived.” *Conrad Associates v. Hartford Acc. & Indem. Co.*, 994 F. Supp.
6 1196, 1199 (N.D. Cal. 1998); *see Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 942 (9th
7 Cir. 2006) (“A lack of subject matter jurisdiction . . . , is a non-waivable defect.”).
8 Accordingly, the Parties’ assertion in the Plan that this is a diversity case, is not binding for
9 the purpose of proving the amount in controversy to assert subject matter jurisdiction.

10 Further, even if the Court were to take the Plan as evidence of Plaintiff’s belief
11 regarding the amount in controversy at the time the parties filed the Plan with the Court, it
12 would not serve as evidence of the amount in controversy at the time of removal. Instead, it
13 might be indicative of the amount in controversy at the time the Plan was filed. Absent any
14 further evidence of the amount in controversy at the time of removal, Defendant has failed
15 to meet its burden of showing that the amount in controversy was greater than \$75,000 when
16 this case was removed.

17 Further, Defendants argue that this case should not be remanded because Plaintiff
18 failed to previously raise the amount in controversy issue. “If at any time before final
19 judgment it appears that the district court lacks subject matter jurisdiction, the case shall be
20 remanded.” 28 U.S.C. § 1447(c). Although Plaintiff should have moved to remand earlier in
21 the litigation for the convenience of all parties and judicial economy, a lack of subject matter
22 jurisdiction necessitates remand whenever the issue is raised.

23 **IV. CONCLUSION**

24 In light of this Court’s duty to strictly construe the removal statute and Defendant’s
25 failure to support its allegations with sufficient evidence, the Court cannot conclude that
26 Defendant has proven by a preponderance of the evidence that the amount in controversy is
27 more likely than not \$75,000.

28 Accordingly,

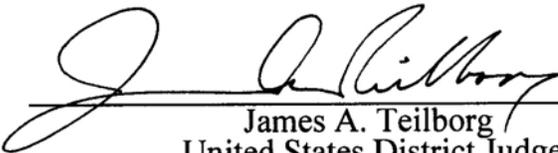
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IT IS ORDERED that Plaintiff's Motion to Remand (Doc. 43) is granted.

IT IS FURTHER ORDERED that the Clerk of the Court remand this case to Pinal County Superior Court.

IT IS FURTHER ORDERED that this Order does not undertake to rule on the pending Motion for Summary Judgment (Doc. 49) and such motion shall remain pending before the Superior Court judge.

DATED this 14th day of June, 2012.



James A. Teilborg
United States District Judge