

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZEEV COHEN, an individual,)	CASE NO.: CV 08-5404-FMC-CWx
)	
Plaintiff,)	
)	
vs.)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR REMAND AND
)	DENYING PLAINTIFF'S REQUEST
)	FOR ATTORNEY'S FEES
COLORADO ELECTRIC SUPPLY)	
LIMITED d/b/a/ City Electric Supply,)	
a British corporation; PHILIP)	Hearing Date: October 27, 2008
STURGESS, an individual; ADAM)	Time: 10:00 a.m.
MACKIE, an individual; GERALD)	
MACKIE, an individual; and DOES)	
1-10, inclusive,)	
)	
Defendants.)	

This matter is before the Court on Plaintiff's Motion for Remand of Entire Action (docket no. 21), filed on September 19, 2008. The Court has considered the moving, opposition, and reply documents submitted in connection with this motion. The Court deems the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for October 27, 2008 is hereby removed from the Court's calendar. For the reasons and in the manner set forth below, the Court hereby **GRANTS** in part and **DENIES** in part Plaintiff's Motion.

//

//

1 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 Zeev Cohen (“Plaintiff”) is a French national who was employed with the
3 Mackie Group, a network of companies of which Defendant Colorado Electric
4 Supply (“CES” or “Defendant”) is the principal company. Compl. ¶¶ 10-11. In
5 October 2004, as part of its decision to expand its United States operations into
6 California, Defendant offered Plaintiff the position of Group Manager in Los
7 Angeles. In April 2005, Plaintiff accepted the offer and moved from France to open
8 the first Mackie Group branch in California.

9 Plaintiff alleges that, during his employment, he was subjected to repeated acts
10 of discrimination and harassment by Defendant based on his national origin, race,
11 and age. When he complained to Defendant of such discrimination and harassment,
12 Defendant, in retaliation, terminated Plaintiff in June 2007. On June 25, 2008,
13 Plaintiff brought suit against Defendant, citing fifteen causes of action relating to the
14 acts of discrimination, harassment and retaliation.

15 On August 18, 2008, Defendant filed a Notice of Removal of Action to this
16 Court, basing its removal on diversity and federal question jurisdiction. Defendant
17 contends that CES is a corporate citizen of the State of Colorado and thereby covered
18 by 28 U.S.C. § 1332, which allows the federal courts to hear cases between “citizens
19 of a State and citizens or subjects of a foreign state.” Def.’s Mem. in Opp’n to Pl.’s
20 Mot. for Remand at 1. Defendant also relies on Plaintiff’s Eleventh Cause of Action
21 alleging CES’ failure to notify Plaintiff of his rights under the Consolidated Omnibus
22 Budget Reconciliation Act (“COBRA”), Compl. ¶¶ 117-22, to argue that Plaintiff
23 has pleaded and asserted a federal cause of action appropriate for adjudication by this
24 Court. Def.’s Mem. in Opp’n at 1.

25 On September 19, 2008, Plaintiff moved for remand to the Los Angeles
26 Superior Court, and an order pursuant to 28 U.S.C. § 1447(c) requiring Defendant
27 to pay Plaintiff all costs, expenses, and attorneys’ fees incurred as a result of
28 improper removal.

1 **II. DISCUSSION**

2 The United States District Courts have original subject matter jurisdiction
3 over cases where all parties are citizens of different states and the amount in
4 controversy exceeds \$75,000. 28 U.S.C. § 1332(a)(1). A defendant has the
5 burden of proving that the requisite jurisdiction exists to support removal. *Gaus*
6 *v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

7 **A. Defendant’s Burden as to Diversity Jurisdiction**

8 Diversity jurisdiction exists between “citizens of a State and citizens or
9 subjects of a foreign state.” 28 U.S.C. § 1332(a)(2). However, there is no diversity
10 jurisdiction where foreign plaintiffs sue foreign defendants. *Mutuelles Unies v. Kroll*
11 *& Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (citing *Cheng v. Boeing Co.*, 708 F.2d
12 1406, 1412 (9th Cir. 1983).

