

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 ALC Holding LLC,

10 Plaintiff,

11 v.

12 Federated Service Insurance Company, et
13 al.,

14 Defendants.

No. CV-15-08162-PCT-GMS

ORDER

15 Pending before this Court is Plaintiff, ALC Holding, LLC's, motion to remand
16 pursuant to 28 U.S.C. § 1447(c). (Doc. 18.) For the foregoing reasons, the Court grants
17 the motion and remands the matter back to the Apache County Superior Court.

18 **BACKGROUND**

19 This case arises out of a 2011 fire that damaged the facilities of a business in
20 which Plaintiff allegedly holds a majority interest. (Doc. 1 at 4.) Defendant provided
21 property insurance coverage for the business. (*Id.*) A dispute arose over the extent of
22 smoke damage, thus, Plaintiff requested an appraisal of said damage pursuant to the
23 terms of its insurance policy with Defendant. (*Id.*) Both parties elected independent
24 appraisers, but the appraisers could not agree on a third-party umpire required by the
25 terms of the insurance agreement. (*Id.*)

26 On May 6, 2014, Plaintiff filed its Petition for Appointment of Umpire ("Petition")
27 in state court. (Doc. 18 at 1.) The Petition alleged complete diversity between the
28 parties. (Doc. 1, Ex. B.) Plaintiff is an Arizona Limited Liability Company with

1 members in Arizona and North Carolina. (Doc. 1.) And defendant, Federated Service
2 Insurance Company, is a Minnesota corporation with its principal place of business in
3 Minnesota. (*Id.*) The Petition, however, did not state on its face an amount in
4 controversy. (Doc. 1, Ex. B.) On May 22, 2014, the state court appointed an umpire.
5 (Doc. 1 at 4.) On October 23, 2014, the appraisers and umpire reached an appraisal
6 award amount of \$626,000. (*Id.*) In light of the award amount, on December 10, 2014,
7 Defendant paid Plaintiff the balance owed under the insurance policy. (*Id.*)

8 On May 21, 2015, Plaintiff filed a motion to confirm the appraisal award. (Doc.
9 25 at 5.) Plaintiff attached the October 23, 2014 appraisal award as an exhibit to the
10 motion. (*Id.* at 8.) The motion prayed for the court to enter an order confirming the
11 appraisal award without modification. (Doc. 1, Ex. H.) On July 10, 2015, Defendant
12 filed a motion to dismiss the motion to confirm the appraisal award. (*Id.*, Ex. J.) Plaintiff
13 filed its response on July 28, 2015 within which it noted new claims for insurance bad
14 faith. (*Id.*, Ex K.) Plaintiff filed a “complaint” raising its new claims that same day. (*Id.*,
15 Ex. J.) Defendant filed a motion to dismiss the “complaint” on August 17, 2015. (*Id.*,
16 Ex. P.) On August 27, 2015, Defendant filed its notice of removal with the Court. (*Id.*)
17 Plaintiff filed its motion to remand on September, 26, 2015. (Doc. 18.) The matter is
18 fully briefed.

19 DISCUSSION

20 I. Legal Standard

21 Under 28 U.S.C. § 1446(b)(1), notice of removal “shall be filed within thirty days
22 after the receipt [of a copy of the initial pleading] by the defendant.” However, “if the
23 case stated by the initial pleading is not removable, a notice of removal may be filed
24 within thirty days after receipt by the defendant, through service or otherwise, of a copy
25 of an amended pleading, motion, order or other paper from which it may first be
26 ascertained that the case is one which is or has become removable.” § 1446(b)(3). In
27 other words:

28 ///

1 [S]ection 1446(b) identifies two thirty-day periods for
2 removing a case. The first thirty-day removal period is
3 triggered “if the case stated by the initial pleading is
4 removable on its face.” *Harris v. Bankers Life & Cas. Co.*,
5 425 F.3d 689, 694 (9th Cir. 2005). The second thirty-day
6 removal period is triggered if the initial pleading does not
7 indicate that the case is removable, and the defendant receives
8 “a copy of an amended pleading, motion, order or other
9 paper” from which removability may first be ascertained. 28
10 U.S.C. § 1446(b).

