

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 FANTASTIC INDOOR SWAP MEET, INC., )

4 )  
5 Third-Party Plaintiff, )

6 vs. )

7 NATIONWIDE MUTUAL INSURANCE )

8 COMPANY; )

9 Third-Party Defendant. )

Case No.: 2:16-cv-02292-GMN-CWH

ORDER

10 Pending before the Court is the Motion to Remand, (ECF No. 8), filed by Third-Party  
11 Plaintiff Fantastic Indoor Swap Meet, Inc. (“Fantastic”). Third-Party Defendant Nationwide  
12 Mutual Insurance Company (“Nationwide”) filed a Response, (ECF No. 16), and Fantastic filed  
13 a Reply, (ECF No. 21). For the reasons set forth herein, Fantastic’s Motion to Remand is  
14 **GRANTED.**

15 **I. BACKGROUND**

16 On July 9, 2012, a fire sprinkler leaked inside the property located at 1717 S. Decatur  
17 Boulevard, Las Vegas, NV 89102, causing water damage to the property. (Nationwide’s Resp.  
18 3:13–16, ECF No. 16). As a lessee of the property, Fantastic was responsible for repairing and  
19 maintaining the land and building. (Mot. to Remand 4:2–6, ECF No. 8).

20 On February 27, 2014, Nieves Electric, LLC (“Nieves”)—a subcontractor who had  
21 performed repairs on the property following the incident—filed an action in state court against  
22 the general contractor (“Desert Valley”) and the property owners (“Mortimers”), asserting that  
23 the parties failed to fully compensate Nieves for the repair work. (See State Court Compl., Ex.  
24 1 to Nationwide’s Resp., ECF No. 17-1). On July 29, 2016, Desert Valley filed a similar third-  
25 party complaint against Fantastic, alleging that Fantastic failed to fully compensate Desert

1 Valley for its portion of the repair work. (See Desert Valley Compl, Ex. 10 to Nationwide’s  
2 Resp., ECF No. 17-10).

3         Thereafter, Fantastic filed the instant Third-Party Complaint against Nationwide,  
4 asserting multiple claims related to the parties’ insurance agreement and Nationwide’s  
5 purported failure to pay for repairs under the policy. (See Third-Party Compl., Ex. A to Pet. of  
6 Removal, ECF No. 1). On September 29, 2016, Nationwide removed Fantastic’s Third-Party  
7 Complaint to federal court based on 28 U.S.C. § 1441(b) and 28 U.S.C. § 1332. (Pet. of  
8 Removal).

9 **II. LEGAL STANDARD**

10         Federal courts are courts of limited jurisdiction, possessing only those powers granted by  
11 the Constitution and by statute. See *United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008).  
12 “If at any time before final judgment it appears that the district court lacks subject matter  
13 jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). Removal statutes are strictly  
14 construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).  
15 “Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first  
16 instance.” *Id.* (citing *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979)).  
17 In evaluating diversity jurisdiction, the defendant has the burden of overcoming the “strong  
18 presumption” against removal. *Gaus*, 980 F.2d at 566.

19         Pursuant to 28 U.S.C. § 1332, a federal district court has original jurisdiction over all  
20 civil actions between citizens of different states where the amount in controversy exceeds  
21 \$75,000. See 28 U.S.C. § 1332(a)(1). “Where it is not facially evident from the complaint that  
22 more than \$75,000 is in controversy, the removing party must prove, by a preponderance of the  
23 evidence, that the amount in controversy meets the jurisdictional threshold.” *Matheson v.*  
24 *Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). Section 1332 requires  
25 complete diversity among the parties; each of the plaintiffs must be a citizen of a different state

1 than each of the defendants. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir.  
2 2001).

### 3 **III. DISCUSSION**

4 The primary issue before the Court is whether Nationwide, as a third-party defendant,  
5 has the right to remove this matter in the first place.<sup>1</sup> An action filed in state court may be  
6 removed to federal court if the federal court would have had original subject matter jurisdiction  
7 over the action. See 28 U.S.C. § 1441(a). Here, Nationwide removed only Fantastic’s Third-  
8 Party Complaint from the underlying state court action, rather than the action as a whole. (See  
9 Pet. of Removal). Since Nationwide did not remove the actual “action” from state court, the  
10 Court finds that Nationwide has failed to demonstrate proper removal in accordance with §  
11 1441(a). See *Yuki v. Chevron Corp.*, No. 2:12-cv-01428-GEB, 2012 WL 3000643, at \*1 (E.D.  
12 Cal. July 23, 2012).

13 Even if Nationwide had removed the entire action, the Court still finds that Nationwide  
14 did not have the authority to perfect such removal. Only “true” defendants—as opposed to  
15 cross-defendants, counter-defendants, or third-party defendants—have the right to remove an  
16 action from state to federal court. See *Fed. Nat’l Mortg. Ass’n v. Barbuti*, No. 2:12-cv-101,  
17 2012 WL 1378648, at \*2 (D. Nev. Apr. 20, 2012) (citing *Shamrock Oil & Gas Corp. v. Sheets*,  
18 313 U.S. 100, 104–05 (1941)); see also *Westwood Apex v. Contreras*, 644 F.3d 799, 805 (9th  
19 Cir. 2011) (citing “the longstanding rule that a party who is joined to such an action as a  
20 defendant to a counterclaim or as a third-party defendant may not remove the case to federal  
21 court.”); *First Nat’l Bank of Pulaski v. Curry*, 301 F.3d 456, 461 (6th Cir. 2002) (“The majority  
22 view is that third-party defendants are not ‘defendants’ for purposes of § 1441(a).”).

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25 <sup>1</sup> Neither party addresses the authority of third-party defendants to remove to federal court. Nonetheless, the Court is under a continuing duty to determine subject matter jurisdiction over the action and therefore considers the issue. See Fed. R. Civ. P. 12(h)(3); 28 U.S.C. § 1447(c).

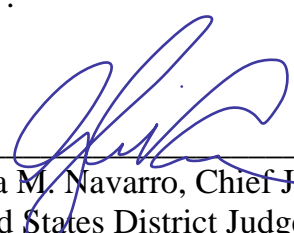
1 As Nationwide is not a “true” defendant in the underlying case, the Court finds that §  
2 1441(a) does not furnish a basis for Nationwide to have removed this action.

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Fantastic’s Motion to Remand, (ECF No. 8), is  
5 **GRANTED.**

6 **IT IS FURTHER ORDERED** that this case is remanded back to Clark County District  
7 Court. The Clerk is instructed to close the case.

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9 **DATED** this 12 day of September, 2017.

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13 Gloria M. Navarro, Chief Judge  
14 United States District Judge  
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