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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL NEKY,
Plaintiff,
v.
COSTCO WHOLESALE CORPORATION,
Defendant.

Case No. [19-cv-03781-WHO](#)

**ORDER GRANTING MOTION TO
REMAND**

Re: Dkt. No. 6

INTRODUCTION

Plaintiff Michael Nemy filed suit in San Mateo County Superior Court against defendant Costco Wholesale Corporation (“Costco”) alleging negligence and premises liability. Costco removed the case to federal court based on diversity jurisdiction, and Nemy has filed a motion to remand. Because Costco’s Notice of Removal was filed outside of the 30-day window allowed by 28 U.S.C. § 1446(b)(3), the Motion to Remand is GRANTED.

BACKGROUND

On January 19, 2017, while working for Heartland Express, Inc., Nemy made a delivery to a Costco-owned property in Foster City, California. Complaint, Ex. A to the Notice of Removal [Dkt. No. 1-1] (“Compl.”) ¶ 6. During the delivery, he slipped and fell on a wet area of the property’s delivery docks, sustaining severe personal injuries. *Id.* at ¶ 7. He alleges that Costco’s negligence and failure to maintain the property were the proximate causes of his fall and subsequent injuries. *Id.* at ¶ 8.

Nemy filed suit in state court on January 17, 2019, alleging negligence and premises liability against the defendant. In his Complaint, Nemy requests general damages, special damages, loss of earnings, and other costs in an unspecified amount. *Id.* On March 1, 2019, Costco’s registered agent was personally served with summons, a copy of the Complaint, and other papers, including plaintiff’s Statement of Damages enumerating over \$1 million in general and specific damages. Proof of Service of Summons and Statement of Damages, attached at Ex. A

1 to the Notice of Removal [Dkt. No. 1-1 at ECF Pgs. 15-17 of 40]. The Proof of Service was
2 signed by the process server on March 7, 2019, and was filed with the Superior Court on March
3 25, 2019. Dkt. No. 1-1 ECF Pg. 15. Costco filed an answer to the Complaint on April 15, 2019.
4 Dkt. No. 1-1 ECF pgs. 18-21 of 40.

5 On May 30, 2019, Costco’s counsel of record received an Application for Lien from
6 Heartland Express, Inc., claiming and applying for a lien of \$116,048.00. Notice of Removal
7 [Dkt. No. 1] 2-3. The Application for Lien states that “[a]s a proximate result of the injuries to
8 plaintiff . . . [Heartland Express, Inc.] has paid to and on behalf of plaintiff, the minimum sum of
9 \$116,048.00, as and for workers’ compensation benefits and medical care and temporary and/or
10 permanent disability indemnity.” *Id.*

11 On June 28, 2019, Costco removed the case to this court on the basis of diversity
12 jurisdiction. *Id.* On July 26, 2019, Neko filed a motion to remand, asserting that removal was
13 improper because there is not complete diversity among the parties and the Notice of Removal
14 was untimely. Dkt. No. 6.

15 **LEGAL STANDARD**

16 A defendant may remove a case from state to federal court by filing a notice of removal
17 that lays out the grounds for removal. 28 U.S.C. § 1441(a). A “notice of removal may be filed
18 within 30 days after receipt by the defendant, through service or otherwise, of a copy of an
19 amended pleading, motion, order or other paper from which it may first be ascertained that the
20 case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3). The removal statute’s
21 “time limit is mandatory and a timely objection to a late petition will defeat removal. . . .” *Fristoe*
22 *v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

23 **DISCUSSION**

24 Costco filed the Notice of Removal on June 28, 2019, after its counsel received the
25 Application for Lien on May 30, 2019. Dkt. No. 1. It claims the Application for Lien was the first
26 indicator that the case involved an amount in controversy above the \$75,000 threshold for
27 diversity jurisdiction. Costco’s Opposition to Motion to Remand 3, 6-8 [Dkt. No. 11]. However,
28 Neko points out that Costco was served with the Statement of Damages seeking a total of

1 \$1,525,000.00 in damages on March 1, 2019. Motion to Remand 3 [Dkt. No. 6], Dkt. No. 1-1 at
2 ECF pgs. 14-17. Because Costco filed the Notice of Removal more than 30 days after March 1,
3 2019, Neky argues the Notice was untimely and therefore invalid. *Id.* at 4-5.

