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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 IOW LLC; and When Enterprises
10 Corporation,

11 Plaintiffs,

12 v.

13 Michael Breus and Lauren Breus, husband
and wife,

14 Defendants.
15

No. CV-18-01649-PHX-DGC

ORDER

16 This case was removed from Maricopa County Superior Court on May 31, 2018,
17 by former defendants Hachette Book Group Incorporated and Little, Brown and
18 Company (collectively, the “Hachette Defendants”) with the consent of the remaining
19 defendants Michael and Lauren Breus (collectively, the “Breus Defendants”). Doc. 1.
20 On August 1, 2018, the Hachette Defendants were dismissed by stipulation. Doc. 28.
21 Plaintiffs now move to remand this case back to state court. Doc. 34. The Breus
22 Defendants oppose the motion. Doc. 36. Because Plaintiffs cite no authority for remand
23 under these circumstances, the Court will deny the motion.

24 **I. Background.**

25 Plaintiff IOW originally filed suit against only the Breus Defendants in state court
26 in December 2016. See Doc. 1-2; *IOW, LLC v. Breus*, No. CV2016-010236 (Maricopa
27 Cty. Superior Ct. Dec. 21, 2016). In February 2018, based on facts uncovered during
28 discovery, IOW sought leave to amend its complaint to add the Hachette Defendants and

1 Plaintiff When Enterprises Corporation. Doc. 1-3 at 279-85. The state court granted the
2 motion, and the amended complaint was filed May 7, 2018. Doc. 1-4 at 72-86.

3 On May 31, 2018, the Hachette Defendants filed a notice of removal. Doc. 1. The
4 notice states that removal is based on federal question jurisdiction, 28 U.S.C. § 1331,
5 because Plaintiffs’ amended complaint asserts a claim under the Lanham Act, 15 U.S.C.
6 § 1051 et seq. *Id.* at 3. The notice further asserts that the Court has jurisdiction over the
7 state-law unfair competition claim pursuant to 28 U.S.C. §§ 1338(b), 1367(a). *Id.* The
8 notice does not specifically address the additional state-law claims asserted solely against
9 the Breus Defendants, *see* Doc. 1-4 at 80-82 (asserting claims for breach of contract,
10 breach of the implied covenant of good faith and fair dealing, misappropriation of trade
11 secrets, and unjust enrichment), but Plaintiffs do not dispute that the Court has
12 supplemental jurisdiction over these claims.

13 **II. Discussion.**

14 Plaintiffs argue that the Court should remand this case because the Breus
15 Defendants “waived their right to remove this case, and thus can no longer avail
16 themselves of the jurisdiction of this Court now that the removing [Hachette] Defendants
17 have been dismissed.” Doc. 34 at 2. Plaintiffs stress that the Breus Defendants could
18 have removed the case based on diversity or federal question jurisdiction, but they
19 allowed the 30-day deadline to pass without removing and instead chose to litigate in
20 state court. Therefore, Plaintiffs argue, the Breus Defendants cannot benefit from the
21 Hachette Defendants’ removal now that the Hachette Defendants have been dismissed.

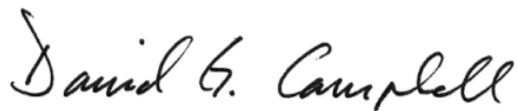
22 The Court does not agree. The Ninth Circuit has held that a party which waives its
23 right to remove a case, and yet which ends up in federal court upon removal by a newly
24 added defendant, may remain in federal court even after the removing defendant is
25 dismissed. *See Brockman v. Merabank*, 40 F.3d 1013, 1017 (9th Cir. 1994) (“Although
26 the RTC waived its right to seek removal, it did not waive its right to a federal forum.”).
27 The Fifth Circuit has reached the same conclusion. *See Buchner v. FDIC*, 981 F.2d 816,
28 819-21 (5th Cir. 1993).

1 Plaintiffs cite cases discussing the “first-served” rule, which held that once “the
2 right to removal is waived, it is generally waived for all time (and for all defendants),
3 regardless of subsequent changes in the case.” Doc. 34 at 6 (quoting *Dunn v. Gaiam,*
4 *Inc.*, 166 F. Supp. 2d 1273, 1278-79 (C.D. Cal. 2001)). As the Breus Defendants
5 correctly point out, the Ninth Circuit rejected the first-served rule in 2011, and Congress
6 amended the removal statute to reject it shortly thereafter. *See* Doc. 36 at 6-7 (citing 28
7 U.S.C. § 1446(b)(2)(C) (“If defendants are served at different times, and a later-served
8 defendant files a notice of removal, any earlier-served defendant may consent to the
9 removal even though that earlier-served defendant did not previously initiate or consent
10 to removal”); *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011) (“There is no reason
11 to lock an earlier-served defendant out of the federal forum, if he later chooses to
12 consent.”)).

13 Plaintiffs have identified no defect in removal, and they admit that the Court has
14 original subject matter jurisdiction over the case. The Court has no basis for remand.¹

15 **IT IS ORDERED** that Plaintiffs’ motion to remand (Doc. 34) is denied.

16 Dated this 31st day of August, 2018.

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20 David G. Campbell
21 Senior United States District Judge
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28 ¹ The Breus Defendants also argue that Plaintiffs waived the right to seek remand because they failed to do so within 30 days of removal. Doc. 36 at 4-5. The Court need not address this argument because it finds that remand is inappropriate.