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

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9 Deutsche Bank,

No. 11-CV-0944-PHX-GMS

10 Plaintiff,

**ORDER**

11 vs.

12 Vladimir Brunat, Dagmar Brunat, John  
13 Does I-X, John Doe Occupant 1-5, and  
Jane Doe Occupant 1-5,

14 Defendants.

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16 Pending before the Court is a Motion to Remand to state court filed by Plaintiff  
17 Deutsche Bank. (Doc. 6). For the reasons stated below, the Court grants the motion.

18 **BACKGROUND**

19 On or about April 12, 2011, Plaintiff filed an action in state court for Forcible Entry  
20 and Detainer (“FED”) after a Trustee’s Sale pursuant to Arizona Revised Statute § 12-  
21 1173.01, *et seq.* (Doc. 1-1). The Complaint alleges that following a non-judicial foreclosure,  
22 on November 2, 2009, Plaintiff obtained title to the property located at 30507 N. 164th St.,  
23 Scottsdale, Arizona 85262. (*Id.* at ¶ 2). Plaintiff further alleges that despite giving written  
24 notice to vacate to Defendants, who were the prior owners and occupants of the property,  
25 Defendants have either failed or refused to surrender possession of the property. (*Id.* at ¶¶  
26 4–5). Plaintiff seeks to recover possession of the real property through the present forcible  
27 detainer action.

28 In an earlier related case, filed before Judge Martone in this Court in August 2009, the

1 Brunats commenced action against Plaintiff and others challenging their security interest in  
2 the property under the Truth in Lending Act and Arizona state law governing notice of  
3 trustee's sales. *See Brunat v. IndyMac, et al.*, CV-09-1796-PHX-FJM. On April 6, 2011,  
4 Judge Martone granted defendants' motion for summary judgment on all claims in that case  
5 and judgment was entered in favor of defendants on the same day. The Brunats appeal on that  
6 summary judgment order is currently pending before the Ninth Circuit.

7 Defendants removed this case to federal court on or about May 11, 2011 based on  
8 diversity jurisdiction, (Doc. 1), and soon thereafter sought to consolidate this matter with  
9 *Brunat v. IndyMac, et al.* (Doc. 5). After it was determined that the two cases do not share  
10 a common question of law or fact, the motion to consolidate was denied on July 14, 2011.  
11 *See Brunat v. IndyMac, et al.*, CV-09-1796-PHX-FJM, Doc. 69. Plaintiff presently seeks to  
12 remand to state court due to improper removal. (Doc. 6).

## 13 DISCUSSION

### 14 I. Legal Standard

15 "Under 28 U.S.C. § 1441(a), the district courts have removal jurisdiction over any  
16 claim that could have been brought in federal court originally." *Hall v. N. Am. Van Lines,*  
17 *Inc.*, 476 F.3d 683, 686–87 (9th Cir. 2007). The party asserting federal jurisdiction has the  
18 burden of proof on a motion to remand to state court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566  
19 (9th Cir. 1992). The removal statute is strictly construed against removal jurisdiction. *Id.*  
20 (citing *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988)). There is a  
21 "strong presumption" *against* removal jurisdiction, and "[f]ederal jurisdiction must be  
22 rejected if there is *any doubt* as to the right of removal in the first instance." *Id.* (emphasis  
23 added). "The 'strong presumption' against removal jurisdiction means that the defendant  
24 always has the burden of establishing that removal is proper." *Id.*

### 25 II. Analysis

26 Defendants removed the present case to federal court based upon diversity  
27 jurisdiction. (Doc. 1). They asserted that because the Defendants are residents of Maricopa  
28 County, Arizona and Plaintiff is a New York corporation with its principal executive office

1 in New York, there is complete diversity of citizenship and therefore removal is proper  
2 pursuant to 28 U.S.C. § 1332(a) and (c)(1). To the extent that the Notice of Removal purports  
3 to invoke the Court’s diversity jurisdiction under 28 U.S.C. § 1332, the requirements for  
4 diversity jurisdiction are not satisfied. In order to invoke the Court’s diversity jurisdiction,  
5 Defendants must show both that they and Plaintiff are not residents of the same state, and that  
6 the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332 (setting forth requirements  
7 for diversity jurisdiction). In addition, even where there is diversity between the parties, a  
8 federal court may not exercise jurisdiction where the moving defendant is a resident of the  
9 forum state. 28 U.S.C. § 1441(b). Here, the Court need not decide whether there is diversity  
10 between the parties or whether the amount in controversy requirement is met as Defendants  
11 concede that they are residents of Arizona and that they reside at the property at issue in this  
12 action (located in Maricopa County, Arizona); thus, they are clearly forum defendants who  
13 may not remove a state-court action. *See id.*

