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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Aqua Connect, Inc.,)	CV 11-5764 RSWL (MANx)
)	
Plaintiff,)	
)	
v.)	ORDER Re: Plaintiff Aqua
)	Connect, Inc.'s Motion
)	to Remand [11]
)	
Code Rebel LLC, Arben)	
Kryeziu, and Vladimir)	
Bickov,)	
)	
)	
Defendants.)	
)	
)	

On October 12, 2011, Plaintiff Aqua Connect, Inc.'s Motion for Remand came on for regular calendar before this Court [11]. The Court, having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW**

FINDS AND RULES AS FOLLOWS:

The Court hereby **DENIES** Plaintiff's Motion to Remand.

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1 **I. BACKGROUND**

2 **A. Factual Background**

3 Plaintiff brings this current Action against
4 Defendants for claims arising from Defendants' alleged
5 reverse engineering of Plaintiff's software and
6 subsequent distribution of an allegedly infringing
7 software product. Plaintiff is a Nevada corporation
8 that sells software and has its principal place of
9 business in California.

10 Defendant Code Rebel LLC ("Code Rebel") also sells
11 software and is a limited liability corporation
12 organized under the laws of Hawaii, with its principal
13 place of business in Hawaii. Defendant Arben Kryeziu
14 ("Kryeziu"), a citizen of Hawaii, is the managing
15 partner and only member of Defendant Code Rebel.
16 According to the Complaint, Defendant Bickov is a
17 resident of Russia, who worked as an agent of Defendant
18 Code Rebel, at the behest of Defendant Kryeziu.
19 Defendant Bickov has not been served.

20 **B. Procedural Background**

21 On May 25, 2011, Plaintiff filed this Action
22 against Defendants in the Superior Court of California,
23 County of Los Angeles [1]. Defendants Code Rebel and
24 Kryeziu were served with a Summons and Complaint on
25 June 6, 2011. On July 12, 2011, Defendants Code Rebel
26 and Kryeziu allege they received a letter from unserved
27 Defendant Bickov, in which Defendant Bickov claimed to
28 be a citizen of Ukraine and consented to removal.

1 Consequently, on July 13, 2011, Defendants Code Rebel
2 and Kryeziu jointly filed a Notice of Removal on
3 diversity grounds. Thereafter, on August 12, 2011,
4 Plaintiff filed this present Motion to Remand [11].
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6 **II. LEGAL STANDARD FOR REMAND**

7 In deciding whether to remand a case, this Court
8 must determine whether the case was properly removed to
9 this Court. The right to remove a case to federal
10 court is governed by 28 U.S.C. § 1441, which in
11 relevant part states that "any civil action brought in
12 a State court of which the district courts of the
13 United States have original jurisdiction, may be
14 removed by the defendant or the defendants. . . ." 28
15 U.S.C. § 1441(a). District courts have diversity
16 jurisdiction over all civil actions between citizens of
17 different states where the amount in controversy
18 exceeds \$ 75,000, exclusive of interest and costs. 28
19 U.S.C. § 1332.

20 Section 1446(b) governs the timing of removal. If
21 the initial pleading shows that the case is "removable
22 on its face," then a defendant has thirty days from
23 receipt of the pleading to remove the case. Carvalho
24 v. Equifax Info. Servs., LLC, 629 F.3d 876, 885
25 (quoting Harris v. Bankers Life & Cas. Co., 425 F.3d
26 689, 694 (9th Cir. 2005)). If, however, no basis for
27 removal is apparent in that pleading, the requisite
28 thirty-day removal period does not begin until the

1 defendant receives "a copy of an amended pleading,
2 motion, order or other paper" from which removability
3 may first be ascertained. 28 U.S.C. § 1446(b).

4 The Court may remand a case to state court for lack
5 of subject matter jurisdiction or defects in removal
6 procedure. 28 U.S.C. § 1447(c). The defendant has the
7 burden of proving that removal is proper and that all
8 of the prerequisites are satisfied. If at any time
9 before final judgment it appears that the district
10 court lacks subject matter jurisdiction over a case
11 that has been removed to federal court, the case must
12 be remanded. 28 U.S.C. § 1447(c). The Ninth Circuit
13 strictly construes the removal statute against removal
14 jurisdiction, and federal jurisdiction must be rejected
15 if there is any doubt as to the right of removal in the
16 first instance. See Shamrock Oil & Gas Corp. v.
17 Sheets, 313 U.S. 100, 108-09 (1941) (stating that
18 removal statutes should be construed narrowly in favor
19 of remand to protect jurisdiction of state courts).