11 *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 885 (9th Cir. 2010). Additionally,
12 if the “case stated by the initial pleading is not removable solely because the amount in
13 controversy does not exceed [\$75,000], information relating to the amount in controversy
14 in the record of the State proceeding, . . . shall be treated as an “other paper” under
15 subsection (b)(3).” § 1446(c)(3)(A). Generally, federal courts “strictly construe” the
16 requirements of removal. *See, e.g., Durham v. Lockheed Martin Corp.*, 445 F.3d 1247,
17 1252 (9th Cir. 2006) (affirming that “[r]emoval statutes are to be strictly construed, and
18 any doubts as to the right of removal must be resolved in favor of remanding to state
19 court.”) (citation omitted); *Nev. v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012)
20 (“Removal statutes are to be ‘strictly construed’ against removal jurisdiction.”).
21 Accordingly, the thirty day time limit is likewise strictly construed against removal. *See*
22 *U.S. ex rel. Walker v. Gunn*, 511 F.2d 1024, 1026 (9th Cir. 1975) (“[time for removal] is
23 imperative and mandatory, must be strictly complied with, and is to be narrowly
24 construed”).

25 Finally, when removal is sought on the basis of diversity jurisdiction, a defendant
26 cannot remove under § 1446(b)(3) more than one year after the commencement of the
27 action, “unless the district court finds that the plaintiff has acted in bad faith in order to
28 prevent a defendant from removing the action.” § 1446(c)(1). The statute specifically
notes that if “the district court finds that the plaintiff deliberately failed to disclose the
actual amount in controversy to prevent removal, that finding shall be deemed bad faith”
and will permit removal after one year. § 1446(c)(3)(B).

///
///

1 **II. Analysis**

2 **A. Timeliness of removal**

3 Plaintiff raises two arguments in favor of remand. First, since its initial pleading
4 did not raise an amount in controversy, Plaintiff does not contend that its initial May 6,
5 2014 pleading evidenced removability to trigger the start of the thirty day removal clock.¹
6 But Plaintiff does argue that Defendant learned of the amount in controversy over the
7 course of the state court litigation, either as early as October 23, 2014, when the
8 appraisers and umpire reached an award amount of \$626,000, or upon the May 21, 2015
9 filing of Plaintiff’s motion to confirm the appraisal award. (Doc. 18 at 11.) Second,
10 Plaintiff argues that Defendant’s notice of removal violates § 1446(c)’s one year bar
11 since Defendant filed it fifteen months after Plaintiff entered its initial pleading. (*Id.* at
12 2.)

13 Defendant argues that not until Plaintiff filed its “complaint” raising its insurance
14 bad faith claim on July 28, 2015 did the thirty day removal clock begin. (Doc. 22 at 4–5.)
15 As such, Defendant timely filed its notice of removal on August 27, 2015. And to
16 account for § 1446(c)’s one year bar on diversity removals, Defendant asserts that
17 Plaintiff deliberately withheld the amount in controversy triggering § 1446(c)(3)(B)’s bad
18 faith exception to the one year bar. Defendant also contends that Plaintiff signed a
19 “consent to jurisdiction” form waiving its right to object to removal. (*Id.* at 5.)

20 The October 23, 2014 appraisal award triggered the thirty day removal period
21 under § 1446(b)(3). Plaintiff’s May 21, 2015 motion to confirm the appraisal award
22 would have also triggered the thirty day removal period. Accordingly, Defendant’s

23
24 ¹ Plaintiff also raises the fact that Defendant’s privity to the insurance claims
25 during the years prior to Plaintiff’s initial pleading provided Defendant with constructive
26 knowledge of the amount in controversy. (Doc. 18 at 7–10.) Subjective knowledge
27 allegedly learned before the filing of the initial pleading does not suffice to start the thirty
28 day removal clock upon the filing of an indeterminate pleading. *See Harris v. Bankers
Life & Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005) (The thirty day removal period
begins once removability is ascertainable from “examination of the four corners of the
applicable pleadings, not through subjective knowledge or a duty to make further
inquiry.”); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 886 (9th Cir. 2010)
 (“[A] document received prior to receipt of the initial pleading cannot trigger the . . .
thirty-day removal period.”)

