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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MARCOS MODIANO and PREPANGO
12 LLC,

13 Plaintiffs,

14 v.

15 BMW OF NORTH AMERICA LLC;
16 DOES 1 to 10,

17 Defendants.
18

Case No.: 21-cv-00040-DMS-MDD

**ORDER DENYING MOTION TO
REMAND**

19 Pending before the Court is Plaintiffs Marcos Modiano (“Modiano”) and Prepango,
20 LLC’s (“Prepango”) motion to remand this action to the Superior Court of California.
21 Defendant BMW of North America, LLC (“BMW”) filed an opposition, and Plaintiffs filed
22 a reply. For the reasons set forth below, the Court denies the motion.

23 **I.**

24 **BACKGROUND**

25 This action arises from Plaintiffs’ lease of an allegedly defective 2019 BMW
26 vehicle. On December 7, 2020, Plaintiffs filed a Complaint against Defendant BMW in the
27 Superior Court of California, County of San Diego, alleging claims for violation of the
28 Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790 *et seq.*, and violation of

1 California Business and Professions Code § 17200. On January 8, 2021, BMW removed
2 the action to this Court based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.
3 Specifically, BMW contends complete diversity exists between the parties because
4 Plaintiffs are citizens of California and BMW is a citizen of Delaware and New Jersey, and
5 the amount in controversy exceeds \$75,000. On February 5, 2021, Plaintiffs filed the
6 present motion to remand the action to state court for lack of subject matter jurisdiction.

7 II.

8 LEGAL STANDARD

9 Federal courts are courts of limited jurisdiction, having subject matter jurisdiction
10 only over matters authorized by the Constitution and Congress. *See Kokkonen v. Guardian*
11 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A defendant may remove a civil action
12 from state court to federal court only if the district court could have original jurisdiction
13 over the matter. 28 U.S.C. § 1441(a). A removed action must be remanded to state court
14 if the federal court lacks subject matter jurisdiction. *See* 28 U.S.C. § 1447(c); *Kelton Arms*
15 *Condo. Owners Ass’n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003)
16 (“Subject matter jurisdiction may not be waived, and, . . . the district court must remand if
17 it lacks jurisdiction.”). “The burden of establishing federal jurisdiction is on the party
18 seeking removal[.]” *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir.
19 1999). The Ninth Circuit has directed courts to “strictly construe the removal statute against
20 removal jurisdiction,” so that “any doubt as to the right of removal” is resolved in favor of
21 remanding the case to state court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

22 Under 28 U.S.C. § 1441, a defendant may remove an action from state court to
23 federal court on the basis of diversity jurisdiction if “none of the parties in interest properly
24 joined and served as defendants is a citizen of the State in which such action is brought.”
25 Where removal is based on diversity, there must be “complete diversity” between the
26 parties and the amount in controversy requirement of \$75,000 must be met. 28 U.S.C.
27 § 1332(a). The party asserting diversity jurisdiction bears the burden of proof. *Emrich v.*
28

1 *Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988); *Lew v. Moss*, 797 F.2d 747, 749
2 (9th Cir. 1986).

3 III.

4 DISCUSSION

5 Plaintiffs challenge Defendant's removal, arguing the Court lacks subject matter
6 jurisdiction in this matter because diversity jurisdiction does not exist. Specifically,
7 Plaintiff contends Defendant has not met either its burden of proving complete diversity
8 exists between the parties or its burden of proving the amount in controversy exceeds
9 \$75,000.

10 A. Diversity

11 Plaintiffs contend BMW has not met its burden to show complete diversity of
12 citizenship between the parties, arguing BMW has failed to establish Plaintiffs' citizenship.

13 For a court to have diversity jurisdiction under 28 U.S.C. § 1332(a), the citizenship
14 of each plaintiff must be diverse from the citizenship of each defendant. *Caterpillar Inc.*
15 *v. Lewis*, 519 U.S. 61, 68 (1996). In support of its opposition to Plaintiffs' motion to
16 remand, BMW submits the declaration of Robert K. Dixon ("Dixon Declaration") as
17 evidence of the parties' citizenship. (ECF No. 14-1.) Plaintiffs object to several assertions
18 therein and to three exhibits: a lease agreement between Prepango and BMW dated April
19 20, 2019 (the "Lease Agreement"), Prepango's Statement of Information filed with the
20 California Secretary of State filed January 27, 2020 (the "Statement of Information"), and
21 Prepango's application for registration with the California Secretary of State, filed January
22 7, 2010 (the "Application for Registration"). (*See* Exs. 1, 2, 4 to Dixon Decl.) Plaintiffs
23 argue this evidence is unauthenticated, lacks foundation, and is inadmissible hearsay. (Pls.'
24 Reply, ECF No. 15 at 3–4; Pls.' Objections to Evidence, ECF No. 15-1, at 1–2.)

