

JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

9 HENRY CROSSMAN, 10 11                     Plaintiff, 12             v. 13 LESLIE'S POOLMART, INC., <u>et al.</u> , 14                     Defendants.	) ) ) ) ) ) )	Case No. CV 14-1479 FMO (JEMx)  <b>ORDER REMANDING ACTION</b>
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16             On January 21, 2014, Henry Crossman ("plaintiff") filed a Complaint in the Superior Court  
 17 of the State of California for the County of Los Angeles against defendants Leslie's Poolmart, Inc.,  
 18 and Does 1 through 50. (See Notice of Removal ("NOR") ¶ 1 & Exhibit ("Exh.") A ("Complaint")).  
 19 On February 27, 2014, defendant Leslie's Poolmart, Inc. ("defendant") removed that action on  
 20 diversity jurisdiction grounds pursuant to 28 U.S.C. §§ 1332 and 1441. (See NOR at 2). Having  
 21 reviewed the pleadings, the court hereby remands this action to state court for lack of subject  
 22 matter jurisdiction. See 28 U.S.C. §§ 1447(c).<sup>1</sup>

**LEGAL STANDARD**

24             "[A]ny civil action brought in a State court of which the district courts of the United States  
 25 have original jurisdiction, may be removed by the defendant or the defendants, to the district

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27             <sup>1</sup> Title 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that  
 28 the district court lacks subject matter jurisdiction, the case shall be remanded."

1 court[.]” 28 U.S.C. § 1441(a). A removing defendant bears the burden of establishing that  
2 removal is proper. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (“The strong  
3 presumption against removal jurisdiction means that the defendant always has the burden of  
4 establishing that removal is proper.”) (internal quotation marks omitted); Abrego Abrego v. The  
5 Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (noting the “longstanding, near-  
6 canonical rule that the burden on removal rests with the removing defendant”). Moreover, if there  
7 is any doubt regarding the existence of subject matter jurisdiction, the court must resolve those  
8 doubts in favor of remanding the action to state court. See Gaus, 980 F.2d at 566 (“Federal  
9 jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”).  
10 Indeed, “[i]f at any time before final judgment it appears that the district court lacks subject matter  
11 jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c); see Kelton Arms Condo. Owners  
12 Ass’n, Inc. v. Homestead Ins. Co., 346 F.3d 1190, 1192 (9th Cir. 2003) (“Subject matter  
13 jurisdiction may not be waived, and, indeed, we have held that the district court must remand if  
14 it lacks jurisdiction.”); Snell v. Cleveland, Inc., 316 F.3d 822, 826 (9th Cir. 2002) (“Federal Rule  
15 of Civil Procedure 12(h)(3) provides that a court may raise the question of subject matter  
16 jurisdiction, sua sponte, at any time during the pendency of the action, even on appeal.”) (footnote  
17 omitted); Washington v. United Parcel Serv., Inc., 2009 WL 1519894, \*1 (C.D. Cal. 2009) (a  
18 district court may remand an action where the court finds that it lacks subject matter jurisdiction  
19 either by motion or sua sponte).

## 20 DISCUSSION

21 The court’s review of the NOR and the attached state court Complaint make clear that this  
22 court has neither federal question nor diversity jurisdiction over the instant matter. In other words,  
23 plaintiff could not have originally brought this action in federal court, in that plaintiff does not  
24 competently allege facts supplying either federal question or diversity jurisdiction, and therefore  
25 removal was improper. See 28 U.S.C. §§ 1441(a);<sup>2</sup> Caterpillar, Inc. v. Williams, 482 U.S. 386,

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27 <sup>2</sup> Title 28 U.S.C. § 1441(a) provides that:

28 Except as otherwise expressly provided by Act of Congress, any civil action

1 392, 107 S.Ct. 2425, 2429 (1987) (“Only state-court actions that originally could have been filed  
2 in federal court may be removed to federal court by the defendant.”) (footnote omitted).

3 First, there is no basis for federal question jurisdiction, as the Complaint contains only state  
4 law causes of action for: (1) wrongful termination in violation of public policy; (2) wrongful  
5 demotion in violation public policy; (3) retaliation in violation of public policy; (4) age discrimination  
6 in violation of Cal. Gov’t Code § 12940(a); (5) age harassment in violation of Cal. Gov’t Code §  
7 12940(j); (6) failure to take all reasonable steps to prevent discrimination and harassment in  
8 violation of Cal. Gov’t Code § 12940(k); (7) retaliation for making age discrimination complaints  
9 in violation of Cal. Gov’t Code § 12940(h); (8) intentional infliction of emotional distress; (9)  
10 negligent infliction of emotional distress; (10) failure to pay wages in violation of Cal. Labor Code  
11 § 201; and (11) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200. (See  
12 Complaint at ¶¶ 23-56). All of the claims are based on common law or California state law. (See  
13 id.). In short, the Complaint discloses no federal statutory or constitutional question. See  
14 Caterpillar, 482 U.S. at 392, 107 S.Ct. at 2429 (removal pursuant to § 1331 “is governed by the  
15 ‘well-pleaded complaint rule,’ which provides that federal question jurisdiction exists only when a  
16 federal question is presented on the face of plaintiff’s properly pleaded complaint.”); Taylor v.  
17 Anderson, 234 U.S. 74, 75-76, 34 S.Ct. 724, 724 (1914) (stating that federal question jurisdiction  
18 “must be determined from what necessarily appears in the plaintiff’s statement of his own claim  
19 in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses  
20 which it is thought the defendant may interpose”).