1 August 27, 2015 notice of removal was untimely. Furthermore, in light of this Court's
2 obligation to strictly construe removal statutes, Defendant failed to prove Plaintiff's
3 conduct amounted to a bad faith act of deceit in order to conceal the amount in
4 controversy and prevent removal. As such, this matter is remanded back to the Apache
5 County Superior Court.

6 There is no dispute that the May 6, 2014 initial pleading did not indicate
7 removability since Defendant could not ascertain the alleged amount in controversy
8 within its "four corners." *See Harris*, 425 F.3d at 694. Thus, because the initial pleading
9 could not be removed, § 1446(b)'s first thirty day window does not apply. *Id.* ("[T]he
10 first thirty-day period for removal in 28 U.S.C. § 1446(b) only applies if the case stated
11 by the initial pleading is removable on its face.") Accordingly, the second thirty day
12 window is in play here.

13 Defendant contends that not until Plaintiff filed its "complaint" raising its
14 insurance bad faith claim could Defendant have ascertained removability. Defendant
15 ignores, however, the October 23, 2014 appraisal award and Plaintiff's May 21, 2015
16 motion to confirm the appraisal award. Plaintiff rightly contends that both papers
17 provided Defendant the information requisite to have ascertained removability. Courts
18 have held that documents similar to the appraisal award constituted "other paper" as
19 contemplated by § 1446(b). *See, e.g., Carvalho*, 629 F.3d at 885 (noting that a demand
20 letter sent between counsel during the course of a state court action constitutes an "other
21 paper" within the meaning of § 1446(b)); *Eyak Native Village v. Exxon Corp.*, 25 F.3d
22 773, 779 (9th Cir. 1994) (holding that a reply brief qualified as an "other paper" within
23 § 1446(b)). So long as the "other paper" reasonably reflects Plaintiff's claims, it triggers
24 the second thirty day removal period. *See Babasa v. LensCrafters, Inc.*, 498 F.3d 972,
25 975 (9th Cir. 2007). Here, the October 23, 2014 appraisal award reasonably reflected the
26 appraised value of Plaintiff's claims against Defendant. Consequently, Defendant's thirty
27 day window to remove began on October 23, 2014 when the appraisers calculated
28 Plaintiff's award amount and distributed the document to the parties. Defendant's

1 August 27, 2015 notice of removal was therefore untimely.

2 Plaintiff's motion to confirm the appraisal award would have also triggered
3 Defendant's removal clock. Plaintiff attached the award amount as an exhibit to its
4 motion, thus, again apprising Defendant of the amount in controversy. The removal
5 statutes expressly note "motion[s]" as qualified triggers of its second thirty day removal
6 period. § 1446(b)(3) ("receipt by the defendant, through service or otherwise, of a copy
7 of an . . . motion"). Because Plaintiff filed its motion on May 21, 2015, Defendant's
8 August 27, 2015 notice of removal was untimely under this timeframe as well.

9 Finally, § 1446(c)'s one year bar also applies to this case and requires remand.
10 Defendant frames Plaintiff's July 28, 2015 "complaint" as evidence of bad faith. (Doc.
11 22 at 3.) Specifically "that [Plaintiff] has all along pursued a strategy that was intended
12 to ambush [Defendant] with an insurance bad faith claim in excess of this court's
13 diversity jurisdiction limit in the event of a favorable insurance appraisal award." (*Id.*)
14 According to Defendant, further evidence of Plaintiff's mendacious plan is Plaintiff's
15 "references to the arbitration statute" in its initial pleading. (*Id.*)

16 The addition of the bad faith exception into § 1446 is a relatively recent change; as
17 a result, the Ninth Circuit has yet to clarify what conduct qualifies as bad faith under the
18 exception. The rule states that Defendant must show that Plaintiff "deliberately failed to
19 disclose the actual amount in controversy to prevent removal[.]" § 1446(c)(3)(B). The
20 plain meaning of the rule suggests that the Plaintiff must possess an intent to avoid
21 removal through the concealment of the amount in controversy. This is a high threshold,
22 but such a threshold is consistent with how the Ninth Circuit applies the bad faith
23 standard in other contexts. For example, in determining the propriety of awarding
24 sanctions, the Ninth Circuit held that a "finding of bad faith is warranted where an
25 attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious
26 claim for the purposes of harassing an opponent." *Primus Auto. Fin. Servs., Inc. v.*
27 *Batarse*, 115 F.3d 644, 649 (9th Cir. 1997).

