

1 Remand (Dkt. 24) and Defendant CareMore’s pending Motion to Dismiss (Dkt. 27) as
2 moot.

3 **BACKGROUND**

4 Plaintiff filed this action on May 21, 2021 in Orange County Superior Court
5 against CareMore and Mesa Verde Convalescent Hospital (“Mesa Verde”)
6 (collectively, “Defendants”). *See* Dkt. 1-4 (“Compl.”). Plaintiff is a home care
7 organization that provides non-medical services, including supervisory “sitter
8 services,” to patients that reside in their home or live in an elderly care facility.
9 Compl. ¶ 1. Defendant CareMore is a “medical group health plan, care delivery
10 system and insurer that works with a subscriber member’s insurance plan to deliver
11 needed care to subscribing members.” *Id.* ¶ 2. Mesa Verde is a care facility with its
12 principal place of business in California. *Id.* ¶ 3. Plaintiff seeks damages against
13 Defendants for (1) fraud, (2) breach of contract, (3) breach of contract as third-party
14 beneficiary, (4) breach of implied contract, (5) account stated, (6) quantum meruit,
15 and (7) unjust enrichment.¹ Compl. ¶¶ 22-62.

16 Plaintiff alleges Mesa Verde and CareMore entered into a Letter of Agreement
17 (“LOA”) through which Plaintiff would provide sitter services for patient D.B.
18 (“Patient”),² who was enrolled in a Medicare Advantage plan administered by
19 CareMore.³ Compl. ¶ 9; Dkt. 22 at 2. According to Plaintiff, it rendered these sitter
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22 ¹ The Complaint asserts different causes of action in the body of the Complaint than in
23 the caption on its first page. The court refers to the causes of action asserted in the
24 body of the Complaint.

25 ² Patient is identified by his initials for privacy purposes.

26 ³ Medicare Advantage allows individuals to receive Medicare benefits through private
27 health-insurance plans instead of Medicare Parts A and B, the government’s fee-for-
28 service program. *See* 42 U.S.C. § 1395w–21. “To participate, insurers referred to as
Medicare Advantage Organizations (MAOs) contract with the federal Centers for
Medicare & Medicaid Services (CMS).” *Ohio State Chiropractic Ass’n v. Humana*

1 services for Patient from January 11, 2020 to January 18, 2020 in Mesa Verde’s
2 facility. Compl. ¶ 11. In January 2020, Plaintiff sent Mesa Verde an invoice for the
3 sitter services it performed for Patient in the amount of \$3,222. Compl. ¶ 12, Ex. 1.
4 Plaintiff alleges it still has not received payment for the sitter services, despite making
5 several telephone calls to the Mesa Verde facility and sending multiple overdue
6 invoices. Compl. ¶¶ 14-21.

7 Defendant CareMore removed this action from state court on July 2, 2021,
8 arguing removal is proper under the “federal officer” removal statute, 28 U.S.C.
9 § 1442(a)(1), and that the court has federal question jurisdiction pursuant to 28 U.S.C.
10 § 1441(c). Dkt. 1. The court set the instant OSC regarding the court’s subject matter
11 jurisdiction on July 15, 2021. Dkt. 19. The parties responded on July 30, 2021. Dkts.
12 22, 23.

13 On August 2, 2021, Plaintiff filed a Motion to Remand. Dkt. 24. Defendant
14 CareMore filed a Motion to Dismiss on August 9, 2021, arguing, inter alia, that
15 Plaintiff’s state law claims are preempted under the Medicare Act and that the court
16 lacks subject matter jurisdiction because Plaintiff did not comply with the Medicare
17 Act’s exhaustion requirements. Dkt. 27.

18 DISCUSSION

19 Federal courts have subject matter jurisdiction only as authorized by the
20 Constitution and Congress. U.S. Const. art. III, § 2, cl. 1; *see also Kokkonen v.*
21 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A suit filed in state court
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23 *Health Plan Inc.*, 647 Fed. App’x 619, 620 (6th Cir. 2016) (citing 42 U.S.C. § 1395w-
24 27; 42 C.F.R. § 422.503). As the Sixth Circuit has explained, “CMS makes monthly
25 per-beneficiary payments to MAOs, which take on the prospective financial risk of
26 serving Medicare beneficiaries. Generally speaking, MAOs have latitude to ‘select
27 the [health-care] providers from whom the benefits under the plan are provided.’ To
28 that end, MAOs often contract with physicians and hospitals. But to cover the full
panoply of Medicare benefits, [Medicare Advantage] plans include services that are
sometimes furnished by non-contract providers.” *Id.* (citations omitted).