4 A defendant must file its notice of removal, including “a short and plain statement of the
5 grounds for removal,” within 30 days of receiving the initial pleading. 28 U.S.C. § 1446. If the
6 initial pleading does not appear removable on its face, the defendant may file a notice of removal
7 “within 30 days after receipt . . . , through service or otherwise, of a copy of an amended pleading,
8 motion, order or other paper from which it may first be ascertained that the case is one which is or
9 has become removable.” 28 U.S.C. § 1446(b)(3). If a notice of removal is filed outside the 30-
10 day limit and the opposing party objects in a timely manner, removal is defeated. *Fristoe*, 615
11 F.2d at 1212.

12 Costco failed to file its Notice of Removal within 30 days of being served with plaintiff’s
13 Statement of Damages, making removal untimely. Although the Complaint did not indicate a
14 specific amount in controversy, the Statement of Damages that was served with the Complaint
15 outlined general and specific damages of \$1,525,000.00. Statement of Damages, Dkt. No. 1-1 at
16 ECF pgs. 14-17. Statements of damages, like the one here, are considered “the functional
17 equivalent of an amendment to a complaint.” *Plotitsa v. Superior Court*, 140 Cal. App. 3d 755,
18 759 (1983). Its service on March 1, 2019, therefore, triggered the 30-day period to remove the
19 case.

20 In its opposition, Costco objects to the court taking judicial notice of the Statement of
21 Damages and the related Proof of Service. *Oppo*. 7. However, the Statement of Damages, as well
22 as the Complaint and the Proof of Service, were part of the Costco’s Notice of Removal. Dkt. No.
23 1-1. These documents are part of the record of this case, and subject to judicial notice in the same
24 way the state court Complaint is. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980)
25 (court may take judicial notice of its own records).

26 Costco also notes that the California statute governing statements of damages provides that
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1 a defendant “may” ask for plaintiff to provide one. Cal. C.C.P. § 425.11.¹ But there is nothing in
2 the statutory language that *prevents* a plaintiff from serving one on its own accord, absent a
3 request from the defendant. *Id.* The purpose of the statute “is to give the defendant specific notice
4 of damages sought,” therefore allowing defendants to better address claims brought against them.
5 *Debbie S. v. Ray*, Cal. App. 4th 193, 199 (1993). Costco was given that specific notice when
6 Neky served the Statement of Damages on March 1, 2019. Costco had notice that this case was
7 removable on that date.

8 Costco does not dispute, through a declaration or otherwise, that it received the Statement
9 along with the Complaint on March 1, 2019. Costco’s counsel merely asserts that he was not
10 aware of the amount in controversy until he received the Application for Lien. Declaration of
11 Arthur J. Casey [Dkt. No. 11-1]. But that does not counter or otherwise undermine Neky’s Proof
12 of Service of the Statement on March 1, 2019.

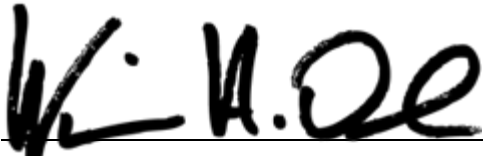
13 Defendant did not file a timely notice of removal and, therefore, this case must be
14 remanded.²

15 **CONCLUSION**

16 Because defendant’s Notice of Removal was filed after the 30-day statutory limit, the
17 Motion to Remand is GRANTED and the case is remanded to the Superior Court of California,
18 County of San Mateo.

19 **IT IS SO ORDERED.**

20 Dated: October 10, 2019

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22 William H. Orrick
23 United States District Judge
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26 ¹ Cal. Code Civ. Proc. § 425.11(b) provides “When a complaint is filed in an action to recover
27 damages for personal injury or wrongful death, the defendant may at any time request a statement
28 setting forth the nature and amount of damages being sought. The request shall be served upon the
plaintiff, who shall serve a responsive statement as to the damages within 15 days.”

² Because the notice of removal was untimely, I need not reach whether there is diversity
jurisdiction.