25 Plaintiffs' objections are overruled. Dixon declares under penalty of perjury that he
26 has personal knowledge of the facts contained in his declaration and that the attached
27 exhibits are true and correct copies. (Dixon Decl. ¶ 1.) The Lease Agreement is a contract,
28 signed by both parties, and is therefore not hearsay. *See United States v. Pang*, 362 F.3d

1 1187, 1192 (9th Cir. 2004) (evidence of legally operative verbal conduct is not hearsay).
2 With respect to the California Secretary of State records, Dixon states he obtained copies
3 of the Statement of Information and the Application for Registration from the Secretary of
4 State’s website on January 6, 2021. (Dixon Decl. ¶ 2.) These records were filed on the
5 Secretary of State’s website and are readily available there. “[B]ecause the record is
6 generated by an official government website[,] its accuracy is not reasonably in dispute.”
7 *Bleakley v. Birdcage Shopping Ctr.*, No. CIV210332WBSEFB, 2010 WL 11700698, at *2
8 (E.D. Cal. Apr. 13, 2010) (finding record from California Secretary of State website
9 admissible as evidence of citizenship in deciding motion to remand). These documents are
10 of the type that the Court may judicially notice under Federal Rule of Evidence 201(b).
11 Even if these documents were hearsay, the Court will consider them here because their
12 contents could be submitted in an admissible form at trial. *See JL Beverage Co., LLC v.*
13 *Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016) (stating that, at summary
14 judgment, “a district court may consider hearsay evidence submitted in an inadmissible
15 form, so long as the underlying evidence could be provided in an admissible form at trial”).

16 The Court finds BMW has met its burden to establish complete diversity of
17 citizenship. The evidence shows both Modiano and Prepango are citizens of California.
18 For purposes of diversity jurisdiction, a limited liability corporation “is a citizen of every
19 state of which its owners/members are citizens.” *Johnson v. Columbia Properties*
20 *Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). Prepango’s Statement of Information
21 lists Marcos Modiano as the sole manager or member and provides a Chula Vista,
22 California address for Modiano. (Ex. 1 to Dixon Decl.) The Lease Agreement between
23 Prepango and BMW also lists a California address for Modiano. (Ex. 4 to Dixon Decl.)
24 Modiano is listed as Prepango’s agent for service of process on Prepango’s Application for
25 Registration, which form states: “If the agent is an individual, the agent must reside in
26 California.” (Ex. 2 to Dixon Decl.) There is no evidence that Prepango has any other
27 members besides Modiano or that any member resides outside of California. Nor do
28 Plaintiffs submit evidence that Modiano is a citizen of any other state.

1 BMW's evidence indicates both Plaintiff Modiano and Plaintiff Prepango are
2 citizens of California, and Plaintiffs submit no evidence to the contrary. BMW further
3 avers it is a citizen of Delaware and New Jersey.¹ (Dixon Decl. ¶ 3.) BMW has therefore
4 met its burden to show Plaintiffs and BMW are citizens of different states. *See Kalasho v.*
5 *BMW of N. Am., LLC*, No. 20-CV-1423-CAB-AHG, 2020 WL 5652275, at *2 (S.D. Cal.
6 Sept. 23, 2020) (finding diversity jurisdiction satisfied where unrebutted evidence
7 demonstrated plaintiffs resided in California, because "a person's residence is prima facie
8 evidence of domicile and citizenship") (citing *Lee v. BMW of N. Am., LLC*, No.
9 SACV1901722JVSADXS, 2019 WL 6838911, at *2 (C.D. Cal. Dec. 16, 2019)).
10 Accordingly, complete diversity exists between the parties, satisfying this element of
11 diversity jurisdiction.