21 Second, there is no basis for diversity jurisdiction because the amount in controversy does  
22 not appear to exceed the diversity jurisdiction threshold of \$75,000. See 28 U.S.C. § 1332.<sup>3</sup>

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24 brought in a State court of which the district courts of the United States have  
25 original jurisdiction, may be removed by the defendant or the defendants, to  
26 the district court of the United States for the district and division embracing  
the place where such action is pending.

27 <sup>3</sup> In relevant part, 28 U.S.C. § 1332(a) provides that “district courts shall have original  
28 jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of  
\$75,000, exclusive of interest and costs.”

1 Defendant bears the burden of proving by a preponderance of the evidence that the amount in  
2 controversy meets that jurisdictional threshold. See Valdez v. Allstate Ins. Co., 372 F.3d 1115,  
3 1117 (9th Cir. 2004); Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.  
4 2003) (per curiam) (“Where it is not facially evident from the complaint that more than \$75,000 is  
5 in controversy, the removing party must prove, by a preponderance of the evidence, that the  
6 amount in controversy meets the jurisdictional threshold. Where doubt regarding the right to  
7 removal exists, a case should be remanded to state court.”) (footnotes omitted).

8 As an initial matter, the amount of damages plaintiff seeks cannot be determined from the  
9 Complaint, as the Complaint simply alleges “damages according to proof,” rather than a specific  
10 amount. (See Complaint at 11-13). Further, defendants proffer no evidence that might help the  
11 court determine whether the damages alleged would fulfill the amount in controversy requirement.  
12 (See, generally, NOR). For example, there is no evidence of plaintiff’s salary, any payments made  
13 to plaintiff during his employment, or anything else that might assist the court in determining the  
14 potential economic damages. (See, generally, id.). Instead, defendants merely cite to plaintiff’s  
15 broad claims for economic damages and demands for relief as proof, ipso facto, that the amount  
16 plaintiff seeks for loss of earnings and other employment benefits would meet the amount in  
17 controversy requirement. (See id. at 3-5). Such unsubstantiated assertions, untethered to any  
18 evidence, cannot satisfy the amount in controversy requirement of § 1332(a). See Gaus, 980 F.2d  
19 at 567 (remanding for lack of diversity jurisdiction where defendant “offered no facts whatsoever  
20 . . . [to] overcome[ ] the strong presumption against removal jurisdiction, nor satisf[y] [defendant’s]  
21 burden of setting forth . . . the underlying facts supporting the assertion that the amount in  
22 controversy exceeds [\$75,000].”) (internal quotations omitted) (emphasis in the original).

23 Defendant’s reliance on plaintiff’s demand for emotional distress damages, (see NOR at  
24 3), is similarly unpersuasive. Even if emotional distress damages are potentially recoverable,  
25 plaintiff’s Complaint does not allege any specific amount for his emotional distress claims, (see,  
26 generally, Complaint at ¶¶ 41-47), and it would therefore be speculative to include these damages  
27 in the total amount in controversy. See Davis v. Staples, Inc., 2014 WL 29117, \*2 (C.D. Cal. 2014)  
28 (“[E]ven if emotional distress damages are potentially recoverable [plaintiff’s] Complaint does not

1 expressly state that she is seeking emotional distress damages, and it would therefore also be  
2 speculative to include these damages in the total amount in controversy.”).

3 Plaintiff also seeks an unspecified amount of punitive damages, (see Complaint at 11-12),  
4 which may be included in the amount in controversy calculation. See Gibson v. Chrysler Corp.,  
5 261 F.3d 927, 945 (9th Cir. 2001), cert. denied, 534 U.S. 1104 (2002). “However, the mere  
6 possibility of a punitive damages award is insufficient to prove that the amount in controversy  
7 requirement has been met.” Burk v. Med. Sav. Ins. Co., 348 F.Supp.2d 1063, 1069 (D. Ariz.  
8 2004); accord Geller v. Hai Ngoc Duong, 2010 WL 5089018, \*2 (S.D. Cal. 2010); J. Marymount,  
9 Inc. v. Bayer Healthcare, LLC, 2009 WL 4510126, \*4 (N.D. Cal. 2009). Rather, a defendant “must  
10 present evidence that punitive damages will more likely than not exceed the amount needed to  
11 increase the amount in controversy to \$75,000. Removing defendants may establish probable  
12 punitive damages by, for example, introducing evidence of jury verdicts in analogous cases.”  
13 Burk, 348 F.Supp.2d at 1069.

