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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MELODY TOLENTINO and VICTOR
TOLENTINO,

Plaintiffs,

v.

COSTCO WHOLESALE
CORPORATION and
DOES 1-50, INCLUSIVE,

Defendants.

No. 2:17-cv-02425-KJM-DB

ORDER

Plaintiffs move to remand this personal injury action back to state court. Defendant opposes. The court submitted the motion without a hearing on January 22, 2018. Min. Order, ECF No. 10. For the following reasons, the court GRANTS plaintiffs' motion.

I. BACKGROUND

On March 2, 2016, plaintiff Melody Tolentino ("Ms. Tolentino") alleges she slipped and fell on a "wet piece of fruit" at the Costco Wholesale Corporation ("Costco") store in Vallejo, California. Removal Not. Ex. A ("Compl."), ECF No. 1-1 ¶¶ 15-17. Ms. Tolentino alleges she suffered "severe injury to her knee requiring surgery" and "great mental, physical and nervous pain and suffering." *Id.* ¶¶ 17, 31. She further alleges her injuries will result in "some permanent disability," impaired earning capacity, and ongoing expenses for "medical services, x-

1 rays, drugs, [and] sundries reasonably required in the treatment and relief of her injuries.” *Id.*
2 ¶¶ 31-33. Her husband, plaintiff Victor Tolentino (“Mr. Tolentino”), alleges loss of consortium.
3 *Id.* ¶¶ 46–52.

4 On October 4, 2017, plaintiffs sued Costco in Solano County Superior Court for
5 premises liability, negligence and loss of consortium, seeking damages and costs. *Id.* at 8–9
6 (Prayer). Although plaintiffs filed an “unlimited civil case,” indicating damages exceeding
7 \$25,000, they did not specify a sum sought. *See id.* ¶ 6. On November 16, 2017, Costco filed an
8 answer and a notice of removal based on diversity jurisdiction. Removal Not., ECF No. 1. On
9 December 14, 2017, plaintiffs moved to remand. Remand Mot., EFC No. 5. Costco opposes.
10 Opp’n, ECF No. 8. Plaintiffs did not file a reply.

11 II. LEGAL STANDARD

12 “[A]ny civil action brought in a State court of which the district courts of the
13 United States have original jurisdiction, may be removed by the defendant or the defendants, to
14 the district court of the United States for the district and division embracing the place where such
15 action is pending.” 28 U.S.C. § 1441(a). Generally, subject matter jurisdiction may be
16 established through either (1) federal question jurisdiction under 28 U.S.C. § 1331 or (2) diversity
17 jurisdiction under 28 U.S.C. § 1332. “[R]emoval statutes should be construed narrowly in favor
18 of remand to protect the jurisdiction of state courts.” *Harris v. Bankers Life and Cas. Co.*, 425
19 F.3d 689, 698 (9th Cir. 2005). “[T]he defendant always has the burden of establishing that
20 removal is proper, and [] the court resolves all ambiguity in favor of remand to state court.”
21 *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (internal quotation marks and
22 citations omitted). “[I]f there is any doubt as to the right of removal in the first instance[,]” the
23 case should be remanded. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

24 III. DISCUSSION

25 Costco contends this court has diversity jurisdiction. Removal Not. ¶¶ 6-12.
26 Diversity jurisdiction exists only if there is (1) complete diversity of citizenship among the
27 parties, and (2) an amount in controversy exceeding \$75,000.00. 28 U.S.C. § 1332(a). The
28 parties agree they are completely diverse. Joint Status Report, ECF No. 9 at ¶ E. Plaintiffs are

1 California citizens and Costco is a citizen of Washington State. Compl. ¶ 7 (plaintiffs reside in
2 Vallejo, California); Removal Not. ¶¶ 7-8 (Costco is incorporated and has its principal place of
3 business in Washington State). The sole question is whether the amount in controversy exceeds
4 \$75,000.

5 Plaintiffs' complaint does not expressly plead more than \$75,000 in damages. *See*
6 Compl. ¶ 6 (alleging damages exceed \$25,000 for purposes of classifying case as "unlimited");
7 *see also* Cal. Civ. Proc. Code § 425.10(b) ("where an action is brought to recover actual or
8 punitive damages for personal injury . . . , the amount demanded shall not be stated").
9 When, as here, the amount in controversy is unclear or ambiguous from the face of the complaint,
10 the defendant has the burden to prove by a preponderance of the evidence that the amount in
11 controversy exceeds \$75,000. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090
12 (9th Cir. 2003). The court "consider[s] facts presented in the removal petition as well as
13 'summary-judgment-type evidence relevant to the amount in controversy at the time of
14 removal.'" *Id.* (citation omitted). But the defendant's conclusory allegations as to the amount in
15 controversy will not suffice. *Id.* at 1090-91.

16 Costco has not met its burden. The nature of plaintiffs' alleged injuries do not
17 necessarily establish the requisite amount in controversy. *See, e.g., In re: Incretin Mimetics Prod.*
18 *Liab. Litig.*, No. 13MD2452 AJB (MDD), 2015 WL 11658714, at *4 (S.D. Cal. Mar. 16, 2015)
19 ("[C]ourts have recognized that claims for wrongful death are sufficient to establish the requisite
20 amount in controversy on the face of the complaint."); *cf. Corbelle v. Sanyo Elec. Trading Co.*,
21 No. C-03-1509 EMC, 2003 WL 22682464, at *4 (N.D. Cal. Nov. 4, 2003) (finding plaintiff's
22 personal injury action arising from electrocution did not clearly establish an amount in
23 controversy exceeding \$75,000).