1 may be removed to federal court only if the federal court would have had original
2 jurisdiction over the suit. 28 U.S.C. § 1441(a). The party seeking removal bears the
3 burden of establishing federal jurisdiction by a preponderance of the evidence. *Gaus*
4 *v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992) (citing *McNutt v. Gen. Motors*
5 *Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)).

6 In ruling on a motion to remand, jurisdiction is generally determined from the
7 face of the complaint. *Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985). The
8 court may remand the action sua sponte “[i]f at any time before final judgment it
9 appears that the district court lacks subject matter jurisdiction.” 28 U.S.C. § 1447(c);
10 *United Invs. Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 967 (9th Cir. 2004).

11 **I. The Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1)**

12 **A. Legal Standard**

13 Under the federal officer removal statute, a civil action may be removed to
14 federal court by “any officer (or any person acting under that officer) of the United
15 States or of any agency thereof, in an official or individual capacity, for or relating to
16 any act under color of such office....” 28 U.S.C. § 1442(a)(1) (“§ 1442”). In the
17 Ninth Circuit, federal officer removal is available to a defendant under § 1442(a) if:
18 (1) the removing defendant is a “person” within the meaning of the statute; (2) there is
19 a causal nexus between the removing party’s actions, taken pursuant to a federal
20 officer’s directions, and plaintiff’s claims; and (3) the removing party can assert a
21 colorable federal defense. *Stirling v. Minasian*, 955 F.3d 795, 800 (9th Cir. 2020).

22 The federal officer removal statute is an exception to the “well-pleaded
23 complaint” rule, which requires a federal question to appear on the face of the
24 complaint for jurisdiction to be proper, rather than raised as an anticipated or actual
25 defense. *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (*superseded by statute on*
26 *other grounds as discussed in Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th
27 Cir. 2017)). In other words, the statute allows removal of suits against federal officers
28 and people acting under them so long as: (1) a “connection or association” exists

1 between the act in question and the federal office; and (2) their defense depends on
2 federal law. *Id.*

3 **B. Analysis**

4 CareMore argues this case was properly removed to federal court because
5 Patient was enrolled in a Medicare Advantage plan that CareMore administered, and
6 “Medicare coverage determinations and reimbursements are predicated on a purely
7 federal scheme involving federal Medicare Act statutes, its implementing regulations,
8 and policy determinations from the Centers for Medicare and Medicaid Services
9 (“CMS”)....” Dkt. 22 at 2 & n.1. Thus, according to CareMore, removal under the
10 federal officer statute is appropriate for private entities like itself because it
11 administers Medicare benefits under the direction of the federal government. *Id.* at 3-
12 13. The court disagrees for two reasons.

13 First, the parties do not dispute that sitter services are not covered by Medicare.⁴
14 *See* Dkts. 22, 23. Thus, the Medicare Act and its implementing regulations appear to
15 be irrelevant here. CareMore argues that whether the services are covered under
16 Medicare is “wholly irrelevant” to the question of whether the court has subject matter
17 jurisdiction. Dkt. 22 at 12. To the contrary, if sitter services are not covered by
18 Medicare, CareMore cannot assert either: (1) a “causal nexus” between its actions,
19 taken pursuant to a federal officer’s directions, and plaintiff’s claims; or (2) a
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22 ⁴ In a related case before this court, the parties submitted a LOA between CareMore
23 and a healthcare facility which explicitly states that “Patient Sitter Services are
24 considered as excluded from Medicare allowable payment and paid in addition to the
25 Medicare allowable payment at \$16.00/hr....” *Silver Peaks, LLC v. CareMore Health*
26 *Plan, et al.*, Case No. 2:21-cv-05335-FLA (PDx), Dkt. 4-1, ¶ 5. Plaintiff additionally
27 submitted a copy of a CMS document that acknowledges sitter services are not
28 covered by Medicare. *Id.* Dkt. 22-5. In other words, the LOA states that sitter
services are not covered by Medicare, but that CareMore will nonetheless cover those
services at a rate of \$16 an hour. The parties do not dispute that a similar LOA
governs in the instant case. *See* Dkts. 22, 23.