21 III. ANALYSIS

22 A. Evidentiary Objection

23 Plaintiff moves to strike a letter from unserved
24 Defendant Bickov as inadmissible hearsay. See Removal,
25 ¶ 9, Ex. B. Hearsay does not encompass all
26 extrajudicial statements but only those offered for the
27 purpose of proving the truth of matter asserted in the
28 statement. Fed. R. Evid. 801(c). Here, Defendants

1 Code Rebel and Kryeziu offer the letter for two
2 purposes: (1) to prove Defendant Bickov's citizenship
3 and his consent to removal; and (2) to prove that they
4 received notice of removability on July 12, 2011.

5 As for the first purpose, the Court finds that
6 Defendants Code Rebel and Kryeziu may not use the
7 contents of the letter to prove Defendant Bickov's
8 citizenship and his consent to removal. Such use is
9 hearsay, and thus, Plaintiff's evidentiary objection as
10 to Bickov's letter is **SUSTAINED in part**.

11 As for the second purpose, the Court finds that
12 Defendants Code Rebel and Kryeziu may offer the letter
13 to prove that they received notice of removability on
14 July 12, 2011. Such use is a non-hearsay use of the
15 letter, as it is only being offered for the effect on
16 the listener. United States v. Dorsey, 418 F.3d 1038,
17 1044 (9th Cir. 2005) ("If the significance of an offered
18 statement lies solely in the fact that it was made, no
19 issue is raised as to the truth of anything asserted,
20 and the statement is not hearsay." (quoting Fed. R.
21 Evid. 801(c) advisory committee's note)). Thus,
22 Plaintiff's evidentiary objection as to Bickov's letter
23 is **OVERRULED in Part**.

24 **B. Motion to Remand**

25 In its Motion, Plaintiff argues that this Action
26 should be remanded to state court for the following
27 reasons: (1) Defendants Code Rebel and Kryeziu's
28 removal was untimely; (2) Defendants Code Rebel and

1 Kryeziu have failed to make the required showing for
2 diversity jurisdiction; and (3) Defendants Code Rebel
3 and Kryeziu failed to join Defendant Bickov in their
4 Notice of Removal. This Court **DENIES** Plaintiff's
5 Motion to Remand because Defendants Code Rebel and
6 Kryeziu's removal was proper.

7 1. Timing of removal

8 This Court finds that Defendants Code Rebel and
9 Kryeziu's removal was timely under 28 U.S.C. § 1446(b).
10 Specifically, the Court finds that service of the
11 Complaint did not trigger the thirty-day removal period
12 because Defendants Code Rebel and Kryeziu could not
13 have ascertained the removability of the Action without
14 knowing the citizenship of unserved Defendant Bickov.
15 The Complaint, served upon Defendants Code Rebel and
16 Kryeziu, only alleged Defendant Bickov's residence;
17 however, for the purpose of giving notice of
18 removability, the Ninth Circuit has held that a person
19 "residing in a given state is not necessarily domiciled
20 there, and thus is not necessarily a citizen of that
21 state." Kantor v. Wellesley Galleries. Ltd., 704 F.2d
22 1088, 1090 (9th Cir. 1983). As such, the Court finds
23 that the face of the Complaint did not give notice of
24 removability to Defendants Code Rebel and Kryeziu, and
25 thus, the thirty-day removal period could not have
26 started when they were served with the Complaint. See
27 Harris v. Bankers Life and Cas. Co., 425 F.3d 689, 695
28 (9th Cir. 2005)(holding service of the complaint did

1 not trigger the thirty-day removal period because the
2 complaint only alleged an unserved defendant's
3 residence).

4 Rather, the Court finds that the Notice of Removal
5 was timely because the thirty-day removal period did
6 not start until Defendants Code Rebel and Kryeziu
7 received unserved Defendant Bickov's letter on July 12,
8 2011. See § 1446(b) (If no basis for removal is
9 apparent in the initial pleading, the thirty-day
10 removal period does not begin until a defendant
11 receives "a copy of an amended pleading, motion, order
12 or other paper" from which removability may first be
13 ascertained.); see, e.g., Harris v. Bankers Life and
14 Cas. Co., 425 F.3d 689, 691-92 (9th Cir. 2005)(the
15 defendant timely removed the case within thirty days of
16 discovering additional information about an unserved
17 defendant). The Court finds that Defendant Bickov's
18 letter alerted Defendants Code Rebel and Kryeziu that
19 complete diversity existed and that this case was
20 removable. Therefore, Defendants Code Rebel and
21 Kryeziu timely filed their Notice of Removal on July
22 13, 2011.