13 Where citizenship of an alien corporation¹ is at issue, the dual citizenship
14 provision as to corporations found at 28 U.S.C. § 1332(c)(1) applies.² *Danjaq, S.A.*
15 *v. Pathe Communications Corp.*, 979 F.2d 772, 773 (9th Cir. 1992). As a result, an
16 alien corporation is considered a citizen of both the country of incorporation and the
17 state in which it has its principal place of business. *Nike, Inc. v. Commercial Iberica*
18 *De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994). Significantly, it
19 is the corporation’s *worldwide* principal place of business that is relevant for
20 purposes of diversity jurisdiction, and not its principal place of business within the
21 United States. *Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1100-01
22 (2nd Cir. 1986).

23 Defendant is a registered British corporation. Flaherty Decl. ¶ 3 In its

24 _____
25 ¹ An “alien corporation” is a corporation that is incorporated under the laws of a
26 foreign country only.

27 ² 28 U.S.C. § 1332(c)(1) states in relevant part that “a corporation shall be deemed to
28 be a citizen of any State by which it has been incorporated and of the State where it has its
principal place of business...”

1 submissions to the Court, Defendant refers to its office in Colorado as its “principal
2 United States office.” *Id.* ¶¶ 3-4; Def.’s Mem. in Opp’n at 2. In addition, Defendant
3 only cites data regarding its United States sales and business, and does not indicate
4 whether these activities represent all or most of its worldwide operations.³ As stated
5 above, the relevant consideration for diversity jurisdiction purposes is an alien
6 corporation’s worldwide principal place of business, not its principal place of
7 business in the United States; consequently, Defendant has not carried its burden of
8 proving that the requisite jurisdiction exists to support removal.

9 **B. Federal Question Jurisdiction**

10 Ordinarily, a defendant may remove a suit to federal court only if the suit
11 could have been brought there originally. 28 U.S.C. § 1441(a). Under the well-
12 pleaded complaint rule, “federal-question jurisdiction only exists when a federal
13 question is presented on the face of the plaintiff’s complaint.” *Caterpillar v.*
14 *Williams*, 482 U.S. 386, 392 (1987).

15 However, to bring a case “within the statute, a right or immunity created by
16 the Constitution or laws of the United States must be an element, and an *essential*
17 *one*, of the plaintiff’s cause of action. *Gully v. First Nat. Bank*, 299 U.S. 109, 112
18 (1936) (emphasis added). The “controversy arising under the laws of the United
19 States must be basic in character as distinguished from those that are collateral.”
20 *Rosecrans v. William S. Lozier, Inc.* 142 F.2d 118, 123 (8th Cir. 1944); *see also*
21 *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308,
22 313-14 (2005) (stating that federal jurisdiction requires a case to demonstrate a
23 “substantial” federal issue).

24
25
26 ³ For example, according to Defendant, CES conducts most of its sales in *the United*
27 *States* in Texas and Colorado; these sales totaled about 35% for Texas and 27% for Colorado
28 “of all sales *nationwide*.” Flaherty Decl. ¶ 4 (emphasis added). Such a recitation of sales
data for the United States alone does not answer the question whether Defendant’s
worldwide principal place of business happens to be located in the United States.