1 “colorable federal defense.” *See Stirling*, 955 F.3d at 800. CareMore, thus, fails to
2 establish removal is appropriate.

3 Second, even if Medicare covered sitter services here, the court is not persuaded
4 CareMore was “acting under” any federal officer or agency under Supreme Court
5 precedent interpreting § 1442(a)(1).⁵ CareMore quotes *Watson v. Philip Morris Cos.*,
6 551 U.S. 142, 147, 152 (2007), to argue that a private entity is “acting under” a federal
7 officer when it is involved in “an effort to *assist*, or to help *carry out*, the duties or
8 tasks of the federal superior,” and that the term “acting under” is broad and must be
9 liberally construed. Dkt. 22 at 6 (italics in *Watson*). The Supreme Court, however,
10 has also emphasized that “broad language is not limitless. And a liberal construction
11 nonetheless can find limits in a text’s language, context, history, and purposes.”
12 *Watson*, 551 U.S. at 147.

13 As *Watson* explained, the “basic purpose” of federal officer removal is to
14 prevent interference with the federal government’s operations caused, for example, by
15 a state’s prosecution of federal officers and agents acting within the scope of their
16 authority. *Id.* at 150. It also serves to protect federal officers and agents from “local
17 prejudice” against federal laws or officials, and to ensure “federal officials [access to]
18 a federal forum in which to assert federal immunity defenses.” *Id.*

19 Here, CareMore’s interpretation of the federal officer removal statute stretches
20 it too far from its original purpose. CareMore is not at a significant risk of state-court
21 “prejudice” because it administers Medicare benefits. *See id.* at 152. A state-court
22 lawsuit brought against CareMore is not likely to disable federal officials from taking
23 necessary action to enforce federal law. *Id.* Nor is a state-court lawsuit in this action
24 likely to deny a federal forum to an individual entitled to assert a federal claim of
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27 ⁵ As the court concludes Defendant does not meet its burden to show it was “acting
28 under” a federal official or agency for purposes of the removal statute, it need not
address the parties’ arguments regarding the additional requirements of § 1442.

1 immunity. *Id.* Accordingly, neither the language, nor history, nor purpose of the
2 removal statute leads the court to believe Congress intended to expand the scope of
3 federal officer removal to entities such as CareMore. *See id.* at 147-53 (reviewing the
4 history and purpose of the federal officer removal statute).

5 To be sure, a private contractor may “act under” a federal officer or agency
6 when it “helps [federal] officers fulfill ... basic governmental tasks” and “perform[s] a
7 job that, in the absence of a contract with a private firm, the Government itself would
8 have ... to perform.” *Id.* at 153. This requires a showing that the government
9 formally delegated its legal authority to the private entity to act on its behalf. *Id.* at
10 156.

11 Although CareMore argues it performs government tasks by administering
12 Medicare benefits under Medicare Advantage plans, it fails to submit any evidence
13 showing Congress, CMS, or any other federal agency formally delegated legal
14 authority to CareMore. *See id.* at 157 (noting that without evidence of formal
15 delegation, the defendant was merely subject to government regulation, which is not
16 sufficient for removal purposes). For example, CareMore does not submit evidence of
17 a contract between itself and the government or point to a statute or regulation that
18 explicitly delegates legal authority from the government to CareMore. *See id.*
19 (holding plaintiff failed to establish it was “acting under” a federal officer where there
20 was “no evidence of any delegation of legal authority” from a government agency nor
21 “evidence of any contract, any payment, any employer/employee relationship, or any
22 principal/agent arrangement”).

23 CareMore, thus, has failed to demonstrate by a preponderance of the evidence
24 that it has anything more than an arms-length relationship with CMS, or that the
25 control to which CareMore is subject is the type of close relationship necessary for a
26 private contractor to “act under” a federal agency. *See Vaccarino v. Aetna, Inc.*, No.
27 5:18-cv-02349-JGB (SHKx), 2018 WL 6249707, at *6 (C.D. Cal. Nov. 29, 2018)
28 (holding that “[b]ecause Removing Defendants have not explained the nature of

1 CMS’s control over coverage decisions or elaborated on the government’s interest in
2 such decisions, they fail to meet their burden of showing that their actions were ‘taken
3 pursuant to a federal officer’s directions.’”).

4 Accordingly, CareMore is not entitled to remove this action as a “person acting
5 under” an officer of the United States.