12 **B. Amount in Controversy**

13 Next, Plaintiffs argue BMW has not met its burden to show the amount in
14 controversy exceeds \$75,000.

15 "The amount in controversy is simply an estimate of the total amount in dispute, not
16 a prospective assessment of defendant's liability." *Arias v. Residence Inn by Marriott*, 936
17 F.3d 920, 927 (9th Cir. 2019) (quoting *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d 395,
18 400 (9th Cir. 2010). "In determining the amount in controversy, the Court accepts the
19 allegations contained in the complaint as true and assumes the jury will return a verdict in
20 the plaintiff's favor on every claim." *Henry v. Cent. Freight Lines, Inc.*, 692 F. App'x 806,
21 807 (9th Cir. 2017).

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25 ¹ Although Plaintiffs object generally to the citizenship assertions in paragraph 3 of the
26 Dixon Declaration, they do not object to Exhibit 3 to the Dixon Declaration, a record which
27 indicates BMW's sole corporate member is organized under Delaware law with its
28 principal place of business in New Jersey. (Ex. 3 to Dixon Decl.; *see* Pls.' Objections to
Evidence.). Nor do they raise a dispute to BMW's citizenship in their motion. (*See* Mem.
of P. & A. in Supp. of Pls.' Mot. to Remand, ECF No. 11, at 11–12.)

1 Plaintiffs' Complaint alleges damages of "not less than \$25,000.00." (Compl., ECF
2 No. 1-4, ¶ 9.) The Song-Beverly Act permits a plaintiff to recover a civil penalty of up to
3 two times the amount of damages if the defendant's failure to comply with the Act was
4 willful. Cal. Civ. Code § 1794(e). Plaintiffs allege "willful" failure to comply with the
5 Song-Beverly Act. (Compl. ¶¶ 10, 17.) Accordingly, Plaintiffs seek relief including actual
6 damages, "a civil penalty in the amount of two times Plaintiff[s'] actual damages," costs
7 and attorneys' fees. (Compl., Prayer for Relief.)

8 Plaintiffs argue that civil penalties should not be included in the amount in
9 controversy calculation. Some courts in this District have imposed a higher standard for
10 defendants seeking to include civil penalties in the amount in controversy. *See, e.g., Millan*
11 *v. FCA US LLC*, No. 20CV328 JM (MDD), 2020 WL 3604132, at *2 (S.D. Cal. July 2,
12 2020) ("Courts in this district have found that bare allegations that civil penalties are
13 available in Song-Beverly Act cases are insufficient to establish the requisite amount in
14 controversy."); *Ronquillo v. BMW of N. Am., LLC*, No. 3:20-CV-1413-W-WVG, 2020 WL
15 6741317, at *3 (S.D. Cal. Nov. 17, 2020) ("Rather than simply assuming that because a
16 civil penalty is available, one will be awarded, the defendant must make some effort to
17 justify the assumption by, for example, pointing to allegations in the Complaint suggesting
18 such an award would be appropriate.").

19 However, this Court and others in this District have previously included Song-
20 Beverly civil penalties in the amount in controversy calculation. *See, e.g., Khan v. Jaguar*
21 *Land Rover N. Am., LLC*, No. 18-CV-0389 DMS (WVG), 2018 WL 7286509, at *2 (S.D.
22 Cal. Apr. 11, 2018) (including civil penalties in amount in controversy); *Luna v. BMW of*
23 *N. Am., LLC*, No. 317CV02067BENKSC, 2018 WL 2328365, at *4 (S.D. Cal. May 22,
24 2018) (finding amount in controversy satisfied by combining actual damages with civil
25 penalties authorized by Song-Beverly Act); *Kalasho*, 2020 WL 5652275, at *2 (S.D. Cal.
26 Sept. 23, 2020) ("[E]ven using the minimum amount of damages alleged in the complaint,
27 the \$75,000 minimum for diversity jurisdiction is satisfied when accounting for civil
28 penalties and the attorney's fees[.]"); *Ferrer v. FCA US LLC*, No. 17-CV-0530-AJB-BGS,

1 2017 WL 2875692, at *3 (S.D. Cal. July 6, 2017) (finding Song-Beverly civil penalties
2 included in amount in controversy and stating “[c]ourts[,] as a matter of law, calculate the
3 amount in controversy based upon the maximum amount of civil penalties available to
4 plaintiff”) (citation omitted).

