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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 37-2016-00026756-CU-PO-CTL

11 DON ALLEN,

Case No.: 18-cv-0066-BTM-NLS

12 Plaintiff,

**ORDER GRANTING MOTION TO  
REMAND [ECF No. 7]**

13 v.

14 ESA MANAGEMENT, LLC dba  
15 EXTENDED STAY AMERICA,

16 Defendant.

17  
18 Presently before the Court is Plaintiff Don Allen's motion to remand this  
19 action to state court. (ECF No. 7.) For the reasons discussed below, Plaintiff's  
20 motion is **GRANTED**.

21 **BACKGROUND**

22 On August 4, 2016, Plaintiff initiated an action against ESA Management,  
23 Inc. in the Superior Court of California in the County of San Diego. In September  
24 2017, after the court entered default in the case, counsel for Defendant ESA  
25 Management, LLC contacted Plaintiff and informed him that it was the proper  
26 defendant, not ESA Management, Inc. Plaintiff, via e-mail, provided counsel for  
27 Defendant with the complaint but no effort was made at that time to remove the  
28 case to federal court. Plaintiff sought leave from the court to file an amended

1 complaint relating back to its original filing date and properly naming Defendant.  
2 Defendant specially appeared and opposed the motion. On November 17, 2017,  
3 Plaintiff was permitted to file a first amended complaint properly naming  
4 Defendant. Plaintiff subsequently served Defendant with the summons,  
5 amended complaint, and notice of hearing on December 11, 2017.

6 On January 10, 2018, Defendant removed this action from state court.  
7 (ECF No. 1.) Because Defendant had failed to provide the Court with sufficient  
8 facts to establish diversity jurisdiction, the Court issued an order to show cause  
9 requiring Defendant to establish its sole member Extended Stay America, Inc.'s  
10 citizenship. (ECF No. 4.) On February 9, 2018, Plaintiff filed this instant motion  
11 to remand. On February 16, 2018, based on Defendant's response to the order  
12 to show cause, the Court issued an order stating that Defendant had adequately  
13 established diversity jurisdiction. However, because Plaintiff grounds his motion  
14 to remand on both the existence of subject matter jurisdiction and the timeliness  
15 of the removal, the Court addresses that latter argument below.

### 16 **DISCUSSION**

17 In general, "any civil action brought in a State court of which the district  
18 courts of the United States have original jurisdiction, may be removed by the  
19 defendant or the defendants, to the district court of the United States for the  
20 district court and division embracing the place where such action is pending." 28  
21 U.S.C. § 1441(a). Title 28 U.S.C. § 1446(b)(1) requires a defendant to file a  
22 notice of removal "within 30 days after the receipt by the defendant, through  
23 service or otherwise, of a copy of the initial pleading setting forth the claim for  
24 relief upon which such action or proceeding is based." However, "if the case  
25 stated by the initial pleading is not removable, a notice of removal may be filed  
26 within 30 days after receipt by the defendant, through service or otherwise, of a  
27 copy of an amended pleading, motion, order or other paper from which it may  
28 first be ascertained that the case is one which is or has become removable." 28

1 U.S.C. § 1446(b)(3). “A case may not be removed under subsection (b)(3) on  
2 the basis of jurisdiction conferred by section 1332 more than one year after  
3 commencement of the action, unless the district court finds that the plaintiff has  
4 acted in bad faith in order to prevent a defendant from removing the action.” §  
5 1446(c)(1).

6 Here, there is no dispute that Defendant was not formally served until  
7 December 11, 2017. However, it is also undisputed that Plaintiff commenced this  
8 action on August 4, 2016, more than one year before Defendant filed its notice of  
9 removal. The Ninth Circuit has made it clear that the statute’s one-year deadline  
10 for removing diversity cases applies only to cases in which there is no basis for  
11 diversity jurisdiction when the case is filed in state court. *See Ritchey v. Upjohn*  
12 *Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998). Therefore, the timeliness of this  
13 removal depends on whether the case was initially removable under diversity  
14 jurisdiction.

15 The parties disagree as to whether the case was initially removable.  
16 Plaintiff argues that as plead, this case was not removable under diversity  
17 jurisdiction because both parties were citizens of California and the amount-in-  
18 controversy could not be ascertained. Defendant, on the other hand, contends  
19 that the case was initially removable but does not explain why. In *Harris v.*  
20 *Bankers Life & Co.*, 425 F.3d 689, 695 (9th Cir. 2005), the Ninth Circuit joined  
21 other circuits in holding that the “ground for removal must be revealed  
22 affirmatively in the initial pleading in order for the first thirty-day clock under §  
23 1446(b) to begin.” As noted by Plaintiff, the initial pleading did not state an  
24 amount-in-controversy and also stated that Plaintiff and Defendant were both  
25 citizens of California. As such, the grounds for removal were not “apparent within  
26 the four corners of the initial pleading . . . .” *See Harris*, 425 F.3d at 695.  
27 Because the case was not initially removable, then the one-year time limit under  
28 section 1446(c)(1) applies in this case and Defendant’s removal is barred.

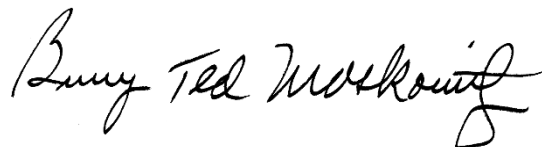
1 Defendant argues that its removal is timely because it was not formally  
2 served until December 11, 2017 and it removed to federal court within thirty days  
3 of service. While the Supreme Court in *Murphy Brothers, Incorporation v.*  
4 *Michetti Pipe Stringing, Incorporation*, 526 U.S. 344, 348 (1999) does make it  
5 clear that a defendant's time for removal is not triggered until it is formally served  
6 and made a party to the action, the Supreme Court there did not address the  
7 implications of section 1446(c)(1). The Court's independent research has  
8 revealed that district courts have repeatedly applied the one-year time bar to  
9 later-added defendants. See *First Mechs. Trust Co. v. Wal-Mart Stores East, LP*,  
10 630 F. Supp. 2d 964, 969 (S.D. Ind. 2008) (applying the one-year time limit to a  
11 defendant that removed within thirty days of being served, but was added more  
12 than one year after commencement of the case in state court); see also *U.S.*  
13 *Airways, Inc. v. PMA Capital Ins. Co.*, 340 F. Supp. 2d 699, 704–07 (E.D. Va.  
14 2004). Therefore, the Court applies the one-year time bar here. Because  
15 Defendant removed this case under diversity jurisdiction more than a year after it  
16 commenced in state court, and in absence of a showing that Plaintiff acted in bad  
17 faith, the Court holds that Defendant's removal is barred under section  
18 1446(c)(1).

### 19 CONCLUSION

20 For the reasons discussed above, Plaintiff's motion to remand (ECF No. 7)  
21 is **GRANTED**. The case is hereby **REMANDED** to the Superior Court of  
22 California, San Diego.

23 **IT IS SO ORDERED.**

24 Dated: June 13, 2018



25  
26 Barry Ted Moskowitz, Chief Judge  
27 United States District Court  
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