28 ///

1 Accounting for § 1446(c)(3)(B)'s high threshold, and the high bar the Ninth
2 Circuit applies in other bad faith contexts, here, there is no evidence Plaintiff knowingly,
3 recklessly, or deliberately took actions to prevent removal by masking the amount in
4 controversy. Plaintiff may have indeed planned to wait until the state court confirmed its
5 appraisal award before pursuing other claims, as Defendant argued, but such action does
6 not add up to bad faith for numerous reasons. Foremost, Plaintiff disclosed the amount in
7 controversy. Indeed, Plaintiff attached the amount in controversy to its May 21, 2015
8 motion. Next, even if the amount in controversy remained unknown until Plaintiff filed
9 its "complaint," Plaintiff's conduct up to that point does not reach the level of deceit
10 necessary to show bad faith. In fact, Plaintiff seemed to have filed the "complaint" in
11 response to Defendant's opposition to its motion to confirm the appraisal award. (Doc. 1,
12 Ex. K.) A reactionary filing, if proper or improper, does not evidence an intent to be
13 duplicitous as to the amount in controversy in this case. And finally, Plaintiff's litigation
14 strategy, if true, seems reasonable and far from a bad faith plot to remain in state court.
15 Thus, Defendant's arguments in favor of invoking § 1446(c)(B)(3)'s exception to the one
16 year removal bar fail. Accordingly, Defendant's notice of removal was again untimely.²

17 **B. Attorney's fees**

18 "An order remanding the case may require payment of just costs and any actual
19 expenses, including attorney fees, incurred as a result of the removal." § 1447(c). While
20 attorney's fees are available, it is clear that "[a]bsent unusual circumstances, attorney's
21 fees should not be awarded when the removing party has an objectively reasonable basis
22 for removal." *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006) (citation
23 omitted).

24 Here, although the Court grants Plaintiff's motion, the Defendant held an
25 "objectively reasonable basis" to remove the case although ultimately its notice of

26
27 ² Defendant's argument that Plaintiff waived its right to remove by consenting to
28 magistrate judge jurisdiction on September 10, 2015 is inapposite since it occurred after
Defendant filed its notice of removal. Since Defendant's notice of removal was
untimely, the subsequent consent form, without deciding whether it waives Plaintiff's
right to object to removal jurisdiction or not, is moot.

1 removal was untimely. For all of the reasons Defendant argues in its motion to dismiss,
2 Plaintiff's "complaint" seemed to raise brand new causes of action and reasonably
3 prompted Defendant to seek removal. While Defendant's bases for removal were ripe
4 months before, that does not render Defendant's actions objectively unreasonable. Thus,
5 Plaintiff's prayer for attorney's fees is denied.

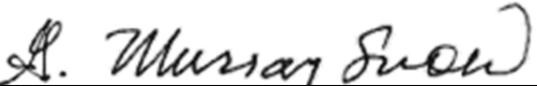
6 For the reasons stated above,

7 **IT IS ORDERED** granting Plaintiff's Motion to Remand (Doc. 18) but denies the
8 award of attorney's fees. The Clerk of Court is directed to remand this action.

9 **IT IS FURTHER ORDERED** that the Clerk of the Court send a certified copy of
10 this Order to the Apache County Superior Court for further proceedings.

11 **IT IS FURTHER ORDERED** finding Defendant's Motion to Strike (Doc. 23)
12 moot.

13 Dated this 22nd day of December, 2015.

14 
15 Honorable G. Murray Snow
16 United States District Judge