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

DANIEL LOPEZ)	Case No. 1:10-cv-01958 AWI JLT
)	
Plaintiff,)	FINDINGS AND RECOMMENDATION TO
)	DENY MOTION TO PROCEED IN FORMA
vs.)	PAUPERIS AND REMAND THE MATTER TO
)	KERN COUNTY SUPERIOR COURT
FEDERAL NATIONAL MORTGAGE)	
ASSOCIATION,)	(Docs. 1, 3)
)	
Defendants.)	
_____)	

Daniel Lopez is seeking to remove an action from the Kern County Superior Court based upon his claim that the Federal National Mortgage Association is a foreign corporation and, based thereon, claims that, in fact, 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. 3)

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 October 19, 2010, Lopez filed an application to proceed in IFP pursuant to 28 U.S.C. § 1915. (Doc. 3) Under 28 USC § 1915(e)(2), the Court is obligated to deny the motion to

1 proceed IFP if the allegation of poverty is untrue or the action is frivolous or malicious, it fails to
2 state a claim upon which relief may be granted or seeks monetary relief against a defendant who
3 is immune. For the reasons set forth below, the Court recommends that the motions to proceed
4 IFP be **DENIED** and the action be **REMANDED** to the Kern County Superior Court.

5 **A. Background**

6 On May 24, 2010, Lopez and Rita Lopez¹ were sued in Kern County Superior Court in
7 case number S-1500-CL-249339 for unlawful detainer.² The underlying state court complaint,
8 attached to Lopez’s filing as Exhibit 1, details that on March 16, 2010, the Federal National
9 Mortgage Association foreclosed on the property where Lopez and Rita Lopez lived. (Doc. 1,
10 Exhibit 1) Although the Lopezs were served with notices to quit the property, they failed to do
11 so. Id. In the unlawful detainer action, Federal National Mortgage Association sought to have
12 the Lopezs evicted from the property and to receive an award of \$50 per day rental value. Id.

13 The Lopezs were served on May 25, 2010—Daniel Lopez was served via substituted
14 service to Rita Lopez— although proof of service was not filed until July 20, 2010. The Lopezs
15 filed demurrer to the complain which were denied on July 6, 2010. They filed their answer to the
16 complaint on July 12, 2010. The court set the matter for trial to occur on October 20, 2010. The
17 day before the trial was to commence, on October 19, 2010, Lopez filed his notice of removal to
18 this Court.

19 **B. The current matter**

20 Lopez purports to file a motion to remove the state court action based upon diversity of
21

22 ¹The relationship between Rita Lopez and Daniel Lopez is unclear.

23 ²The court may take notice of facts that are capable of accurate and ready determination by resort to sources
24 whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,
25 333 (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.
27 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*
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 citizenship and because he contends that the United States of America is the real party in
2 interest.³ Lopez asserts that the Court has original jurisdiction in this matter under 28 USC §§
3 1346 and 2410. (Doc. 1 at 4) Toward this end, Lopez asserts that the Federal National Mortgage
4 Association is a foreign corporation. He provides no evidence to this effect but, on this basis, he
5 claims that the United States is the real party in interest.⁴ Id. Finally, Lopez fails to provide any
6 evidence that his codefendant, Rita Lopez, joins in the removal.

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

8 Under 28 U.S.C. § 1446(b) provides,

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

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

17 Emphasis added. As noted, Lopez defended himself in the action filed in the Kern County
18 Superior Court by filing a demurrer to the complaint and later by filing an answer. Notably, the
19 Kern County Superior Court docket for case number S-1500-CL-249339 demonstrates that Rita

21 ³ Although purportedly a motion to remove, Lopez creates a new caption and names himself as the “petitioner,”
22 despite that he was a defendant in the state court action. Moreover, he omits reference to the other defendant in the state
23 court action, Rita Lopez. However, whether it is a motion to remove or an original complaint, for the reasons set forth,
24 the Court has no jurisdiction in this matter.

25 ⁴ In Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, (2009), the Court held that, in evaluating pleadings, a trial court
26 is entitled and, indeed required, to apply a “plausibility” standard. The Court held, “The plausibility standard is not akin
27 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 Lopez was served for herself and served as a substitute for Lopez on May 25, 2010. Service was
2 proven on the docket through the filing of proofs of service.⁵ Although Lopez asserts that he was
3 not properly served, he has failed to evidence this fact and it is contradicted by the docket and his
4 actions in defending against the action. Therefore, the matter had to be removed no later than 30
5 days from service. Instead, Lopez did not file his notice of removal until October 19, 2010.
6 Because this was not timely, the matter cannot be removed to this Court.

7 **D. There is no evidence that Rita Lopez joins in this action**

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

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

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

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

22 Because federal courts are courts of limited jurisdiction, they are presumed to lack
23 jurisdiction unless the contrary is established. Gen. Atomic Co. v. United Nuclear Corp., 655
24 F.2d 968, 968-69 (9th Cir. 1981). Thus, “the defendant bears the burden of actually proving the
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26 ⁵“The filing of a proof of service creates a rebuttable presumption that the service was proper.” Floveyor
27 Internat., Ltd. v. Superior Court, 59 Cal.App.4th 789, 795(1997).

1 facts to support jurisdiction, including the jurisdictional amount.” Sanchez v. Monumental Life
2 Ins., 102 F.3d 398, 403 (9th Cir. 1996) (citing Gaus v. Miles, 980 F.2d 564, 566-67 (9th Cir.
3 1992)); see also Guglielmino v. McKee Foods Corp., 506 F.3d 696, 699 (9th Cir. 2007);
4 Matheson v. Progressive Speciality Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam).
5 Thus, the notice of removal is defective.

6 **RECOMMENDATIONS**

7 It appears that Lopez’s filing here was an improper attempt to thwart the state court trial.
8 The removal was not timely and it violates the rule of unanimity. Because the Court has no
9 jurisdiction in the matter, the Court hereby **RECOMMENDS** that:

- 10 1. The application to proceed in forma pauperis be **DENIED**;
- 11 2. The motion to remove the matter be **DENIED**;
- 12 3. The matter be **REMANDED** to the Kern County Superior Court;
- 13 4. Because the order remanding this matter to state court concludes this case, the
14 Clerk of the Court be ordered to close this matter.

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

18 Within fourteen days after being served with a copy, any party may file written objections with
19 the court and serve a copy on all parties. Such a document should be captioned “Objections to
20 Magistrate Judge’s Findings and Recommendations.” The Court will then review the Magistrate
21 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
22 objections within the specified time may waive the right to appeal the District Court’s order.

23 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24
25 IT IS SO ORDERED.

26 Dated: October 23, 2010

27 /s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE