

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 U.S. BANK, NA AS TRUSTEE FOR
12 THE CERTIFICATEHOLDERS OF
13 BANC OF AMERICA FUNDING
14 CORPORATION MORTGAGE PASS-
15 THROUGH CERTIFICATES SERIES
2006-H,
16
17 Plaintiff,
18 v.
19 STEVEN H. LUCORE; JUDY L.
20 LUCORE; and DOES 1 to 10, Inclusive,
21 Defendants.

Case No.: 18-CV-286 JLS (MDD)

**ORDER: (1) GRANTING
PLAINTIFF'S MOTION TO
REMAND; (2) REMANDING
ACTION TO THE SUPERIOR
COURT OF CALIFORNIA, COUNTY
OF SAN DIEGO; AND (3) DENYING
AS MOOT DEFENDANTS' MOTION
TO CONSOLIDATE**

(ECF Nos. 3, 6, 17)

21 Presently before the Court is Defendants Steven H. Lucore and Judy L. Lucore's
22 Motion to Consolidate, (ECF No. 3), and Plaintiff U.S. Bank, NA as Trustee for the
23 Certificateholders of Banc of America Funding Corporation Mortgage Pass-Through
24 Certificates, Series 2006-H's Motion to Remand, ("MTN to Remand," ECF No. 5). Also
25 before the Court is Defendants' Opposition, ("Remand Opp'n," ECF No. 11), and
26 Plaintiff's Reply in Support of, ("Remand Reply," ECF No. 12), its Motion to Remand.
27 Additionally, Plaintiff filed a Response in Opposition to, (ECF No. 9), and Defendants
28 filed a Reply in Support of, (ECF No. 15), the Motion to Consolidate. Defendants also

1 filed an *ex parte* motion for leave to file a sur reply. (ECF No. 17.) The Court took these
2 motions under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1).
3 (ECF No. 13.) Having considered the parties’ arguments and the law, the Court **GRANTS**
4 Plaintiff’s Motion to Remand, (ECF No. 6); **REMANDS** this action to the Superior Court
5 of California, County of San Diego, (ECF No. 1); and **DENIES AS MOOT** Defendants’
6 Motion to Consolidate, (ECF No. 3) and Defendants’ *ex parte* motion for leave to file a sur
7 reply, (ECF No. 17).

8 **BACKGROUND**

9 Plaintiff filed its Complaint for unlawful detainer in the Superior Court of California,
10 County of San Diego on June 15, 2015. (Ex. B, ECF No. 1-3.) On July 27, 2015,
11 Defendants filed their Answer asserting as an affirmative defense that the foreclosure sale
12 was void. (Ex. C, ECF No. 1-4.) On February 7, 2018, Defendants filed a Notice of
13 Removal. (ECF No. 1.)

14 Defendants filed the instant Motion to Consolidate on February 2, 2016, (ECF No.
15 4), seeking to consolidate this action with *Lucore v. U.S. Bank as Trustee for the Certificate*
16 *Holders of Banc of America Funding Corporation Mortgage Pass-Through Certificates*
17 *Series 2006-H*, No. 15-CV-2246 JLS (MDD), and *Lucore v. Michael D. Zeff et al.*, No. 15-
18 CV-910 JLS (MDD). Pursuant to the low number rule, this action was reassigned to this
19 Court from Judge Anthony J. Battaglia on February 14, 2016. (ECF No. 5.) Then, Plaintiff
20 filed the instant Motion to Remand on February 15, 2018, (ECF No. 6).

21 **LEGAL STANDARD**

22 In cases “brought in a State court of which the district courts of the United States
23 have original jurisdiction,” defendants may remove the action to federal court. 28 U.S.C.
24 § 1441(a). Section 1441 provides two bases for removal: diversity jurisdiction and subject-
25 matter jurisdiction. Federal courts have diversity jurisdiction “where the amount in
26 controversy” exceeds \$75,000, and the parties are of “diverse” state citizenship. 28 U.S.C.
27 § 1332. Federal courts have federal question jurisdiction over “all civil actions arising
28 under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

1 The party invoking the removal statute bears the burden of establishing that federal
2 subject-matter jurisdiction exists. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th
3 Cir. 1988). Moreover, courts “strictly construe the removal statute against removal
4 jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Boggs v. Lewis*,
5 863 F.2d 662, 663 (9th Cir. 1988); and *Takeda v. Nw. Nat’l Life Ins. Co.*, 765 F.2d 815,
6 818 (9th Cir. 1985)). Therefore, “[f]ederal jurisdiction must be rejected if there is any
7 doubt as to the right of removal in the first instance.” *Id.* (citing *Libhart v. Santa Monica*
8 *Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979)).

9 ANALYSIS

10 Plaintiff seeks remand to state court because the Court lacks subject matter
11 jurisdiction. (MTN to Remand 6.)¹ Plaintiff contends that it filed a limited civil case in
12 state court that did not exceed \$10,000. (*Id.* (citing ECF No. 1-3, at 2).) Therefore, the
13 amount in controversy does not exceed \$75,000, as required for diversity jurisdiction. (*Id.*)
14 Additionally, Plaintiff argues that there is no federal question on the face of Defendants’
15 state court complaint and therefore this Court has no federal question jurisdiction. (*Id.*)

16 Defendants respond by recounting the lengthy procedural history between the two
17 parties. (*See* Remand Opp’n 2–11.) This history includes purported notices of rescission,
18 bankruptcy stays, Plaintiff attempting to enforce unlawful detainers against Defendants,
19 alleged fraud by a notary public, a complaint filed with the Consumer Financial Protection
20 Bureau, and violations of the Fair Debt Collection Practices Act and the Rosenthal Fair
21 Debt Collection Practices Act. (*See id.*) Defendants conclude by arguing that this Court
22 should retain jurisdiction based on the “complex Federal issues plead [sic] in this document
23 because they are better litigated in and under Federal Jurisdiction.” (*Id.* at 12.) Defendants
24 finally argue that Plaintiff has no standing or interest in the mortgage to file a motion to
25 remand because the mortgage on Defendants’ property was void. (*Id.*)

26
27
28 ¹ Pin citations to docketed materials refer to the CM/ECF page numbers electronically stamped at the top
of each page.

1 Plaintiff replies by arguing that Defendants’ time limit to remove this case from state
2 court has long since lapsed. (Remand Reply 2.) 28 U.S.C. § 1446(b)(1) requires notice of
3 removal to be filed within 30 days after receipt by defendant of a copy of the initial
4 pleading. Plaintiff points out that Defendants filed their answer on July 27, 2015, over
5 three years ago.

6 This is not the first time Defendants have removed this particular action from state
7 court. Two years ago, this Court addressed this exact same issue, in the exact same case.
8 On January 28, 2016, Defendants removed the present state court unlawful detainer action
9 to the Southern District of California. (*See* No. 16-CV-226 JLS (MDD), ECF No. 1.)
10 Plaintiff filed a motion to remand, which this Court granted because Defendants’ Notice of
11 Removal was untimely. (*See* No. 16-CV-226 JLS (MDD), ECF No. 20.) The issue here
12 is, once again, timeliness of removal.

13 Under section 1446(b) of title 28 of the United States Code, there are two thirty-day
14 windows within which a case can be removed. *Reyes v. Dollar Tree Stores, Inc.*, 781 F.3d
15 1185, 1189 (9th Cir. 2015). First, a defendant has thirty days to remove after receiving an
16 initial complaint that is removable. 28 U.S.C. § 1446(b)(1). If the initial complaint is not
17 removable, another thirty-day removal window begins after receipt of the first document
18 from which it can be ascertained that the case is removable. 28 U.S.C. § 1446(b)(3). The
19 second removal window is triggered by the occurrence of an event that first discloses that
20 the case is or was removable. *See Reyes*, 781 F.3d at 1189. Furthermore, “[a] case may
21 not be removed under subsection (b)(3) on the basis of [diversity] jurisdiction . . . more
22 than 1 year after commencement of the action.” 28 U.S.C. § 1446(c)(1).

23 Here, Plaintiff filed its complaint in state court on June 15, 2015, (Ex. B, ECF No.
24 1-3), and Defendants answered on July 27, 2015, (Ex. C, ECF No. 1-4). Defendants did
25 not file their Notice of Removal until February 7, 2018—nearing three years since the filing
26 of Plaintiff’s state court complaint. (ECF No. 1.) Defendants’ first thirty-day window in
27 which to remove closed in July 2015—long before Defendants filed their Notice of
28 Removal on February 7, 2018. *See* 28 U.S.C. § 1446(b)(1). Further, Defendants do not

1 claim that they received “an amended pleading, motion, order or other paper from which it
2 may first be ascertained that the case is one which is or has become removable” within the
3 thirty days before filing their Notice of Removal. *See* 28 U.S.C. § 1446(b)(3). Nor does it
4 appear from the record that an amended pleading, motion, order or other paper was filed
5 thirty days preceding the notice of removal. Instead, it appears that this case was rapidly
6 proceeding to trial in state court. (*See* MTN to Remand 4.)

7 Finally, section 1446(c)(1) bars removal of a case, based on diversity jurisdiction,
8 more than one year after commencement of the action. Defendants’ Notice of Removal
9 argues this Court has subject matter jurisdiction based on complete diversity of citizenship
10 and the amount in controversy.² (*See* ECF No. 1, at 3.) As this case would be governed
11 under the Court’s diversity jurisdiction, the one year removal window closed June 15,
12 2016. *See* 28 U.S.C. § 1446(c)(1). The time to remove this case has long since passed.

13 The burden of proof is on the party invoking the removal statute. *Emrich*, 846 F.2d
14 at 1195. Defendants do not address the timeliness issue in their Opposition brief. (*See*
15 Remand Opp’n.) Defendants have not carried their burden; this case was not removable in
16 2016 and they have not demonstrated this case is removable in 2018. Accordingly,
17 Defendants “lost their opportunity to remove the case when they failed to file a petition for
18 removal within thirty days of the filing of the original complaint.” *Cantrell v. Great*
19 *Republic Ins. Co.*, 873 F.2d 1249, 1256 (9th Cir. 1989) (citing *Clorox Co. v. U.S. Dist. Ct.*
20 *for N. Dist. of Cal.*, 779 F.2d 517, 521 (9th Cir. 1985)). The Court therefore **GRANTS**
21 Plaintiff’s Motion to Remand, (ECF No. 6), and **REMANDS** this action to the Superior
22 Court of California, County of San Diego, (ECF No. 1). Because the Court grants
23 Plaintiff’s Motion to Remand, the Court **DENIES AS MOOT** Defendants’ Motion to
24

25
26 ² In their Opposition brief, Defendants argue that this case should not be remanded because there are
27 complex federal issues. (Remand Opp’n 12.) A court evaluates federal question jurisdiction based on the
28 existence of a federal question presented on the face of a plaintiff’s properly pleaded complaint.
Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (citing *Gully v. First Nat’l Bank*, 299 U.S. 109,
112–13 (1936)). Here, Plaintiff’s complaint only raises an unlawful detainer issue arising under California
law. (*See* ECF No. 1-3.) There is no federal question jurisdiction.

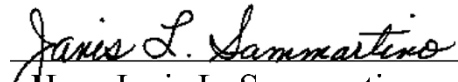
1 Consolidate, (ECF No. 3).

2 **CONCLUSION**

3 In light of the foregoing, the Court **GRANTS** Plaintiff's Motion to Remand, (ECF
4 No. 6); **REMANDS** this action to the Superior Court of California, County of San Diego,
5 (ECF No. 1); and **DENIES AS MOOT** Defendants' Motion to Consolidate, (ECF No. 3),
6 and Defendants' *ex parte* Motion to file a Sur Reply, (ECF No. 17).

7 **IT IS SO ORDERED.**

8 Dated: May 14, 2018


9 Hon. Janis L. Sammartino
10 United States District Judge

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28