14 Here, defendants have not provided any evidence of punitive damages awards in similar  
15 cases, (see, generally, NOR), so inclusion of punitive damages in the amount in controversy would  
16 be improper. See Burk, 348 F.Supp.2d at 1070 (“Here, Defendant not only failed to compare the  
17 facts of Plaintiff’s case with the facts of other cases where punitive damages have been awarded  
18 in excess of the jurisdictional amount, it failed even to cite any such cases. . . . This is insufficient  
19 to establish that it is more likely than not that a potential punitive damage award will increase the  
20 amount in controversy above \$75,000.”); Killion v. AutoZone Stores Inc., 2011 WL 590292, \*2  
21 (C.D. Cal. 2011) (“Defendants cite two cases . . . in which punitive damages were awarded, but  
22 make no attempt to analogize or explain how these cases are similar to the instant action. Simply  
23 citing these cases merely illustrate[s] that punitive damages are possible, but in no way shows that  
24 it is likely or probable in this case. Therefore, Defendants’ inclusion of punitive damages in the  
25 calculation of the jurisdictional amount is speculative and unsupported.”).

26 Finally, plaintiff’s Complaint also includes a claim for attorney’s fees. (See Complaint at  
27 12). “[W]here an underlying statute authorizes an award of attorneys’ fees, either with mandatory  
28 or discretionary language, such fees may be included in the amount in controversy.” Lowdermilk

1 v. U.S. Bank Nat'l Ass'n, 479 F.3d 994, 1000 (9th Cir. 2007), overruled on other grounds as  
2 recognized by Rodriguez v. AT & T Mobility Serv. LLC, 728 F.3d 975, 976-77 (9th Cir. 2013).  
3 “[C]ourts are split as to whether only attorneys’ fees that have accrued at the time of removal  
4 should be considered in calculating the amount in controversy, or whether the calculation should  
5 take into account fees likely to accrue over the life of the case.” Hernandez v. Towne Park, Ltd.,  
6 2012 WL 2373372, \*19 (C.D. Cal. 2012) (collecting cases); see Reames v. AB Car Rental Servs.,  
7 Inc., 899 F.Supp.2d 1012, 1018 (D. Or. 2012) (“The Ninth Circuit has not yet expressed any  
8 opinion as to whether expected or projected future attorney fees may properly be considered ‘in  
9 controversy’ at the time of removal for purposes of the diversity-jurisdiction statute, and the  
10 decisions of the district courts are split on the issue.”). The court is persuaded that “the better  
11 view is that attorneys’ fees incurred after the date of removal are not properly included because  
12 the amount in controversy is to be determined as of the date of removal.” Dukes v. Twin City Fire  
13 Ins. Co., 2010 WL 94109, \*2 (D. Ariz. 2010) (citing Abrego v. Dow Chem. Co., 443 F.3d 676, 690  
14 (9th Cir. 2006)). Indeed, “[f]uture attorneys’ fees are entirely speculative, may be avoided, and  
15 are therefore not ‘in controversy’ at the time of removal.” Dukes, 2010 WL at \*2; accord Palomino  
16 v. Safeway Ins. Co., 2011 WL 3439130, \*2 (D. Ariz. 2011).

17 Here, defendant provides no evidence of the amount of attorney’s fees that were incurred  
18 at the time of removal. (See, generally, NOR). Defendant has not shown by a preponderance of  
19 the evidence that the inclusion of attorney’s fees in the instant case would cause the amount in  
20 controversy to reach the \$75,000 threshold. See Walton v. AT & T Mobility, 2011 WL 2784290,  
21 \*2 (C.D. Cal. 2011) (declining to reach the issue of whether future attorney’s fees could be  
22 considered in the amount in controversy because the defendant “did not provide any factual basis  
23 for determining how much attorney’s fees have been incurred thus far and will be incurred in the  
24 future[, and] [b]ald assertions are simply not enough.”).

25 In sum, given that any doubt regarding the existence of subject matter jurisdiction must be  
26 resolved in favor of remanding the action to state court, see Gaus, 980 F.2d at 566, the court is  
27 not persuaded, under the circumstances here, that defendant has met its burden of proving by a  
28 preponderance of the evidence that the amount in controversy meets the jurisdictional threshold.

1 See Matheson, 319 F.3d at 1090 (“Where it is not facially evident from the complaint that more  
2 than \$75,000 is in controversy, the removing party must prove, by a preponderance of the  
3 evidence, that the amount in controversy meets the jurisdictional threshold. Where doubt  
4 regarding the right to removal exists, a case should be remanded to state court.”); Valdez, 372  
5 F.3d at 1117. Therefore, there is no basis for diversity jurisdiction.

6 **This order is not intended for publication. Nor is it intended to be included in or**  
7 **submitted to any online service such as Westlaw or Lexis.**

8 **CONCLUSION**

9 Based on the foregoing, IT IS ORDERED that:

10 1. The above-captioned action shall be **remanded** to the Superior Court of the State of  
11 California for the County of Los Angeles, 111 North Hill St., Los Angeles, CA 90012.

12 2. The Clerk shall send a certified copy of this Order to the state court.

13 Dated this 9th day of April, 2014.

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15 */s/*

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Fernando M. Olguin  
United States District Judge