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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OLGA LOPEZ)	Case No. 1:10-cv-01332 LJO JLT
)	
Plaintiff,)	AMENDED FINDINGS AND
)	RECOMMENDATION TO DENY MOTION
vs.)	TO PROCEED IN FORMA PAUPERIS, TO
)	REMAND THE MATTER TO THE KERN
HSBC BANK USA, NATIONAL)	COUNTY SUPERIOR COURT AND TO
ASSOCIATION, AS TRUSTEE, UNITED)	DISMISS THE MATTER
STATES OF AMERICA, REAL PARTY)	
IN INTEREST,)	(Docs. 1, 2, 5)
)	
Defendants.)	
_____)	

Olga Lopez is seeking, purportedly, to remove an action from the Kern County Superior Court based upon her claim that there is diversity of citizenship and because she claims that the United States of America is the real party in interest. (Doc. 1) Currently before the Court is Plaintiff’s motion to proceed in forma pauperis (“IFP”). (Doc 2) On August 4, 2010, Lopez filed an amended notice of removal. The only change appears to be her handwritten correction to the case number of the Kern County Superior Court action.

I. The motion to proceed in forma pauperis is recommended to be denied because the matter is frivolous, is filed for purposes of harassment and fails to state a claim.

On July 26, 2010, Lopez filed an application to proceed in IFP pursuant to 28 U.S.C. §

1 1915. (Doc. 3) Under 28 USC § 1915(e)(2), the Court is obligated to deny the motion to proceed
2 IFP if the allegation of poverty is untrue or the action is frivolous or malicious, it fails to state a
3 claim upon which relief may be granted or seeks monetary relief against a defendant who is
4 immune. For the reasons set forth below, the Court recommends that the motions to proceed IFP
5 be **DENIED** and the action be **DISMISSED WITH PREJUDICE**.

6 **A. Background**

7 On June 11, 2009, Lopez and Daniel Lopez¹ were sued in Kern County Superior Court in
8 case number S-1500-CL-239442 for unlawful detainer.² Lopez filed an answer in the action on
9 August 4, 2009 after her demurrer to the complaint was overruled on July 30, 2009. The matter
10 was stayed twice; first when Daniel Lopez filed bankruptcy, which was later dismissed, and
11 second when Lopez filed bankruptcy. Ultimately the stay was lifted and the Kern Court
12 proceeded to judgment.

13 The underlying state court complaint, attached to Lopez's filing as Exhibit 1, details that
14 on May 19, 2009, the plaintiff, HSBC, foreclosed on the property where Lopez and Daniel Lopez
15 lived. (Doc. 1, Exhibit 1 ¶¶ 2, 5) Although the Lopezs were served with notices to quit the
16 property, they failed to do so. *Id.* at ¶¶ 6-7. In the unlawful detainer action, HSBC sought to
17 have the Lopezs evicted from the property and to receive an award of \$50 per day rental value.
18 *Id.* at ¶ 9. Notably, on the caption of the complaint, HSBC asserted that the damages sought were
19 "UNDER \$10,000.00."

20 On July 26, 2010, the same date that the current proceedings were initiated in the Eastern
21 District of California, Lopez filed a notice of removal in the Kern County Superior Court action.

23 ¹The relationship between Olga Lopez and Daniel Lopez is unclear.

24 ²The court may take notice of facts that are capable of accurate and ready determination by resort to sources
25 whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,
333 (9th Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned,
26 and judicial notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir.
1987); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9th Cir.); see also
27 Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d
736, 738 (6th. Cir. 1980). As such, the internet website for the Kern County Superior Court, containing the court system's
records for filings in that Court is subject to judicial notice.

1 The Kern County Superior Court denied the motion for removal based upon Lopez’s failure to
2 post a bond. Despite that the matter was set for trial on that day, Lopez failed to appear.
3 However, the Court proceeded and held the trial with Daniel Lopez present. At the conclusion of
4 the trial, the Kern Court found in favor of HSBC and against the Lopezs and awarded \$21,650 in
5 rental damages.

6 **B. The current matter**

7 Lopez purports to file a motion to remove the state court action based upon diversity of
8 citizenship and because she contends that the United States of America is the real party in
9 interest.³ Lopez asserts that the Court has original jurisdiction in this matter under 28 USC §§
10 1346 and 2410. (Doc. 1 at 4) Toward this end, Lopez asserts that HSBC is a foreign corporation
11 rather than a corporation registered to do business in California. Id. at 3. She provides no
12 evidence to this effect but, on this basis, she claims that the United States is the real party in
13 interest because, she claims, as a foreign corporation doing business in this country, HSBC “acts
14 as a federal agency.”⁴ Id. Lopez claims that HSBC sought to quiet title in the subject property
15 and for ejectment in the state court action although, in fact, that action merely stated a cause of
16 action for unlawful detainer. Id. at 3-4. Finally, Lopez fails to provide any evidence that her
17 codefendant, Daniel Lopez, joins in the removal.