1 Plaintiff's suit against Defendant is based primarily on Defendant's alleged
2 acts of employment discrimination and harassment; thus, fourteen out of fifteen
3 claims are based exclusively on state law, while the one federal issue relates to
4 Defendant's failure to notify Plaintiff of his right to COBRA benefits following
5 termination. Compl. ¶¶ 117-22. The latter cause of action cannot be considered a
6 substantial claim for purposes of removal based on federal question jurisdiction;
7 instead, it is a collateral claim to the state law discrimination and harassment claims,
8 and Plaintiff's right to relief does not "[turn] on the federal question." *Berg v.*
9 *Leason*, 32 F.3d 422, 424 (9th Cir. 1994) (citing *Guinasso v. Pacific First Fed. Sav.*
10 *& Loan Ass'n*, 656 F.2d 1364, 1365-66 (9th Cir. 1981).⁴

11 The removal statute is strictly construed against removal jurisdiction, and
12 "federal jurisdiction must be rejected if there is any doubt as to the right of removal
13 in the first instance. *Gaus*, 980 F.2d at 566. Defendant has failed to establish that
14 Plaintiff's sole federal law claim is an essential aspect of his complaint and has
15 therefore not carried its burden of proving that removal is proper.

16 **C. Timeliness of Plaintiff's Motion for Remand**

17 Finally, Defendant argues that Plaintiff's Motion for Remand was untimely
18 because it was made more than 30 days after filing of the removal notice.⁵ However,
19 this argument fails because 28 U.S.C. § 1447(b) expressly states that a "motion to
20 remand the case on the basis of any defect *other than lack of subject matter*
21 *jurisdiction* must be made within 30 days after the filing of the notice of removal
22 under section 1446(a)" (emphasis added). A motion to remand for lack of subject
23

24 ⁴ Plaintiff's Complaint also does not indicate that failure to give notice of COBRA
25 rights was a motivating factor underlying Defendant's alleged acts of employment
26 discrimination and harassment; instead, Plaintiff's COBRA claims relate only to the period
27 after termination, thereby refuting any possible argument that it forms an essential element
28 of the complaint.

⁵ Defendant filed its notice of removal on August 18, 2008. Plaintiff's Motion For
Remand was filed on September 19, 2008.

1 matter jurisdiction may be made at any time before final judgment. *Id.* Plaintiff’s
2 Motion for Remand relies on this Court’s lack of subject matter jurisdiction over the
3 instant case, and not on matters of procedure. Accordingly, Plaintiff’s Motion is not
4 affected by the 30-day statutory time limit.

5 **D. Plaintiff’s Request for Sanctions**

6 Section 1447(c) allows for the “payment of just costs and any actual expenses,
7 including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c).
8 The Court has discretion to grant attorney fees and costs based on “the nature of the
9 removal and the nature of the remand,” *Moore v. Permanente Med. Group, Inc.*, 981
10 F.2d 443, 446 (9th Cir. 1992), and sanctions may be imposed where “the court
11 specifically finds bad faith or conduct tantamount to bad faith.” *Fink v. Gomez*, 239
12 F.3d 989, 994 (9th Cir. 2001) (holding that the award of sanctions requires a specific
13 finding of bad faith); *see also In re Itel Securities Litigation*, 791 F.2d 672 (9th Cir.
14 1986) (finding bad faith where a party acted for an improper purpose).

15 Further, unless there are unusual circumstances, “attorney’s fees should not
16 be awarded when the removing party has an objectively reasonable basis for
17 removal.” *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006) (citing *Martin*
18 *v. Franklin Capital Corp.*, 546 U.S. 132 (2005)). Here, the complexity of the
19 jurisdiction issues involved in the instant case does not make it clear that
20 Defendant’s removal was wholly improper or unreasonable, thus warranting the
21 imposition of sanctions. There has been no specific showing of bad faith on the part
22 of Defendant, and, as a result, Plaintiff’s request for sanctions is denied.

23 **IV. CONCLUSION**

24 Defendant failed to carry its burden of proving that removal is proper based
25 on either diversity or federal question jurisdiction grounds. There is also no merit
26 to Defendant’s argument that the motion to remand was untimely. Plaintiff’s Motion
27 for Remand of Entire Action to Los Angeles Superior Court is **GRANTED**. This
28 Court further **DENIES** Plaintiff’s request for fees and costs as there is no showing

1 of improper removal by Defendant.

2 **IT IS SO ORDERED.**

3 Dated: October 20, 2008



FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28