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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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10 SMS VanKirk, L.L.C.,

11 Plaintiff,

12 vs.

13 John Craig Vankirk, et ux.,

14 Defendants.

No. CV 06-3013-PHX-PGR

ORDER

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16 The defendants removed this action on December 14, 2006 solely on the
17 basis of diversity of citizenship jurisdiction. Having reviewed the defendants'
18 Notice of Removal to determine if subject matter jurisdiction exists in this Court,
19 the Court finds that the Notice of Removal is facially deficient because it fails to
20 properly allege the existence of diversity of citizenship jurisdiction.

21 As the Supreme Court has long since, and repeatedly, made clear,
22 [t]he established rule is that a plaintiff [or removing defendant], suing
23 in federal court, must show in his pleading, affirmatively and
24 distinctly, the existence of whatever is essential to federal
25 jurisdiction, and, if he does not do so, the court, on having the defect
called to its attention or on discovering the same, must dismiss [or
remand] the case, unless the defect be corrected by amendment.

26 Smith v. McCullough, 270 U.S. 456, 459, 46 S.Ct. 338, 339 (1926); accord, Rilling
27 v. Burlington Northern Railroad Co., 909 F.2d 399, 400 (9th Cir. 1990). The
28 defendants have not met their jurisdictional pleading burden because the Notice

1 of Removal fails to affirmatively set forth the facts necessary for the Court to
2 determine the citizenship of any party.

3 First, the citizenship of the plaintiff cannot be determined from the current
4 record inasmuch as the Notice of Removal inexplicably contains no affirmative
5 allegations concerning the plaintiff's citizenship and the complaint merely states
6 that the plaintiff is an Arizona limited liability company with its principal place of
7 business in Phoenix, Arizona. This latter allegation is insufficient as a matter of
8 law because a limited liability company is not treated as a corporation for purposes of
9 determining whether diversity exists for purposes of § 1332. Johnson v. Columbia
10 Properties Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) ("Notwithstanding LLCs'
11 corporate traits, ... every circuit that has addressed the question treats them like
12 partnerships for the purposes of diversity jurisdiction. ... We therefore join our sister
13 circuits and hold that, like a partnership, an LLC is a citizen of every state of which its
14 owners/members are citizens.") What is thus required in the Notice of Removal is an
15 affirmative allegation of the citizenship of each member of the defendant limited liability
16 company.

17 Second, the citizenship of the defendants is not properly alleged in the
18 Notice of Removal, and their citizenship is not apparent from the face of the
19 complaint, inasmuch as the defendants are merely alleged in both pleadings to
20 be residents of Kerr County, Texas. Such an allegation of residency is insufficient
21 as a matter of law under 28 U.S.C. § 1332 because, as the Supreme Court has
22 also repeatedly made clear,

23 [i]t has long been settled that residence and citizenship [are] wholly
24 different things within the meaning of the Constitution and the laws
25 defining and regulating the jurisdiction of the ... courts of the United
26 States; and that a mere averment of residence in a particular state is
not an averment of citizenship in that state for the purpose of
jurisdiction.

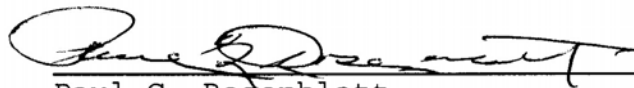
27 Steigleder v. McQuesten, 198 U.S. 141, 143, 25 S.Ct. 616, 617 (1905); cf.,
28 Kanter v. Warner-Lambert Co., 265 F.3d 853, 857-58 (9th Cir. 2001) (Plaintiffs'

1 complaint ... state[s] that Plaintiffs were 'residents' of California. But the diversity
2 jurisdiction statute, 28 U.S.C. § 1332, speaks of citizenship, not of residency. ...
3 [The] failure to specify Plaintiffs' state of citizenship was fatal to [the] assertion of
4 diversity jurisdiction.")

5 In order to cure these pleading deficiencies, the Court will require the defendants
6 to file an amended notice of removal that affirmatively states the citizenship of each
7 member of the plaintiff and the citizenship of each defendant. The defendants are
8 advised that their failure to timely comply with this order shall result in the remand of this
9 action without further notice for lack of subject matter jurisdiction. Therefore,

10 IT IS ORDERED that the defendants shall file an amended notice of removal
11 properly stating a jurisdictional basis for this action no later than **January 2, 2007**.

12 DATED this 18th day of December, 2006.

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16 Paul G. Rosenblatt
17 United States District Judge
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