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

FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,

Plaintiff,

No. 2:12-cv-00877 JAM KJN PS

v.

JUAN LOZANO; NORMA LOZANO;  
and DOES 1 through 25, inclusive,

Defendants.

ORDER and FINDINGS AND  
RECOMMENDATIONS

Presently before the court is plaintiff’s motion to remand this unlawful detainer action to the Superior Court of California for the County of San Joaquin (“Superior Court”), which also seeks a recovery of attorney’s fees and costs (Dkt. No. 3).<sup>1</sup> Defendant Juan Lozano failed to file a written opposition or other response to plaintiff’s motion to remand, and defendant Norma Lozano has not appeared in this action.

Because oral argument would not materially aid the resolution of the pending motion, this matter is submitted on the briefs and record without a hearing. See Fed. R. Civ. P. 78(b); E. Dist. Local Rule 230(g). Having reviewed the moving papers and record in this case,

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<sup>1</sup> This matter proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 the undersigned recommends that plaintiff's motion to remand be granted and that this case be  
2 remanded to the Superior Court on the grounds that this court lacks federal subject matter  
3 jurisdiction over plaintiff's unlawful detainer claim. The undersigned recommends that  
4 plaintiff's request for attorney's fees and costs be denied.

5 I. BACKGROUND<sup>2</sup>

6 On December 20, 2011, plaintiff initiated a limited civil case<sup>3</sup> in the Superior  
7 Court by filing a Verified Complaint for Unlawful Detainer, which notes that the amount  
8 demanded "is less than \$10,000.00" ("Complaint"). (Compl. at 1, attached to Notice of Removal  
9 as part of Ex. A, at Dkt. No. 1 at 11-12.<sup>4</sup>) Plaintiff filed its case seeking to recover possession of  
10 the subject residential property located in Stockton, California. (Compl. ¶ 2.)

11 The Complaint alleges that on or about November 2, 2011, plaintiff became the  
12 owner of the property by purchasing it at a trustee's sale following foreclosure proceedings, and  
13 that plaintiff perfected title in its own name. (Compl. ¶ 3.) Attached to the Notice of Removal is  
14 a Trustee's Deed Upon Sale recorded with the San Joaquin County Recorder's office on  
15 November 29, 2011 (Dkt. No. 1 at 15-18).

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18 <sup>2</sup> Plaintiff filed a request for judicial notice, which asks the court to take judicial notice of  
19 the dates of recording of a Deed of Trust and a Trustee's Deed Upon Sale, plaintiff's Complaint,  
20 defendant Juan Lozano's Demurrer filed in the Superior Court, Mr. Lozano's Answer filed in the  
21 Superior Court, and Mr. Lozano's Notice of Removal. (Req. for Judicial Notice, Dkt. No. 3, Doc.  
22 No. 3-4.) The undersigned denies plaintiff's request because: (1) plaintiff's request is premised  
solely on California law and not the Federal Rules of Evidence or federal case law; (2) plaintiff failed  
to attach several of the subject documents to its request, i.e., the Complaint, the Demurrer, the  
Answer, and the Notice of Removal; and (3) the documents (or dates of recording) to be noticed are  
either already attached to the Notice of Removal or are not required for resolution of this motion.

23 <sup>3</sup> A limited civil action in the California Superior Courts is one where the "whole amount  
24 of damages claimed is twenty-five thousand dollars (\$25,000) or less." See Cal. Civ. Proc. Code  
§ 86(a)(4).

25 <sup>4</sup> Because of the lack of clear exhibit tabs and page numbers in the Notice of Removal, the  
26 undersigned occasionally refers to documents attached to the Notice of Removal by the page  
numbers assigned by the court's electronic filing system.

1 Plaintiff alleges that on December 9, 2011, it provided defendants with a notice to  
2 vacate the premises and deliver possession of the property within three days if they were the  
3 previous owners, which appears to be the case (Dkt. No. 1 at 20-22). Plaintiff alleges that  
4 defendants failed to timely vacate and deliver possession of the property and continue to possess  
5 and occupy the property. (Compl. ¶¶ 5, 7.) Through this action, plaintiff seeks: (1) restitution of  
6 the premises, (2) damages for unlawful detention at a rate of \$60 per day of hold-over occupancy  
7 from the expiration of the notice to vacate through the entry of judgment; and (3) costs of suit.  
8 (Id. at 2.)

