

1 No. 2, pp. 7-65)

2 Pending before the Court now is Plaintiff's Motion to Remand Action to State Court
3 filed July 18, 2011. (ECF No. 19.) Defendants Cate, Giurbino, and Doyle filed their
4 Opposition to the motion on August 5, 2011 and Plaintiff filed his Reply August 18, 2011.
5 (ECF Nos. 30 & 42.)
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7 **II. ARGUMENTS**

8 Plaintiff's Arguments

9 In his Motion, Plaintiff argues that the removal was untimely, that service of the
10 notice of removal was defective, and that there is no federal question.

11 Plaintiff argues that this action does not include any federal question which was the
12 basis for removal by Defendants. Plaintiff states that the action could not have originally
13 been filed in federal court because of a "lack of standing and an inability to establish the
14 legal threshold with regards to the RICO Act" (ECF No. 19, p. 3.) Plaintiff states the
15 he did not raise any federal issues related to either RICO or Section 1983 in his Complaint.
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17 Plaintiff argues that the other Defendants have not joined in or consented to the
18 removal.
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20 Plaintiff argues that Defendant Giurbino's notice of removal was untimely pursuant
21 to the "first-served defendant" rule. Plaintiff states that the first served defendant was
22 Defendant Ahlin who was served on June 1, 2011. Plaintiff argues that the thirty day time
23 frame began that day and then ended on June 30, 2011, which made Defendant Giurbino's
24 removal, filed July 1, 2011, untimely.
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26 Plaintiff argues that the service by Defendants of documents was defective. Plaintiff
27 states that the proof of service states that the notice of removal was served on July 1,

1 2011. However, he states, the documents were not postmarked until July 5, 2011

2 Defendants' Arguments

3 In their Opposition, Defendants argue that Plaintiff's allegations are misguided.
4 Specifically, Defendants contend that there are issues of federal law in this action, and
5 Defendants point out that all Defendants have consented to the removal. Defendants
6 highlight sections of Plaintiff's Complaint where he makes claims under the Fifth and
7 Fourteenth Amendments and other federal laws including RICO and a claim for conspiracy.
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9 As to Plaintiff's argument that the removal was not unanimous, Defendants state
10 that that is no longer the case. All Defendants have since joined and consented to the
11 removal making the removal unanimous.
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13 As to Plaintiff's timeliness argument, Defendants state that Plaintiff's calculation is
14 wrong as is he assertion that the first-served Defendant begins the clock. Defendant states
15 that Defendant Ahlin was first served on June 1, 2011, making the last day to remove July
16 1, 2011. Defendant Giurbino filed his Notice of Removal on July 1, 2011 which is within
17 the thirty day time frame. Defendants also note that the trend in case law is for the last-
18 served defendant to be able to remove, so long as consent is obtained from all served
19 defendants, citing Bailey v. Janssen Pharmaceuticals, Inc., 536 F.3d 1202, 1205-06 (11th
20 Cir. 2008) and Destfino v. Reiswig, ___ F.3d ___, ___ (2011 WL 182241, *3 (9th Cir.
21 2011)).
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23 As to Plaintiff's argument that service of the removal was defective because
24 Plaintiff's envelope was post marked July 5, 2011, Defendants state that the proof of
25 service indicates that the envelope was placed in the law firm's mailing system on July 1,
26 2011. Defendants argue that proof of service requires that the envelope be sent to the
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1 mailroom for processing, not that the item is stamped immediately.

2 Plaintiff's Reply

3 In his Reply, Plaintiff reiterates that he is not making any federal claims, but only
4 claims under the state constitution. Plaintiff also argues that this Court lacks federal
5 personal jurisdiction over this action. Plaintiff states that he is not a prisoner and, thus, it
6 appears that he is alleging that he is not subject to Section 1983.
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8 **III. LEGAL STANDARD**