6 **II. Federal Question Jurisdiction, 28 U.S.C. § 1331**

7 **A. Legal Standard**

8 Federal district courts have original jurisdiction over all civil actions “arising
9 under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

10 “The presence or absence of federal-question jurisdiction is governed by the ‘well-
11 pleaded complaint rule,’ which provides that federal jurisdiction exists only when a
12 federal question is presented on the face of the plaintiff’s properly pleaded
13 complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). “This rule
14 makes a plaintiff the ‘master of his complaint’: He may generally avoid federal
15 jurisdiction by pleading solely state-law claims.” *Valles v. Ivy Hill Corp.*, 410 F.3d
16 1071, 1075 (9th Cir. 2005).

17 As an exception to the well-pleaded complaint rule, the court has subject matter
18 jurisdiction when a federal question is necessarily embedded in the state law claims
19 asserted in a complaint. For a state law claim to provide federal question jurisdiction,
20 the “state law claim [must] necessarily raise a stated federal issue, actually disputed
21 and substantial, which a federal forum may entertain without disturbing any
22 congressionally approved balance of federal and state judicial responsibilities.”
23 *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).
24 “That is, federal jurisdiction over a state law claim will lie if a federal issue is:
25 (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of
26 resolution in federal court without disrupting the federal-state balance approved by
27 Congress.” *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

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1 **B. Analysis**

2 CareMore argues the court has federal question jurisdiction because Plaintiff's
3 state law claims depend upon an interpretation of a Medicare reimbursement
4 mechanism. Dkt. 22 at 13-14. Thus, according to CareMore, "Plaintiff's claims
5 necessarily raise the issue of whether Defendant administered Plaintiff's claim in
6 accordance with the Medicare Act." *Id.* at 14.

7 The court, however, finds Plaintiff's state law claims do not raise a substantial
8 and disputed federal issue. Plaintiff does not seek reimbursement for services it
9 claims were denied under the Medicare Act. *See Ardary v. Aetna Health Plans of*
10 *Cal., Inc.*, 98 F.3d 496, 500 (9th Cir. 1996) (holding an action does not raise a federal
11 issue under the Medicare Act when "at bottom [it is] not seeking to recover
12 [Medicare] benefits"). Nor do Plaintiff's claims require interpretation of Medicare
13 laws, as it is undisputed sitter services are not covered by Medicare. *See City of*
14 *Oakland*, 969 F.3d at 906-07 (finding no federal jurisdiction under the "slim category"
15 articulated in *Grable* where the claim "neither require[d] an interpretation of a federal
16 statute nor challenge[d] a federal statute's constitutionality" (citation omitted)).
17 Rather, Defendant raises the Medicare Act as a shield to liability. *See* Dkt. 22 at 9-13
18 (arguing the Medicare Act provides CareMore with a "colorable defense" in this
19 action). It is well-established that federal issues raised as a defense are not sufficient
20 to support subject matter jurisdiction. *See Caterpillar*, 482 U.S. at 393 ("[A] case
21 may *not* be removed to federal court on the basis of a federal defense, ... even if the
22 defense is anticipated in the plaintiff's complaint, and even if both parties concede that
23 the federal defense is the only question truly at issue.") (italics in original).

24 Because Plaintiff's state-law claims do not raise a substantial federal issue, the
25 court lacks subject matter jurisdiction. *See Grable*, 545 U.S. at 314. The court
26 REMANDS this action to the Orange County Superior Court and DISCHARGES the
27 OSC (Dkt. 19).

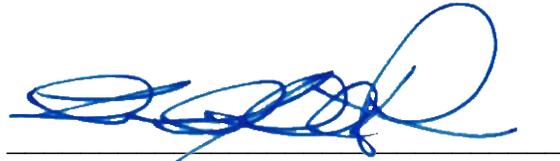
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CONCLUSION

For the foregoing reasons, the court REMANDS this action to the Orange County Superior Court. The OSC regarding the court’s subject matter jurisdiction (Dkt. 19) is hereby DISCHARGED. Plaintiff’s Motion to Remand (Dkt. 24) and Defendant CareMore’s Motion to Dismiss (Dkt. 27) are DENIED as moot.

IT IS SO ORDERED.

Dated: September 7, 2021



FERNANDO L. AENLLE-ROCHA
United States District Judge

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