9 Defendant Juan Lozano appears to have filed a demurrer to the Complaint in the  
10 Superior Court, but it is unclear when Mr. Lozano filed the demurrer (see Dkt. No. 1 at 26-31).  
11 The Notice of Removal asserts that the demurrer was “based on a defective notice, i.e., the  
12 Notice to Occupants to Vacate Premises, failed to comply with The Protecting Tenants at  
13 Foreclosure Act [12 U.S.C. §5220].” (Notice of Removal ¶ 8.) It further represents that the  
14 demurrer was not sustained. (Id. ¶ 9.) For its part, plaintiff represents in its motion that the  
15 demurrer was filed on January 13, 2012, that the demurrer was overruled, and that Mr. Lozano  
16 filed an Answer to the Complaint on February 24, 2012. (Mot. to Remand at 3-4.) However,  
17 none of these representations is substantiated by a declaration or judicially noticeable documents.  
18 In any event, the facts concerning the filing and denial of the demurrer, and the filing of the  
19 answer, are not material to the resolution of the motion to remand.

20 Mr. Lozano removed this unlawful detainer action to federal court on April 5,  
21 2012, pursuant to 28 U.S.C. § 1441(a), asserting that this court has subject matter jurisdiction  
22 over plaintiff’s claim pursuant to 28 U.S.C. § 1331.<sup>5</sup> (Notice of Removal ¶¶ 5-6, 10.) Mr.  
23 Lozano asserts that “[f]ederal question jurisdiction exists because Defendants’ [*sic*] demurrer, a  
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25 <sup>5</sup> The Notice of Removal does not assert that this court can exercise subject matter  
26 jurisdiction over plaintiff’s unlawful detainer claim based on the diversity jurisdiction statute, 28  
U.S.C. § 1332(a).

1 pleading depend on the determination of Defendants' [*sic*] rights and Plaintiff's duties under  
2 federal law." (*Id.* ¶ 10.) The implication of Mr. Lozano's statement appears to be that he  
3 believes this case was removable on the basis of his defense to the unlawful detainer action  
4 premised on the adequacy of the notice to quit under the Protecting Tenants at Foreclosure Act of  
5 2009. Defendant Norma Lozano did not join in the removal, and the record does not suggest that  
6 she consented to the removal.

7           On May 30, 2012, plaintiff filed its motion to remand, arguing that this court lacks  
8 subject matter jurisdiction over its single unlawful detainer claim, that Mr. Lozano's removal  
9 was untimely, and that the Notice of Removal is "defective in form and content."<sup>6</sup> As noted  
10 above, Juan Lozano failed to oppose or otherwise respond to the motion to remand, and Norma  
11 Lozano has not yet appeared in federal court.

## 12 II.     LEGAL STANDARDS

13           In relevant part, the federal removal statute provides:

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

17 28 U.S.C. § 1441(a). "The defendant bears the burden of establishing that removal is proper."  
18 Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1087 (9th Cir. 2009), cert.  
19 denied, 131 S. Ct. 65 (2010). "The removal statute is strictly construed against removal  
20 jurisdiction," id., and removal jurisdiction "must be rejected if there is any doubt as to the right  
21 of removal in the first instance" Geographic Expeditions, Inc. v. Estate of Lhotka, 599 F.3d 1102,  
22 1106 (9th Cir. 2010) (citation and quotation marks omitted).

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25           <sup>6</sup> In light of the conclusion set forth below that the court lacks subject matter jurisdiction,  
26 the undersigned declines to address plaintiff's argument that the removal was untimely or "defective  
in form and content."

1           Additionally, a federal court has an independent duty to assess whether federal  
2 subject matter jurisdiction exists, whether or not the parties raise the issue. See United Investors  
3 Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960, 967 (9th Cir. 2004) (stating that “the district  
4 court had a duty to establish subject matter jurisdiction over the removed action *sua sponte*,  
5 whether the parties raised the issue or not”); accord Rains v. Criterion Sys., Inc., 80 F.3d 339,  
6 342 (9th Cir. 1996). Because subject matter jurisdiction may not be waived by the parties, a  
7 district court must remand a case if it lacks jurisdiction over the matter. Kelton Arms  
8 Condominium Owners Ass’n, Inc. v. Homestead Ins. Co., 346 F.3d 1190, 1192 (9th Cir. 2003)  
9 (citing Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc., 159 F.3d 1209, 1211 (9th Cir.  
10 1998)); see also 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the  
11 district court lacks subject matter jurisdiction, the case shall be remanded.”).