14 Further, in response to Plaintiff’s motion to remand, Defendants make no mention of  
15 their diversity-based arguments – the sole basis asserted in their Notice of Removal – and  
16 instead assert that the Court should exercise supplemental question jurisdiction based on the  
17 federal question (i.e., Truth in Lending Act) presented in *Brunat v. IndyMac, et al.*, which  
18 is currently on appeal. Defendants’ assertion that the Court has supplemental jurisdiction  
19 pursuant to 28 U.S.C. § 1441(c) because of the federal question of law on appeal in the  
20 related case is without merit. Section 1441(c) provides that “[w]henver a separate and  
21 independent claim or cause of action within the jurisdiction conferred by section 1331 of this  
22 title is joined with one or more otherwise non-removable claims or causes of action, the  
23 entire case may be removed and the district court may determine all issues therein, or, in its  
24 discretion, may remand all matters in which State law predominates.” However, Defendants  
25 concede that “the present action is not presently joined with any nonremovable action before  
26 this court but contend[] Plaintiff’s action should have been compulsory joined” with *Brunat*  
27 *v. IndyMac, et al.* (Doc. 9 at 4). To this end, Defendants attempted to consolidate this matter  
28 with the related case, which did involve a federal question. Nevertheless, their Motion to

1 Consolidate was denied after determination that the two cases did not share a common  
2 question of law or fact pursuant to Federal Rule of Civil Procedure 42(a). *See Brunat v.*  
3 *IndyMac, et al.*, CV-09-1796-PHX-FJM, Doc. 69.

4 In furtherance of their effort to assert supplemental jurisdiction, Defendants also rely  
5 on 28 U.S.C. § 1367(a), which provides that “in any civil action of which the district courts  
6 have original jurisdiction, the district courts shall have supplemental jurisdiction over all  
7 other claims that are so related to claims in the action within such original jurisdiction that  
8 they form part of the same case or controversy . . . .” However, the Court lacks original  
9 jurisdiction in this matter. Under 28 U.S.C. § 1331, “[t]he district courts shall have original  
10 jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United  
11 States.” A case “‘arises under’ federal law . . . if ‘a well-pleaded complaint establishes either  
12 that federal law creates the cause of action or that the plaintiff’s right to relief necessarily  
13 depends on resolution of a substantial question of federal law.’” *Proctor v. Vishay Intertech.*  
14 *Inc.*, 584 F.3d 1208, 1219 (9th Cir. 2009) (quoting *Empire Healthchoice Assurance, Inc. v.*  
15 *McVeigh*, 547 U.S. 677, 689–90 (2006)). This is a straightforward forcible detainer,  
16 otherwise known as an eviction action. The only issue in a forcible entry and detainer action  
17 is the right of actual possession – the merits of the title are not litigated. A.R.S. § 12-1177(a);  
18 *Curtis v. Morris*, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996). Accordingly, the Court lacks  
19 original jurisdiction, and therefore supplemental jurisdiction as well.

20 Plaintiff seeks attorneys’ fees and costs pursuant to 28 U.S.C. § 1447(c), which  
21 provides, in relevant part, that “[a]n order remanding the case may require payment of just  
22 costs and any actual expenses, including attorney fees, incurred as a result of the removal.”  
23 Plaintiff asserts that because Defendants’ removal has no basis in law or fact, and because  
24 “Plaintiff has expended time, money and legal resources in battling this frivolous removal,”  
25 attorneys’ fees and costs are merited. (Doc. 6 at 4–5). The Court is persuaded that  
26 Defendants’ removal was frivolous. Defendants improperly removed on the basis of diversity  
27 jurisdiction, apparently in a misguided effort to move for consolidation with the related  
28 matter that was then before the Ninth Circuit. If it is Defendants’ intention to forestall

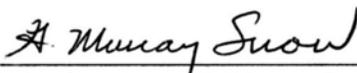
1 eviction pending their appeal in the related matter, their efforts must be made in state court.  
2 Based on the foregoing considerations, the Court, in its discretion, finds Defendants' removal  
3 sufficiently frivolous as to merit the award of fees. Plaintiff's request for attorneys' fees and  
4 costs is granted.

5 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Remand (Doc. 6) is  
6 **GRANTED.**

7 **IT IS FURTHER ORDERED** that Plaintiff's request for attorneys' fees is  
8 **GRANTED.** The Court will grant reasonable attorneys' fees and costs upon compliance with  
9 Federal Rule of Civil Procedure 54(d).

10 **IT IS FURTHER ORDERED** directing the Clerk of the Court to remand this case  
11 to the Maricopa County Superior Court.

12 DATED this 31st day of August, 2011.

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16 G. Murray Snow  
17 United States District Judge  
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