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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KATHLEEN EMERSON, et al.,
Plaintiffs,
v.
KRISTA MITCHELL,
Defendant.

No. 2:18-cv-02200-TLN-DB

SUA SPONTE REMAND ORDER

This matter is before the Court pursuant to Defendant Krista Mitchell’s (“Defendant”) Notice of Removal. (ECF No. 1.) For the reasons set forth below, Defendant’s Ex Parte Motion to Dissolve the Temporary Restraining Order (ECF No. 3) and Defendant’s Motion for Judgment on the Pleadings (ECF No. 4) are DENIED AS MOOT, and the Magistrate Judge’s Findings and Recommendations (ECF No. 8) are VACATED. The Court hereby REMANDS the action sua sponte to the Superior Court of California, Yolo County, due to lack of subject matter jurisdiction.

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Plaintiffs Kathleen Emerson and Daniel R. Enos (“Plaintiffs”) live in Woodland,
3 California. (ECF No. 1 at 102.) Defendant lives in Davis, California. (ECF No. 1 at 1.) On
4 April 23, 2018, Plaintiffs filed in Yolo County Superior Court a request for a temporary civil
5 restraining order against Defendant, which request the superior court granted. (ECF No. 1 at 2.)
6 On June 22, 2018, Plaintiffs requested a permanent civil restraining order against Defendant.
7 (ECF No. 1 at 111.) Defendant, proceeding pro se, then removed the action to this Court on
8 August 13, 2018. (ECF No. 1.) Thereafter, Defendant filed an ex parte motion to dissolve the
9 temporary restraining order, (ECF No. 3), as well as a motion for judgment on the pleadings,
10 (ECF No. 4). On October 3, 2018, the Magistrate Judge issued Findings and Recommendations
11 on two issues, including whether removal was proper. (ECF No. 8.) Before the Court had an
12 opportunity to adopt or reject the Magistrate Judge’s recommendations, Defendant retained
13 counsel and the action was referred to this Court on October 17, 2018. (ECF No. 16.)

14 **II. STANDARD OF LAW**

15 28 U.S.C. § 1441 permits the removal to federal court of “any civil action brought in a
16 State court of which the district courts of the United States have original jurisdiction.” 28 U.S.C.
17 § 1441(a). “The propriety of removal thus depends on whether the case originally could have
18 been filed in federal court.” *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 163 (1997).

19 “[R]emoval statutes are strictly construed against removal. A defendant seeking removal
20 has the burden to establish that removal is proper and any doubt is resolved against removability.”
21 *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008) (internal
22 citation omitted). Furthermore, “[i]f the district court at any time determines that it lacks [subject
23 matter] jurisdiction over the removed action, it must remedy the improvident grant of removal by
24 remanding the action to state court.” *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831,
25 838 (9th Cir. 2004) (citing 28 U.S.C. § 1447), as amended, 387 F.3d 966 (9th Cir. 2004).

26 **III. ANALYSIS**

27 A. Grounds for Removal

28 Defendant provides in the notice of removal that this Court has jurisdiction pursuant to 28

1 U.S.C. §§ 1443(1) and 1455. (ECF No. 1 at 2.) Regarding 28 U.S.C. § 1443(1), Defendant
2 contends removal was proper because she was denied her rights by the Superior Court of
3 California, Yolo County, on account of her race. (ECF No. 1 at 2.) Turning to 28 U.S.C. § 1455,
4 Defendant alleges removal was proper because the instant civil action has turned into a criminal
5 prosecution. (ECF No. 1 at 2.) In Defendant’s objections to the Magistrate Judge’s Findings and
6 Recommendations, Defendant argues removal was proper under 28 U.S.C. § 1331 because the
7 present action hinges on a violation of federal tax law. (ECF No. 17 at 3, 5.) The Court will
8 address each argument in turn.

9 i. Removal Under 28 U.S.C. § 1443(1)

10 Removal under 28 U.S.C. § 1443(1) requires meeting a two-part test: (1) “the [defendant]
11 must assert, as a defense to the prosecution, rights that are given to them by explicit statutory
12 enactment protecting equal racial civil rights”; and (2) “[defendant] must assert that the state
13 courts will not enforce that right, and that allegation must be supported by reference to a state
14 statute or constitutional provision that purports to command the state courts to ignore the federal
15 rights.” *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006) (internal citation omitted).

16 First, this action is not a criminal prosecution. (See ECF No. 1 at 2.) Second, even
17 assuming Defendant is able to meet the first prong of the test outlined above, Defendant fails to
18 meet the second prong. While Defendant mentions California Penal Code sections 21a and 646.9
19 and California Code of Civil Procedure sections 527.6 and 2015.5, (ECF No. 1 at 2, 5, 7; ECF
20 No. 17 at 9, 10), Defendant does not explain how these laws, or any other California law,
21 command the Yolo County Superior Court to ignore Defendant’s federal rights. See *Azam v. U.S.*
22 *Bank, N.A.*, 690 F. App’x 484, 486 (9th Cir. 2017) (affirming bankruptcy court’s remand when
23 the removal petition cited various state laws, but “d[id] not and could not explain how those laws
24 commanded the state court to ignore her civil rights”).