23 2. Diversity Jurisdiction

24 The parties do not dispute whether diversity
25 jurisdiction exists; rather, Plaintiff argues that
26 Defendants Code Rebel and Kryeziu failed to prove
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1 diversity jurisdiction by a preponderance of evidence.¹

2 Generally, on a motion to remand, the defendant has
3 the burden of proving by a preponderance of evidence
4 that diversity jurisdiction exists. Gaus, 980 F.2d at
5 565 (holding that the defendant must prove by a
6 preponderance of evidence that the amount in
7 controversy exceeded \$50,000); Guryev v. Life Investors
8 Ins. Co. of Am., No. 00-2679, 2000 U.S. Dist. LEXIS
9 18079, at *2 (N.D. Cal. Dec. 4, 2000). However, on a
10 motion to remand, alleging a party's residence in the
11 complaint creates a presumption that the party
12 continues to reside in that state and puts "the burden
13 of coming forward with contrary evidence on the party
14 seeking to prove otherwise," which is Plaintiff in this
15 case. Baumann v. American Family Mut. Ins. Co., 2011
16 WL 2709121, *2 (D. Colo. July 12, 2011) (quoting State
17 Farm Mut. Auto. Ins. Co. v. Dyer, 19 F.3d 514, 519
18 (10th Cir. 1994)); Harrell v. Kepreos, 2005 WL 730639,
19 *2 (D. Or. March 30, 2005)(holding that a person's
20 residence is presumed to be the person's domicile or
21 place of citizenship).²

22 _____
23 ¹As discussed previously, Defendant Bickov's letter
24 is hearsay; thus, Defendants Code Rebel and Kryeziu may
25 not use its contents to prove Defendant Bickov's
citizenship.

26 ²If a complaint states that a person is a resident
27 of a state, there is a presumption that the person is
28 also a citizen of that state. State Farm Mut. Auto.
Ins. Co. v. Dyer, 19 F.3d 514, 520 (10th Cir. 1994);

1 Here, Plaintiff alleges in the Complaint that
2 Defendant Bickov is a resident of Russia. As such,
3 Plaintiff's allegation created a presumption that
4 Russia is Defendant Bickov's domicile and consequently
5 created a presumption of complete diversity.
6 Therefore, Plaintiff, as the party challenging
7 diversity jurisdiction here, has the burden of
8 disproving this presumption of complete diversity. See
9 Lew v. Moss, 797 F.2d 747, 751 (9th Cir. 1986) (holding
10 that the proponent of jurisdiction bears the burden of
11 proof, but the presumption of continued residence
12 shifts the burden of production onto the party seeking
13 to prove otherwise).

14 The Court finds that Plaintiff has failed to
15 produce any evidence to challenge the presumption of
16 complete diversity, and thus, Plaintiff failed to meet
17 its burden.

18 3. Joining in Notice of Removal

19 The Court finds removal was proper because
20 Defendants Code Rebel and Kryeziu did not need consent
21 of unserved Defendant Bickov to remove. Case law
22 generally requires all defendants to join or consent to
23 the notice of removal, but an exception exists when a
24

25 Gonzalez v. First NLC Financial Servs., 2009 WL
26 2513670, *2 (C.D. Cal. June 12, 2009). However, as
27 discussed in the previous section, residence in a
28 complaint is not enough to give a defendant sufficient
notice of removability.

1 non-joining defendant has not been served in state
2 court. See Community Bldg. Co. v. Maryland Casualty
3 Co., 8 F.2d 678 (9th Cir. 1925); Lopez v. BNSF Ry. Co.,
4 614 F. Supp. 2d 1084, 1087 (E.D. Cal. 2007). Because
5 Defendant Bickov has not been served, the Court finds
6 that this exception to joining or consenting to removal
7 applies here. Thus, the Court finds removal was
8 proper.

9 4. Attorney's Fees

10 Plaintiff requests attorney's fees in connection
11 with bringing this Motion. Defendants Code Rebel and
12 Kryeziu argue that the Court should instead award them
13 attorney's fees to punish Plaintiff for making
14 misleading arguments and misstatements of fact and law.

15 The Court finds that neither party should be
16 awarded attorney's fees. Fee awards are left to the
17 district court's discretion, but section 1447(c)
18 provides for attorney's fees "only where the removing
19 party lacked an objectively reasonable basis for
20 seeking removal." Martin v. Franklin Capital Corp.,
21 546 U.S. 132, 141 (2005). Defendants Code Rebel and
22 Kryeziu had an objectively reasonable basis for seeking
23 removal, and there is no evidence that Plaintiff filed
24 this Motion to Remand in bad faith.

25 Accordingly, the Court **DENIES** Plaintiff and
26 Defendants Code Rebel and Kryeziu's requests for
27 attorney's fees.

28

1 **IV. CONCLUSION**

2 For the reasons stated above, the Court **DENIES**
3 Plaintiff's Motion to Remand. Furthermore, the Court
4 **DENIES** Plaintiff and Defendants Code Rebel and
5 Kryeziu's requests for attorney's fees.
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8 DATED: October 25, 2011

9 **IT IS SO ORDERED.**

10 **RONALD S.W. LEW**
11 _____

12 **HONORABLE RONALD S.W. LEW**

13 Senior, U.S. District Court Judge
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