### 12       III.     DISCUSSION

13           Juan Lozano’s Notice of Removal asserts that removal was proper on the basis of  
14 the court’s federal question jurisdiction. (See Notice of Removal ¶¶ 5-6, 10.) For the reasons  
15 that follow, the undersigned concludes that this court lacks subject matter jurisdiction over  
16 plaintiff’s claim. The court also denies plaintiff’s request for attorney’s fees and costs.

#### 17           A.     The Propriety of Removal to Federal Court

18           Before addressing the question of subject matter jurisdiction, the undersigned  
19 notes that Juan Lozano’s removal of the unlawful detainer case to this court is facially defective  
20 because Norma Lozano did not join in the removal, and there is no evidence in the record that  
21 suggests Norma Lozano consented to the removal. A general rule referred to as the “rule of  
22 unanimity” provides that “all defendants must consent to or join in a removal” of a case to  
23 federal court. Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 933 (9th Cir. 2010)  
24 (citing Chicago Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900)); accord Proctor  
25 v. Vishay Intertechnology Inc., 584 F.3d 1208, 1225 (9th Cir. 2009); see also 28 U.S.C.  
26 § 1446(b)(2)(A). Nevertheless, because certain exceptions to the rule of unanimity exist, and the

1 record is rather underdeveloped, the undersigned does not recommend the remand of this case on  
2 the basis of the rule of unanimity and proceeds to evaluate the court’s subject matter jurisdiction.<sup>7</sup>

3           Turning to the question of jurisdiction, district courts have federal question  
4 jurisdiction over “all civil actions that arise under the Constitution, laws, or treaties of the United  
5 States.” 28 U.S.C. § 1331. “A case ‘arises under’ federal law either where federal law creates  
6 the cause of action or ‘where the vindication of a right under state law necessarily turn[s] on  
7 some construction of federal law.’” Republican Party of Guam v. Gutierrez, 277 F.3d 1086,  
8 1088-89 (9th Cir. 2002) (modification in original) (citing Franchise Tax Bd. v. Constr. Laborers  
9 Vacation Trust, 463 U.S. 1, 8-9 (1983)). “[T]he presence or absence of federal-question  
10 jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal  
11 jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly  
12 pleaded complaint.” Placer Dome, Inc., 582 F.3d at 1091; see also Ultramar Am. Ltd. v. Dwelle,  
13 900 F.2d 1412, 1414 (9th Cir. 1990) (“Ordinarily, the existence of federal question jurisdiction is  
14 determined from the face of the complaint.”). “In determining the existence of removal  
15 jurisdiction, based upon a federal question, the court must look to the complaint *as of the time the*  
16 *removal petition was filed*. Jurisdiction is based on the complaint as originally filed . . . .”  
17 Abada v. Charles Schwab & Co., 300 F.3d 1112, 1117 (9th Cir. 2002) (citation and quotation  
18 marks omitted).

19           Here, plaintiff filed its Complaint in the Superior Court asserting a single claim  
20 for unlawful detainer premised solely on California law. Because a claim for unlawful detainer  
21 does not by itself present a federal question or necessarily turn on the construction of federal law,  
22 no basis for federal question jurisdiction appears on the face of the Complaint. See, e.g., U.S.

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24 <sup>7</sup> For example, the removing defendant need not obtain the consent of the remaining  
25 defendants who have not been served with process in the case. Salveson v. W. States Bankcard  
26 Ass’n, 731 F.2d 1423, 1429 (9th Cir. 1984) (“Our circuit rule is that a party not served need not be  
joined; the defendants summonsed can remove by themselves.”), superseded by statute on unrelated  
grounds, as noted in Ethridge v. Harbor House Rest., 861 F.2d 1389, 1392 n.3 (9th Cir. 1988);  
accord Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988).