25 While 28 U.S.C. § 1443(1) “normally requires that the denial [of federal rights] be
26 manifest in a formal expression of state law,” there are “unusual case[s] where an equivalent basis
27 could be shown for an equally firm prediction that the defendant would be denied or cannot
28 enforce the specified federal rights in the state court” *Johnson v. Mississippi*, 421 U.S. 213,

1 219 (1975) (internal quotations and citations omitted). Defendant fails to demonstrate there is an
2 equivalent basis for predicting that she would be denied or cannot enforce her federal rights in
3 Yolo County Superior Court. Instead, Defendant makes conclusory statements that the state court
4 denied Defendant her civil rights. (See, e.g., ECF No. 1 at 2–4.) These conclusory statements are
5 inadequate to make removal proper under 28 U.S.C. § 1443(1). *Bogart v. People of State of Cal.*,
6 355 F.2d 377, 381 (9th Cir. 1966); *U.S. Bank Tr., N.A. v. Lukowski*, No. 17-CV-03112-JSW, 2017
7 WL 3224562, at *2 (N.D. Cal. July 28, 2017). Accordingly, removal was not proper under 28
8 U.S.C. § 1443(1).

9 ii. Removal Under 28 U.S.C. § 1455

10 Defendants may remove criminal prosecutions in certain circumstances under 28 U.S.C. §
11 1455. However, as Defendant herself states, this case involves a temporary civil restraining
12 order, (ECF No. 1 at 2), and not a criminal prosecution. Accordingly, removal was not proper
13 under 28 U.S.C. § 1455.

14 iii. Removal Under 28 U.S.C. § 1331

15 “[D]istrict courts shall have original jurisdiction of all civil actions arising under the
16 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “The presence or absence
17 of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides
18 that federal jurisdiction exists only when a federal question is presented on the face of the
19 plaintiff’s properly pleaded complaint.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

20 Plaintiffs’ claims for relief do not implicate any federal law or statute. Instead, Plaintiffs
21 seek a civil restraining order under California law. (ECF No. 1 at 111.) Defendant attempts to
22 invoke federal question jurisdiction by arguing Plaintiffs seek a civil restraining order based on a
23 violation of federal tax law. (ECF No. 17 at 5.) However, this argument strains reason.
24 Plaintiffs’ alleged reasons for seeking a restraining order had nothing to do with any federal tax
25 law violation, but rather Defendant’s harassment and stalking. (ECF No. 1 at 102–111.) To the
26 extent a federal tax law violation might provide a purported defense or counterclaim, federal court
27 jurisdiction must be apparent on the face of the complaint and therefore cannot be based on a
28 defense, counterclaim, cross-claim, or third-party claim raising a federal question. See *Vaden v.*

1 Discover Bank, 556 U.S. 49, 60–61 (2009); Hunter v. Philip Morris USA, 582 F.3d 1039, 1042–
2 43 (9th Cir. 2009). Accordingly, removal was not proper under 28 U.S.C. § 1331.

3 iv. Removal Under 28 U.S.C. § 1332¹

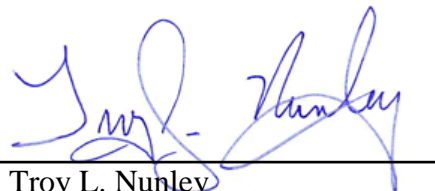
4 Finally, district courts also have original jurisdiction over civil actions between citizens of
5 different states in which the alleged damages exceed \$75,000. 28 U.S.C. § 1332(a)(1). Removal
6 based on diversity requires that the citizenship of each plaintiff be diverse from the citizenship of
7 each defendant. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84 (2005). Here, the parties appear to
8 be citizens of the same state—California—and neither party has claimed otherwise. (ECF No. 1
9 at 1, 102.) Accordingly, removal was not proper under 28 U.S.C. § 1332.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court hereby REMANDS this action to the Superior Court
12 of California, Yolo County. Consequently, Defendant’s Ex Parte Motion to Dissolve the
13 Temporary Restraining Order (ECF No. 3) and Motion for Judgment on the Pleadings (ECF No.
14 4) are DENIED AS MOOT, and the Magistrate Judge’s Findings and Recommendations (ECF
15 No. 8) are VACATED.

16 IT IS SO ORDERED.

17 Dated: March 28, 2019

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21 Troy L. Nunley
22 United States District Judge

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28 ¹ Defendant does not explicitly argue for diversity jurisdiction, but the Court nevertheless addresses it here to foreclose any argument that it exists in this case.