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**\*E-FILED: July 16, 2012\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

AURORA PROPERTIES, LLC,

No. C12-03594 HRL

Plaintiff,

**ORDER THAT CASE BE REASSIGNED  
TO A DISTRICT JUDGE**

v.

MARCELLA ANDRADE and DOES 1-5,  
inclusive,

**REPORT AND RECOMMENDATION RE  
REMAND TO STATE COURT**

Defendants.

\_\_\_\_\_/

Defendant Marcella Andrade removed this unlawful detainer action from the Santa Clara County Superior Court. For the reasons stated below, the undersigned recommends that this matter be remanded.

Removal to federal court is proper where the federal court would have original subject matter jurisdiction over the complaint. 28 U.S.C. § 1441. The removal statutes are strictly construed against removal and place the burden on the defendant to demonstrate that removal was proper. Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009) (citing Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)). Additionally, the court has a continuing duty to determine whether it has subject matter jurisdiction. FED. R. CIV. P. 12(h). A case must be remanded to the state court if it appears at any time before final judgment that the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c).

Andrade fails to show that removal is proper based on any federal law. Federal courts

1 have original jurisdiction over civil actions “arising under the Constitution, laws, or treaties of  
2 the United States.” 28 U.S.C. § 1331. A claim “arises under” federal law if, based on the  
3 “well-pleaded complaint rule,” the plaintiff alleges a federal claim for relief. Vaden v.  
4 Discovery Bank, 129 S. Ct. 1262, 1272 (2009). Defenses and counterclaims asserting a federal  
5 question do not satisfy this requirement. Id. Andrade contends that plaintiff violated federal  
6 law by serving a defective notice to quit. Plaintiff’s complaint, however, presents claims arising  
7 only under state law. It does not allege any federal claims whatsoever. Allegations in a  
8 removal notice or in a response to the complaint cannot provide this court with federal question  
9 jurisdiction.

10 Andrade does not assert diversity jurisdiction under 28 U.S.C. § 1332, and there does  
11 not appear to be any basis for it in any event. The complaint indicates that the amount  
12 demanded does not exceed \$10,000. Moreover, as a California defendant, Andrade cannot  
13 remove an action on the basis of diversity. 28 U.S.C. § 1441(b)(2) (an action may not be  
14 removed “if any of the parties in interest properly joined and served as defendants is a citizen of  
15 the State in which such action is brought.”); see also Spencer v. U.S. Dist. Ct., 393 F.3d 867,  
16 870 (9th Cir. 2004) (“It is thus clear that the presence of a local defendant at the time removal is  
17 sought bars removal.”).

18 Because the parties have yet to consent to the undersigned’s jurisdiction, this court  
19 ORDERS the Clerk of the Court to reassign this case to a District Judge. The undersigned  
20 further RECOMMENDS that the newly assigned judge remand the case to the Santa Clara  
21 County Superior Court. Any party may serve and file objections to this Report and  
22 Recommendation within fourteen days after being served. FED. R. CIV. P. 72.

23 SO ORDERED.

24 Dated: July 16, 2012

  
\_\_\_\_\_  
HOWARD L. LLOYD  
UNITED STATES MAGISTRATE JUDGE

1 5:12-cv-03594-HRL Notice has been electronically mailed to:

2 Daniel Thomas Paris parislaw1@msn.com

3

4 5:12-cv-03594-HRL Notice sent by U.S. Mail to:

5 Marcella Andrade  
6 2498 Amaryl Drive  
7 San Jose, CA 95132

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