5 The Court finds the inclusion of the maximum civil penalty in the amount in
6 controversy is appropriate here. Plaintiffs allege willfulness giving rise to penalties under
7 the Song-Beverly Act, and the Court accepts Plaintiffs’ allegations as true and assumes
8 Plaintiffs will prevail on each of their claims. The amount in controversy is an estimate of
9 the total amount in dispute, rather than a prospective assessment of defendant’s liability.
10 *Arias*, 936 F.3d at 927. The Court declines to require defendants to justify civil penalties
11 by arguing their own conduct was willful.

12 Plaintiffs nevertheless contend their recovery may be less than \$75,000. Based on
13 the Lease Agreement, BMW calculates Plaintiffs’ actual damages to be \$47,460.20, which
14 is an “approximate estimate of statutory repurchase” taking into consideration a mileage
15 offset of \$1,629.63. (Defs.’ Opp’n to Pls.’ Mot. to Remand, ECF No. 14, at 12; Dixon
16 Decl. ¶ 6.) Thus, based on BMW’s estimate of Plaintiffs’ actual damages, Plaintiffs may
17 receive up to \$94,920.40 in civil penalties. (Dixon Decl. ¶ 5.) Plaintiffs argue these
18 amounts are speculative and that a jury may award a lesser amount of damages.

19 An assertion that the amount in controversy exceeds the jurisdictional threshold of
20 \$75,000 “is not defeated merely because it is equally possible that damages might be “less
21 than the requisite . . . amount.” *Arias*, 936 F.3d at 927. Indeed, Plaintiffs here do not
22 declare or stipulate they are seeking less than \$75,000, but rather merely argue that they
23 may ultimately recover less than \$75,000. Nor do Plaintiffs submit any evidence to rebut
24 BMW’s allegations that actual damages are approximately \$47,460.20.

25 The Court finds the amount in controversy requirement is met. BMW’s evidence
26 indicates the amount in controversy, combining actual damages and civil penalties, is
27 \$142,380.60, well over the jurisdictional minimum. Even crediting Plaintiffs’ argument
28 that actual damages may be less than \$47,460.20, the allegations in Plaintiffs’ Complaint

1 are sufficient to satisfy the amount in controversy requirement for diversity jurisdiction.
 2 Plaintiffs seek a minimum of \$25,000 in actual damages, which would lead to an additional
 3 \$50,000 in civil penalties under the Song-Beverly Act, for a combined \$75,000. Plaintiffs
 4 further declare an amount of pre-removal attorneys’ fees “under \$9,000.” (Mem. of P. &
 5 A. in Supp. of Pls.’ Mot. to Remand 12; Declaration of Julian D. Lopez in Supp. of Pls.’
 6 Mot. to Remand, ECF No. 11-2, ¶ 3.) Plaintiffs contend attorneys’ fees should not count
 7 toward the amount in controversy, but per Ninth Circuit precedent, attorneys’ fees may be
 8 included in the amount in controversy if the underlying statute authorizes such an award.
 9 *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). The Song-Beverly Act
 10 permits a prevailing plaintiff to recover attorneys’ fees. Cal. Civ Code § 1794(d). Any
 11 amount of pre-removal attorneys’ fees under \$9,000 here thus brings the combined total
 12 amount in controversy above the \$75,000 jurisdictional minimum.²

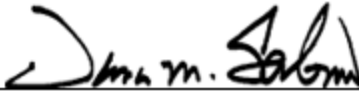
13 Here, BMW has met its burden to show there is complete diversity of citizenship
 14 between the parties and the amount in controversy exceeds \$75,000. The Court therefore
 15 has subject matter jurisdiction over the matter pursuant to 28 U.S.C. § 1332. Accordingly,
 16 Plaintiff’s motion to remand is denied.

17 **IV.**
 18 **CONCLUSION AND ORDER**

19 For the reasons set out above, Plaintiff’s motion to remand is DENIED.

20 **IT IS SO ORDERED.**

21 Dated: March 16, 2021

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 23 _____
 24 Hon. Dana M. Sabraw, Chief Judge
 25 United States District Court
 26

27 ² The Court need not address inclusion of post-removal attorneys’ fees in the amount in
 28 controversy because the combination of damages, civil penalties, and pre-removal
 attorneys’ fees sought here is sufficient to surpass the amount in controversy threshold.