18 **C. The matter was not timely removed**

19 Under 28 U.S.C. § 1446(b) provides,
20

21 ³ Although purportedly a motion to remove, Lopez creates a new caption and names herself as the “petitioner,”
22 despite that she was a defendant in the state court action and names the United States of America although it was not a
23 party in that action. Moreover, she omits reference to the other defendant in the state court action, Daniel Lopez.
24 However, whether it is a motion to remove or an original complaint, for the reasons set forth, the Court has no
25 jurisdiction in this matter.

26 ⁴ In Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, (2009), the Court held that, in evaluating pleadings, a trial court
27 is entitled and, indeed required, to apply a “plausibility” standard. The Court held, “The plausibility standard is not akin
to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.
[Citation]. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the
line between possibility and plausibility of ‘entitlement to relief.’” Id. The Court instructed, “When there are well-pleaded
factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an
entitlement to relief. Id. at 1950. However, the conclusions contained in the pleading “are not entitled to the assumption
of truth.” Id.

1 The notice of removal of a civil action or proceeding **shall be filed within thirty**
2 **days after the receipt by the defendant, through service or otherwise, of a**
3 **copy of the initial pleading** setting forth the claim for relief upon which such
4 action or proceeding is based, or within thirty days after the service of summons
5 upon the defendant if such initial pleading has then been filed in court and is not
6 required to be served on the defendant, whichever period is shorter.

7 If the case stated by the initial pleading is not removable, a **notice of removal**
8 **may be filed within thirty days after receipt by the defendant, through**
9 **service or otherwise, of a copy of an amended pleading, motion, order or**
10 **other paper from which it may first be ascertained that the case is one which**
11 **is or has become removable, except that a case may not be removed** on the
12 basis of jurisdiction conferred by section 1332 of this title [28 USCS § 1332]
13 **more than 1 year after commencement of the action.**

14 Emphasis added. As noted, Lopez defended herself in the action filed in the Kern County
15 Superior Court by filing a demurrer to the complaint and later by filing an answer. Notably, the
16 Kern County Superior Court docket for case number S-1500-CL-239442 demonstrates that she
17 was served on June 13, 2009, Daniel Lopez was served on June 12, 2009 and “All Occupants in
18 Possession” were served on June 12, 2009. Service was proven on the docket through the filing
19 of proofs of service.⁵ Although Lopez asserts that she was not properly served, she has failed to
20 evidence this fact and it is contradicted by the docket and her actions in defending against the
21 action.

22 On June 17, 2009, Lopez paid her first appearance fee on June 25, 2010, she filed her
23 demurrer to the complaint. Therefore, assuming that the matter was removable at the time it was
24 filed, it could have been removed no later than 30 days from service, or if not, it had to be
25 removed no later than June 10, 2010, one year after the matter was commenced. Instead, Lopez
26 did not file her notice of removal until July 26, 2010. Therefore, the matter cannot be removed to
27 this Court.

28 **D. The pleading demonstrates that the Court does not have jurisdiction in this**
29 **matter**

30 **i. There is no evidence that Daniel Lopez joins in this action**

31 ⁵“The filing of a proof of service creates a rebuttable presumption that the service was proper.” Floveyor
32 Internat., Ltd. v. Superior Court, 59 Cal.App.4th 789, 795(1997).

1 In her notice of removal, Lopez fails to indicate that Daniel Lopez, her codefendant in the
2 state court proceeding, joins in the removal. The “rule of unanimity” requires that in a case
3 involving multiple defendants, all defendants must join in a removal petition. Chicago, Rock
4 Island, & Pacific Railway Co. v. Martin, 178 U.S. 245, 248 (1900). In fact, she fails to mention
5 Daniel Lopez and fails to indicate his consent to the removal. Proctor v. Vishay Intertechnology
6 Inc., 584 F.3d 1208, 1225-26 (9th Cir. 2009). Thus, the notice of removal is defective.

7 **ii. There is no diversity jurisdiction**

8 Despite Lopez’s allegation that HSBC is not a California corporation, “HSBC Bank USA,
9 National Association” *is* a corporation registered to do business in California according to the
10 website of the Secretary of State for the State of California.⁶ Notably, Lopez has failed to
11 provide any proof that HSBC’s actual citizenship is not California. Thus, the Court cannot
12 conclude that HSBC’s citizenship and Lopez’s⁷ is diverse.

13 Moreover, there is no allegation that the amount in controversy exceeds \$75,000. In fact,
14 at the filing of the complaint, HSBC alleged that it was owed \$50 per day in rental value and that
15 the total amount in controversy did not exceed \$10,000. Even though there was a significant
16 delay in completing the case, the damages awarded still did not exceed \$25,000, let alone
17 \$75,000.

18 Title 28 U.S.C. § 1441(a) provides,

19 Except as otherwise expressly provided by Act of Congress, any civil action
20 brought in a State court of which the district courts of the United States have
21 original jurisdiction, may be removed by the defendant or defendants, to the
22 district court of the United States for the district and division embracing the place
23 where such action is pending.

