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2 UNITED STATES DISTRICT COURT  
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
4 OAKLAND DIVISION  
5

6 ONEWEST BANK, FSB,

7 Plaintiff,

8 vs.

9 JUDITH MOHR, et al.,

10 Defendants.

Case No: C 10-00639 SBA

**ORDER GRANTING PLAINTIFF'S  
MOTION TO REMAND CASE AND  
DENYING PLAINTIFF'S REQUEST  
FOR ATTORNEY'S FEES AND COSTS**

[Docket No. 7]

11  
12 The parties are presently before the Court on Plaintiff's Motion to Remand Case and  
13 Request for Attorney's Fees and Costs ("Plaintiff's motion"). (Docket 7.) Defendants have not  
14 filed an opposition to Plaintiff's motion. Having read and considered the papers filed in  
15 connection with this matter and being fully informed, the Court hereby GRANTS Plaintiff's  
16 Motion to Remand Case and DENIES Plaintiff's Request for Attorney's Fees and Costs. The  
17 Court, in its discretion, finds this matter suitable for resolution without oral argument. See  
18 Fed.R.Civ.P. 78(b).

19 **I. FACTUAL BACKGROUND**

20 **A. The Underlying State Court Action**

21 Plaintiff commenced this residential Forcible Detainer Action in state court after a non-  
22 judicial foreclosure sale. The facts detailed herein are derived from Plaintiff's complaint in the  
23 state court action, attached as Exhibit 1 to Plaintiff's Request for Judicial Notice (RJN) in  
24 support of this motion. (Docket No. 8.)

25 In July 2006, Defendant Judith Mohr executed a deed of trust encumbering the real  
26 property known as 312 Glencourt Way, Pacifica, CA 94004 ("Property"). The deed of trust  
27 was recorded in the Official Records of San Mateo County on December 1, 2006. In July  
28 2008, the trustee or successor trustee under the deed of trust conducted a trustee's sale of the

1 Property, and Plaintiff's predecessor in interest purchased the Property at the sale. The sale  
2 was held pursuant to Section 2924 of the California Civil Code under a power of sale clause  
3 contained in the deed of trust. Plaintiff asserts that title to the Property was perfected by  
4 recordation. Plaintiff further asserts it is the lawful owner of the Property.

5 On September 30, 2008, Plaintiff filed an Unlawful Detainer action against Defendants  
6 in the San Mateo County Superior Court. On January 6, 2009, judgment in the unlawful  
7 detainer action was entered in favor of Plaintiff and a writ of possession was enforced by the  
8 Sheriff on January 22, 2009. On April 27, 2009, Defendants entered the Property without  
9 authorization and took possession of it.

10 Due to Defendants' unauthorized possession of the Property, on December 21, 2009,  
11 Plaintiff filed a complaint in Forcible Entry and Detainer against Defendants in the San Mateo  
12 County Superior Court (the "State Court Action"). (RJN, Ex. 1.) Plaintiff seeks to recover  
13 possession of the Property. According to Plaintiff, Defendants were personally served with the  
14 complaint in the State Court Action on December 27, 2009, and answered the complaint on  
15 January 19, 2010.

16 **B. Defendants' Notice of Removal**

17 On February 16, 2010, Defendant Judith Mohr filed a Notice of Removal pertaining to  
18 the State Court Action in this Court. (Docket No. 1.) According to the Notice of Removal,  
19 Ms. Mohr filed the Notice with the "express consent" of the other Defendants. (*Id.* at 1.)  
20 Defendants base their Notice of Removal on federal question jurisdiction, by asserting that this  
21 "is a claim brought under the Federal Fair Debt Collection Practices Act (FDCPA), Real Estate  
22 Settlement Procedures Act (RESPA), Truth in Lending Act (TILA), Generally Accepted  
23 Accounting Principals (*sic*) (GAAP), The Universal Commercial Code (UCC) ... [t]hus the  
24 claims by Plaintiff may be maintained in any appropriate United States District Court 15  
25 U.S.C. §1692k(d), and 42 U.S.C. §3631." (*Id.* at 1-2.) Defendants further assert that  
26 "California Civil Code Section §2923.5, §2923.6, §2924, and §2932.5 et. seq., are being  
27 unconstitutionally applied to Defendant." (*Id.* at 2.) Defendants make no assertion regarding  
28 diversity jurisdiction in the Notice of Removal.

1 **II. DISCUSSION**

2 **A. Legal Standards**

3 Federal courts have subject matter jurisdiction over civil actions arising under the  
4 Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331; see also U.S. v. Alisal  
5 Water Corp., 431 F.3d 643, 650 (9th Cir. 2005). A defendant may remove to federal court any  
6 action over which the federal court would have had original subject matter jurisdiction. 28  
7 U.S.C. § 1441. To effect removal, 28 U.S.C. § 1446 requires a defendant to file in the U.S.  
8 district court a notice of removal "containing a short and plain statement of the grounds for  
9 removal, together with a copy of all process, pleadings, and orders served upon such defendant  
10 or defendants in such action." 28 U.S.C. § 1446(a). The notice of removal "shall be filed  
11 within thirty days after the receipt by the defendant, through service or otherwise, of a copy of  
12 the initial pleading setting forth the claim for relief upon which such action or proceeding is  
13 based ...." 28 U.S.C. § 1446(b).

14 **1. There Is No Federal Question Jurisdiction**

15 "The presence or absence of federal-question jurisdiction is governed by the 'well-  
16 pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal  
17 question is presented on the face of the plaintiff's properly pleaded complaint." Wayne v. DHL  
18 Worldwide Express, 294 F.3d 1179, 1183 (9th Cir. 2002). Moreover, the existence of a  
19 defense based upon federal law is insufficient to support jurisdiction. Id.