24 Although Costco contends that plaintiffs' allegations in their complaint as well as
25 jury verdicts in other knee injury cases establish that the amount in controversy is met here, these
26 arguments are unavailing. First, Costco cannot carry its burden through mere speculation that
27 damages arising from Ms. Tolentino's knee injury will necessarily exceed \$75,000. *See* Removal
28 Not. ¶ 11; Opp'n at 4-6; *see generally* Compl. (alleging knee injury required surgery, continuing

1 medical expenses, lost wages and loss of consortium). Costco makes no attempt to quantify these
2 damages, and instead simply assumes that the amount in controversy is established because
3 plaintiffs' alleged injuries "necessarily encompass [] radiology testing, orthopedic care and
4 physical therapy . . . as well as the costs of surgery and post-operative care . . .". See Opp'n at 4-
5 6. Costco's speculation alone is insufficient. See *Martinez v. Vons Cos., Inc.*, No. 2:16-CV-
6 02380-GMN-PAL, 2017 WL 3785215, at *2 (D. Nev. Aug. 30, 2017) (noting defendant's
7 reliance on plaintiff's alleged medical costs, permanent disability and request for general damages
8 was "too speculative" to establish the amount in controversy); see also *Helland v. M705 Kroger*
9 *W./QFC*, No. 2:14-CV-01687, 2015 WL 11715590, at *2 (W.D. Wash. Feb. 20, 2015) (finding
10 defendant's "single speculative assertion" that plaintiff's surgery and hospitalization would
11 exceed \$75,000 "fails to prevail under a preponderance of the evidence standard"). Simply put,
12 Costco presents no facts or evidence from which the court can determine the amount in
13 controversy more likely than not exceeds \$75,000. Cf. *Cruz v. Wal-Mart Stores, Inc.*, No. 2:17-
14 cv-00545-JAD-NJK, 2017 WL 3394308, at *2 (D. Nev. Aug. 4, 2017) (finding plaintiff's
15 medical-expenses table claiming past and future medical expenses exceeding \$100,000 sufficient
16 proof to satisfy amount in controversy).

17 The court is similarly unpersuaded by Costco's reliance on past jury verdicts
18 involving knee injuries. Costco makes no attempt to show those other cases are sufficiently
19 similar to the instant action to support the amount in controversy here. See *Sharp v. DePuy*
20 *Orthopaedics, Inc.*, No. CV 12-5897 PA JCX, 2012 WL 2891182, at *5 (C.D. Cal. July 13, 2012)
21 (finding defendant did not explain factual similarity between cited jury verdicts and plaintiff's
22 allegations); see also *Conrad Assocs. v. Hartford Accident & Indem. Co.*, 994 F. Supp. 1196,
23 1201 (N.D. Cal. 1998) (noting "defendant has made no effort to compare the facts of [jury
24 verdict] cases [presented] with the alleged facts of this case."). For example, Costco cites *Kunik*
25 *v. Heeter*, 39 Trials Dig. 9th 27, 2006 WL 2772793 (Cal. Super. Ct. June 6, 2006), in which the
26 plaintiff suffered neck, shoulder and knee injuries in a car accident and received a \$435,000
27 verdict. See Opp'n at 6. Aside from the existence of a knee injury and loss of consortium claim
28 in both cases, it is unclear that plaintiffs here, who were not involved in a car accident, suffered

1 injuries comparable to those in *Kunik* and Costco presents no argument to that effect. Similarly,
2 in *Halladjian v. Home Depot USA and Tricam Indus. Inc.*, 9 VerdictSearch Cal. Rep. 33, 2010
3 WL 3232795 (C.D. Cal. June 30, 2010), the plaintiff won a \$380,000 verdict in his products
4 liability claim after falling from a ladder and tearing the meniscus in his knee. *See* Opp'n at 6-7.
5 Although Ms. Tolentino also alleges she suffered a knee injury, plaintiffs have not brought a
6 products liability action and Costco does not explain why the court should ignore that
7 inconsistency. Finally, although the jury awarded plaintiff over \$116,000 in *De Escobedo*, which
8 also involved a slip and fall incident at a store, the plaintiff there alleged neck and back injuries in
9 addition to knee injuries and “[t]he jury was particularly affected by the defense’s attempt to
10 suppress evidence and the defense witnesses’ lack of credibility.” *Rojas De Escobedo v. Food 4*
11 *Less of Cal., Inc.*, 31 Nat. Jury Verdict Rev. & Analysis 9, 2016 WL 6068429 (Cal. Super. Ct.
12 March 3, 2016). Costco has not shown such an outcome is likely here.

13 In short, Costco has not overcome the strong presumption against removal
14 jurisdiction and the court is left with “doubt as to the right of removal[.]” *Gaus*, 980 F.2d at 566.
15 Accordingly, plaintiffs’ motion is GRANTED and this case is REMANDED to Solano County
16 Superior Court.

17 IT IS SO ORDERED.

18 DATED: February 6, 2018.

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22 UNITED STATES DISTRICT JUDGE
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