24 Removal statutes are to be strictly construed and any doubts are to be resolved in favor of state
25 court jurisdiction and remand. See Gaus v. Miles, 980 F.2d 564, 566 (9th Cir. 1992). The Court
26 may remand an action to state court for lack of subject matter jurisdiction or for any defect in the
27 removal procedure. 28 U.S.C. § 1447(c).

⁶The Court takes judicial notice of this information for the same reasons set forth in Footnote 2.

⁷Lopez admits that she lives in Bakersfield, California. (Doc. 1 at 3)

1 Because federal courts are courts of limited jurisdiction, they are presumed to lack
2 jurisdiction unless the contrary is established. Gen. Atomic Co. v. United Nuclear Corp., 655
3 F.2d 968, 968-69 (9th Cir. 1981). Thus, “the defendant bears the burden of actually proving the
4 facts to support jurisdiction, including the jurisdictional amount.” Sanchez v. Monumental Life
5 Ins., 102 F.3d 398, 403 (9th Cir. 1996) (citing Gaus v. Miles, 980 F.2d 564, 566-67 (9th Cir.
6 1992)); see also Guglielmino v. McKee Foods Corp., 506 F.3d 696, 699 (9th Cir. 2007);
7 Matheson v. Progressive Speciality Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam).
8 Notably, the party seeking removal must show by a preponderance of the evidence that the
9 amount in controversy exceeds \$ 75,000. See Abrego v. The Dow Chemical Co., 443 F.3d 676,
10 683 (9th Cir. 2006); Conrad Associates v. Hartford Acc. & Indem. Co., 994 F. Supp. 1196, 1198
11 (N.D. Cal. 1998) (“A speculative argument regarding the potential value of the award is
12 insufficient.”) It is insufficient for the removing party to merely state a conclusion that the
13 amount in controversy “exceeds \$75,000.” Instead, the defendant is obligated to provide proof of
14 the underlying facts so to support the Court’s jurisdiction. Thus, the Court has no diversity
15 jurisdiction.

16 **iii. The United States is not a party to the action.**

17 Lopez claims that because HSBC is a foreign company, when it sues, it acts as an agent
18 for the United States of America. Clearly not. In any event, having established that there is no
19 evidence that HSBC is not a California corporation, if Lopez’s novel theory had any authority
20 behind it, it fails still. Thus, the Court has no jurisdiction in the matter.

21 **iv. Because the state court has issued judgment, the current action seems**
22 **to seek, impermissibly, Federal Court review of state court action.**

23 As noted above, on July 26, 2010, the Kern County Superior Court held the trial in the
24 matter that Lopez seeks removed and, at its conclusion, entered judgment against her. Thus, the
25 matter has concluded and there is nothing for this Court to adjudicate.

26 On the other hand, if Lopez is seeking Federal Court review of the imposition of this
27 judgment, the Court has no jurisdiction according to the Rooker-Feldman doctrine. Doe v.

1 Mann, 415 F.3d 1038, 1041-1042 (9th Cir. 2005) (“Typically, the Rooker-Feldman doctrine bars
2 federal courts from exercising subject-matter jurisdiction over a proceeding in which a party
3 losing in state court seeks what in substance would be appellate review of the state judgment in a
4 United States district court, based on the losing party’s claim that the state judgment itself
5 violates the loser’s federal rights.” (internal quotation marks omitted)); Noel v. Hall, 341 F.3d
6 1148, 1156, 1158, 1163-64 (9th Cir. 2003) (Rooker prohibits de facto appeals of the state court
7 decisions in federal court and Feldman prohibits a federal district court from considering any
8 issue that “inextricably intertwined”); see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
9 544 U.S. 280, 284, 292-293 (2005) (The Rooker-Feldman doctrine bars “cases brought by
10 state-court losers complaining of injuries caused by state-court judgments rendered before the
11 district court proceedings commenced and inviting district court review and rejection of those
12 judgments”).

13 **RECOMMENDATIONS**

14 It appears that Lopez’s filing here was an improper attempt to thwart the state court
15 lawsuit. Lopez’s allegations clearly are lacking in support and, in some instances, are
16 indisputably untrue. Thus, the matter is frivolous and fails to state a claim. Because the Court
17 has no jurisdiction in the matter, the Court hereby **RECOMMENDS** that:

- 18 1. The application to proceed in forma pauperis is **DENIED**;
- 19 2. The motion to remove the matter is **DENIED**;
- 20 3. The matter is **REMANDED** to the Kern County Superior Court;
- 21 4. Because the order remanding this matter to state court concludes this case, the
22 Clerk of the Court is ordered to close this matter.

23 This Findings and Recommendations is submitted to the United States District Judge
24 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
25 Local Rules of Practice for the United States District Court, Eastern District of California.

26 Within fourteen days after being served with a copy, any party may file written objections with
27 the court and serve a copy on all parties. Such a document should be captioned “Objections to

1 Magistrate Judge's Findings and Recommendations." The Court will then review the Magistrate
2 Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
3 objections within the specified time may waive the right to appeal the District Court's order.
4 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 Dated: August 5, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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