1 Bank Nat'l Ass'n v. Tyler, No. C 10-4033 PJH, 2010 WL 4918790, at \*2 (N.D. Cal. Nov. 12,  
2 2010) (unpublished) (concluding that a single claim for unlawful detainer under state law does  
3 not provide a basis for federal question jurisdiction); OneWest Bank FSB v. Ignacio, No. CIV  
4 S-10-1683 JAM DAD PS, 2010 WL 2696702, at \*2 (E.D. Cal. July 6, 2010) (unpublished)  
5 (same); IndyMac Federal Bank, F.S.B. v. Ocampo, No. EDCV 09-2337 PA (DTBx), 2010 WL  
6 234828, \*2 (C.D. Cal. Jan. 13, 2010) (unpublished) (same); HSBC Bank, N.A. v. Bryant, No. 09-  
7 CV-1659-IEG (POR), 2009 WL 3787195, at \*3 (S.D. Cal. Nov. 10, 2009) (unpublished) (same).

8           Despite the fact that Juan Lozano failed to oppose plaintiff's motion to remand,  
9 the undersigned briefly addresses the suggestion in the Notice of Removal that this court has  
10 subject matter jurisdiction over plaintiff's claim because plaintiff's three-day notice to vacate the  
11 premises allegedly violated the Protecting Tenants At Foreclosure Act of 2009, Pub. L. No.  
12 111-22, § 702, 123 Stat. 1660 (2009) (the "Act"). (See Notice of Removal ¶¶ 8-10.) Insofar as  
13 Mr. Lozano's argument is concerned, the Act provides protections to tenants who reside in  
14 properties subject to foreclosure, including the requirement that a 90-day notice to vacate be  
15 given to bona fide tenants. See SD Coastline LP v. Buck, No. 10CV2108 MMA (NLS), 2010  
16 WL 4809661, at \*1 (S.D. Cal. Nov. 19, 2010) (unpublished).

17           As an initial matter, it does not appear that Juan Lozano was a bona fide tenant  
18 who resided in a foreclosed property. Instead, it appears that he was a former owner of the  
19 subject property who was subjected to foreclosure proceedings. Accordingly, it is questionable  
20 whether the Act even applied to Juan Lozano.

21           In any event, federal courts have consistently rejected attempts to premise federal  
22 subject matter jurisdiction on the 90-day notice provision provided in the Act. See, e.g.,  
23 Parkland Sec., Inc. v. Carey, Civ. No. S-11-3281 GEB GGH PS, 2012 WL 159621, at \*2 (E.D.  
24 Cal. Jan. 18, 2012) (unpublished), adopted by 2012 WL 458433 (E.D. Cal. Feb. 10, 2012)  
25 (unpublished); Wescom Credit Union v. Dudley, No. CV 10-8203 GAF (SSx), 2010 WL  
26 4916578, at \*2 (C.D. Cal. Nov. 22, 2010) (unpublished); SD Coastline LP, 2010 WL 4809661, at

1 \*2-3; Aurora Loan Servs., LLC v. Martinez, No. C10-01260 HRL, 2010 WL 1266887, at \*1  
2 (N.D. Cal. Mar. 29, 2010) (unpublished). Such rejection is based on the fact that an argument  
3 relying on the Act’s notice provision is an attempt to premise this court’s subject matter  
4 jurisdiction on a defense or a counterclaim. An anticipated defense or counterclaim cannot  
5 establish a federal question because such a defense or counterclaim does not appear on the face  
6 of the complaint.<sup>8</sup> See Vaden v. Discover Bank, 556 U.S. 49, 60 (2009) (stating that federal  
7 question jurisdiction cannot “rest upon an actual or anticipated counterclaim”); accord Takeda v.  
8 Nw. Nat’l Life Ins Co., 765 F.2d 815, 822 (9th Cir. 1985); see also Valles v. Ivy Hill Corp., 410  
9 F.3d 1071, 1075 (9th Cir. 2005) (“A federal law defense to a state-law claim does not confer  
10 jurisdiction on a federal court, even if the defense is that of federal preemption and is anticipated  
11 in the plaintiff’s complaint.”); SD Coastline LP, 2010 WL 4809661, at \*2-3 (concluding that  
12 unlawful detainer defendant’s claim or defense based on the Protecting Tenants at Foreclosure  
13 Act of 2009 cannot serve as a basis for removal jurisdiction).

14 In short, no federal question is present on the face of plaintiff’s Complaint.  
15 Accordingly, 28 U.S.C. § 1331 does not provide this court with subject matter jurisdiction over  
16 plaintiff’s single claim for unlawful detainer brought pursuant to California law.

