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**\*E-FILED: April 17, 2013\***

NOT FOR CITATION  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

AFS INVESTMENT GROUP, LLC; 1 TO INFINITY, LLC dba 1 TO INFINITY DB PLAN,

No. C13-01726 HRL

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

Plaintiffs,

v.

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

MAXIMO F. ESTEBAR JR; and DOES 1 to 20, inclusive,

Defendants.

Defendant Maximo F. Esteban, Jr. 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

United States District Court  
For the Northern District of California

1 the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c).

2 Defendant fails to show that diversity jurisdiction exists. Federal district courts have  
3 jurisdiction over civil actions in which the matter in controversy exceeds the sum or value of  
4 \$75,000 (exclusive of interest and costs) and is between citizens of different states. 28 U.S.C.  
5 §1332. The complaint indicates that the amount demanded does not exceed \$10,000.  
6 Moreover, defendant says that he is a California resident. (Notice of Removal ¶ 6). As a  
7 California defendant, Esteban cannot remove an action on the basis of diversity. 28 U.S.C. §  
8 1441(b)(2) (an action may not be removed “if any of the parties in interest properly joined and  
9 served as defendants is a citizen of the State in which such action is brought.”); see also Spencer  
10 v. U.S. Dist. Ct., 393 F.3d 867, 870 (9th Cir. 2004) (“It is thus clear that the presence of a local  
11 defendant at the time removal is sought bars removal.”).

12 Although Esteban does not assert federal question jurisdiction, there is no basis for it in  
13 any event. Federal courts have original jurisdiction over civil actions “arising under the  
14 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A claim “arises under”  
15 federal law if, based on the “well-pleaded complaint rule,” the plaintiff alleges a federal claim  
16 for relief. Vaden v. Discovery Bank, 129 S. Ct. 1262, 1272 (2009). Defenses and  
17 counterclaims asserting a federal question do not satisfy this requirement. Id. Here, plaintiffs’  
18 complaint presents claims arising only under state law. It does not allege any federal claims  
19 whatsoever. Allegations in a removal notice or in a response to the complaint cannot provide  
20 this court with federal question jurisdiction.

21 Because the parties have yet to consent to the undersigned’s jurisdiction, this court  
22 ORDERS the Clerk of the Court to reassign this case to a District Judge. The undersigned  
23 further RECOMMENDS that the newly assigned judge remand the case to the Santa Clara  
24 County Superior Court. Any party may serve and file objections to this Report and  
25 Recommendation within fourteen days after being served. 28 U.S.C. § 636(b)(1); FED. R. CIV.  
26 P. 72.

27 Dated: April 17, 2013

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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

1 5:13-cv-01726-HRL Notice has been electronically mailed to:

2 Kirkman Jan Hoffman kirk@kirkhoffman.com

3

4 5:13-cv-01726-HRL Notice sent on April 17, 2013 by U.S. Mail to:

5 Maximo F. Esteban, Jr.

6 3451 Gila Drive

7 San Jose, CA 95148

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