20 Plaintiff has only identified one cause of action in its complaint, namely, Forcible  
21 Detainer. (RJN, Ex. 1. at 3.) The elements of a Forcible Detainer action are set forth in  
22 California Code of Civil Procedure § 1160, which provides:

23 Every person is guilty of a forcible detainer who either:

24 1. By force, or by menaces and threats of violence, unlawfully  
25 holds and keeps the possession of any real property, whether the  
same was acquired peaceably or otherwise; or,

26 2. Who, in the night-time, or during the absence of the occupant of  
27 any lands, unlawfully enters upon real property, and who, after  
demand made for the surrender thereof, for the period of five days,  
28 refuses to surrender the same to such former occupant. See Cal.  
C.C.P. § 1160.

1 As such, Plaintiff's complaint involves only state law issues based on the California  
2 Code of Civil Procedure. Plaintiff's complaint does not set forth a federal question or raise a  
3 federal claim. Defendants' notice of removal -- which asserts that Plaintiff's claim is brought  
4 under, among other things, the Federal Fair Debt Collection Practices Act (FDCPA) and Truth  
5 in Lending Act (TILA) -- is inaccurate and cannot support federal question jurisdiction, where  
6 such jurisdiction is unsupported by the face of Plaintiff's complaint. As a result, removal based  
7 on federal question jurisdiction was improper.

## 8 **2. There Is No Diversity Jurisdiction**

9 Pursuant to 28 U.S.C. § 1332, for diversity jurisdiction to apply, the matter in  
10 controversy must exceed the sum or value of \$75,000, and defendant and plaintiff must not be  
11 residents of the same state. Defendants' notice of removal does not allege that the amount of  
12 controversy exceeds \$75,000. Indeed, Plaintiff's complaint states that the case has less than  
13 \$10,000 in controversy. (RJN, Ex. 1 at 3, 4.) Plaintiff asserts that this suit is for possession of  
14 the Property only and not for damages. Lastly, Defendants have made no allegation regarding  
15 the citizenship of Plaintiff and Defendants. Therefore, Defendants have not shown that  
16 removal is proper based on diversity jurisdiction.

## 17 **3. Defendants' Notice of Removal Is Procedurally Improper**

18 28 U.S.C. § 1446(b) requires that a notice of removal be filed within 30 days "after  
19 receipt by the defendant, through service or otherwise, of a copy of the initial pleading."  
20 Plaintiff asserts that Defendants were served in the State Action on December 27, 2009, and  
21 cites Exhibit 2 to the RJN, which Plaintiff identifies as the proof of service. However, that  
22 exhibit is not a proof of service and is rather a duplicate of Exhibit 3 to the RJN. In any event,  
23 if we accept Plaintiff's unopposed representation regarding the date of service, Defendants'  
24 filing of the removal notice was untimely because it was filed on February 16, 2010, which is  
25 51 days after service. As such, Defendants' notice of removal is also procedurally improper.

## 26 **B. An Award of Attorney's Fees and Costs Is Not Appropriate in This Case**

27 28 U.S.C. § 1447(c) provides that on granting a motion for remand, the "order  
28 remanding the case may require payment of just costs and any actual expenses, including

1 attorney fees, incurred as a result of the removal." The standard for awarding fees turns on the  
2 reasonableness of the removal. Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).  
3 "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where  
4 the removing party lacked an objectively reasonable basis for seeking removal. Conversely,  
5 when an objectively reasonable basis exists, fees should be denied." Id. Under this rule,  
6 "district courts retain discretion to consider whether unusual circumstances warrant a departure  
7 from the rule in a given case." Id.

8 Here, Plaintiff argues that attorney's fees and costs should be awarded because  
9 Defendants' notice of removal was untimely and without merit. Plaintiff further argues that  
10 Defendants filed the removal notice to cause Plaintiff to incur further litigation expenses, to  
11 cause unnecessary delay, and to otherwise impede Plaintiff's right to recover possession of real  
12 property it lawfully owns.

13 In this case, Defendants are all appearing *pro se*. To an attorney, it should be readily  
14 apparent that Defendants' notice of removal lacks an objectively reasonable basis for asserting  
15 federal question or diversity jurisdiction. It is also untimely. However, these are "unusual  
16 circumstances" in that Defendants are not represented by an attorney, and as a result, they filed  
17 the notice of removal without the benefit of legal counsel. Therefore, a fee award is not  
18 appropriate in this case.

19 **III. CONCLUSION**

20 For the reasons stated herein,

21 IT IS HEREBY ORDERED THAT Plaintiff's Motion to Remand Case is GRANTED  
22 and Plaintiff's Request for Attorney's Fees and Costs is DENIED.

23 IT IS HEREBY FURTHER ORDERED THAT the hearing on Plaintiff's motion  
24 scheduled for July 14, 2010 at 2:00 p.m. is VACATED. This Order terminates Docket No. 7.

25 IT IS SO ORDERED.

26 Dated: July 6, 2010

27   
28 SAUNDRA BROWN ARMSTRONG  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ONEWEST BANK, FSB,  
  
Plaintiff,

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JUDITH MOHR et al,  
  
Defendant.

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Case Number: CV10-00639 SBA

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 7, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Elizabeth Bernardi  
312 Glencourt Way  
Pacifica, CA 94044

Greg Lester  
312 Glencourt Way  
Pacifica, CA 94044

Judith E. Mohr  
312 Glencourt Way  
Pacifica, CA 94044

Katherine Bernardi  
312 Glencourt Way  
Pacifica, CA 94044

Dated: July 7, 2010

Richard W. Wieking, Clerk

By: LISA R CLARK, Deputy Clerk