17 B. Plaintiff’s Request for Attorney’s Fees and Costs

18 Plaintiff argues that it should be permitted to recover from Juan Lozano its  
19 attorney’s fees and costs incurred in moving to remand this action to the Superior Court. It  
20 contends that the removal effectuated by Mr. Lozano, who is proceeding without counsel, was  
21 untimely, improper, and designed to frustrate the summary nature of unlawful detainer  
22 proceedings. Plaintiff requests an award of \$2,000. (Mot. to Remand at 8; Gonzalez Decl. ¶¶ 3-

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24 <sup>8</sup> Additionally, federal district courts have concluded that the Protecting Tenants at  
25 Foreclosure Act of 2009 does not create a federal private right of action, but provides directives to  
26 state courts. See, e.g., Deutsche Bank Nat’l Trust Co. v. Jora, No. CIV S-10-1617 MCE EFB PS,  
2010 WL 3943584, at \*1 n.3 (E.D. Cal. Oct. 1, 2010) (unpublished); Zalemba v. HSBC Bank, USA,  
Nat’l Ass’n, No. 10-cv-1646 BEN (BLM), 2010 WL 3894577, at \*2 (S.D. Cal. Oct. 1, 2010)  
(unpublished).



1 4.)<sup>9</sup> The undersigned recommends that plaintiff's request be denied.

2 Pursuant to 28 U.S.C. § 1447(c), “[a]n order remanding the case may require  
3 payment of just costs and any actual expenses, including attorney fees, incurred as a result of the  
4 removal.” The United States Supreme Court has confirmed that such an award is permissive  
5 and left to the discretion of the district court, but is not automatic or even presumptive. See  
6 Martin v. Franklin Capital Corp., 546 U.S. 132, 136-40 (2005). Indeed, in Martin, the Court held  
7 that “[a]bsent unusual circumstances, courts may award attorney’s fees under § 1447(c) only  
8 where the removing party lacked an objectively reasonable basis for seeking removal.  
9 Conversely, when an objectively reasonable basis exists, fees should be denied.” Id. at 141.

10 Here, the undersigned cannot conclude that Mr. Lozano, who does not appear to  
11 be an attorney and is proceeding pro se, lacked an objectively reasonable basis for removal. Mr.  
12 Lozano believed that subject matter jurisdiction existed by reason of a potential defense or  
13 counterclaim, but was mistaken. However, that determination was by no means patently  
14 obvious, at least to a non-attorney. Under these circumstances, the undersigned concludes that  
15 sanctions would be inappropriate, if not inequitable, and recommends that plaintiff's request for  
16 attorney's fees be denied.

17 IV. CONCLUSION

18 For the reasons stated above, IT IS HEREBY ORDERED that:

19 1. Plaintiff's motion to remand is submitted without a hearing, and the  
20 July 5, 2012 hearing on plaintiff's motion is VACATED.

21 2. Plaintiff's request for judicial notice is denied.

22 Additionally, IT IS HEREBY RECOMMENDED that:

23 1. Plaintiff's motion to remand (Dkt. No. 3) be granted and that this matter  
24 be remanded to the Superior Court of California, County of San Joaquin.

25 \_\_\_\_\_  
26 <sup>9</sup> The undersigned notes that the Declaration of Janine Gonzalez contains two paragraphs  
numbered “4.”

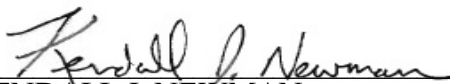
1 2. Plaintiff's request for attorney's fees and costs be denied.

2 3. This case be closed and all dates vacated.

3 These findings and recommendations are submitted to the United States District  
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
5 days after being served with these findings and recommendations, any party may file written  
6 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).  
7 Such a document should be captioned "Objections to Magistrate Judge's Findings and  
8 Recommendations." Any response to the objections shall be filed with the court and served on  
9 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).  
10 Failure to file objections within the specified time may waive the right to appeal the District  
11 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d  
12 1153, 1156-57 (9th Cir. 1991).

13 IT IS SO ORDERED and RECOMMENDED.

14 DATED: June 26, 2012

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17 KENDALL J. NEWMAN  
18 UNITED STATES MAGISTRATE JUDGE  
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