9 Pursuant to 28 U.S.C. § 1441(a), removal is appropriate for “any civil action brought
10 in a State court of which the district courts of the United States have original jurisdiction.
11 . . .” Removal statutes are strictly construed. See Libhart v. Santa Monica Dairy Co., 592
12 F.2d 1062, 1064 (9th Cir. 1979). “Federal jurisdiction must be rejected if there is any doubt
13 as to the right of removal in the first instance.” Gaus v. Miles, 980 F.2d 564, 566 (9th Cir.
14 1992). “The burden of establishing federal jurisdiction falls on the party invoking removal.”
15 Harris v. Provident Life and Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994) (quoting
16 Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 771 (9th Cir. 1986)). Removal is
17 proper where a plaintiff’s complaint, on its face, asserts claims created by federal law or
18 where a substantial federal issue of law exists. Merrell Dow Pharm. v. Thompson, 478
19 U.S. 804, 808-10 (1986).
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22 As a general rule, all defendants in the state court action must join in the petition for
23 removal. United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 762 (9th Cir. 2002).
24 Although there are certain exceptions to this rule of unanimity, “[w]here fewer than all the
25 defendants have joined in a removal action, the removing party has the burden under
26 section 1446(a) to explain affirmatively the absence of any co-defendants in the notice for
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1 removal.” Prize Frize v. Matrix (U.S.) Inc., 167 F.3d 1261, 1266 (9th Cir. 1999),
2 superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem.
3 Co., 443 F.3d 676, 681 (9th Cir. 2006) (class action) (citations omitted); cf., Emrich v.
4 Touche Ross & Co., 846 F.2d 1190, 1193, n. 1 (noting that nominal, unknown, fraudulently
5 joined, or improperly served defendants need not join in a petition for removal).
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7 Furthermore, 28 U.S.C. § 1446(b) requires that the notice of removal be filed “within
8 thirty days after the receipt by the defendant, through service or otherwise, of a copy of the
9 initial pleading setting forth the claim for relief upon which such action or proceeding is
10 based”

11 **IV. ANALYSIS**

12 Plaintiff argues that his Complaint does not contain any federal questions, that
13 Defendant Giurbino did not file a timely notice of removal, and that service of the notice of
14 removal was defective.
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16 **A. Federal Question**

17 Plaintiff’s Complaint alleges that Defendants violated his Fifth and Fourteenth
18 Amendment rights throughout the Complaint. He repeatedly alleges civil rights violations,
19 due process and equal protection violations, along with a Racketeer Influenced and
20 Corrupt Organizations Act claim and a conspiracy claim, among others. Plaintiff refers to
21 rights “bestowed upon [him] by the Constitution of both the State of California and the
22 United States of America.” (ECF No. 2, p. 30.) Clearly, Plaintiff’s Complaint sets forth
23 claims under both federal and state law. Because of the federal questions, the Court finds
24 that removal was appropriate.
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1 **B. Timeliness of Removal**

2 The Court next examines whether the removal was proper. Plaintiff argues that
3 Defendant Giurbino failed to file the notice of removal within the thirty day time frame.
4 Plaintiff argues that Defendant Ahlin, the first served defendant was served on June 1,
5 2011. Plaintiff then states that Defendants had until June 30, 2011 to file for removal.
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7 In his Notice of Removal, filed, July 1, 2011, Defendant Giurbino stated that this
8 action was commenced in California Superior Court on May 11, 2011. (ECF No. 2, p. 1.)
9 He also stated that he was served with the summons and complaint on June 2, 2011.² (Id.
10 pp. 1-2.) Thus, he stated, the action was removed within the thirty day time frame. (Id.)
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12 28 U.S.C. § 1446 requires that all defendants join or consent to the notice of
13 removal. Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986). Moreover, the
14 defendant removing a state action to federal court must file the notice of removal within
15 thirty days of receiving “a copy of the initial pleading setting forth the claim for relief upon
16 which [the] action or proceeding is based” Id. § 1446(b). The Ninth Circuit, along with
17 four others circuits, has adopted the “later-served defendant rule.” See Destfino v.
18 Reiswig, ___ F.3d ___, ___ (2011 WL 182241, *3 (9th Cir. 2011)). Under this rule, each
19 defendant has thirty days to remove a state action to federal court after it is brought into
20 the case, if there is a basis for federal subject matter jurisdiction. Id. at *2. “A contrary rule
21 could deprive some defendants of a right to a federal forum because they were served too
22 late to exercise that right” Id.
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24 Here, all Defendants have joined in and consented to the removal. And, regardless
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26 ² Defendant Giurbino also stated that he believed that Defendants Cate and Doyle had not been
27 served yet. (ECF No. 2, p. 4.) They have since joined in this action. (ECF Nos. 5 & 9.)

1 of the first-served or last-served rule, Defendant Giurbino filed the notice of removal within
2 the thirty day time frame. Plaintiff miscalculated the dates. Thus, this argument must fail.

3 **C. Defective Service**

4 Plaintiff argues that Defendants proof of service for the notice of removal was
5 defective because it states that it was served on July 1, 2011, but it was not postmarked
6 until July 5, 2011.

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8 Plaintiff appears to be arguing that the difference in dates somehow makes the filing
9 improper. Plaintiff cites no authority for this proposition and the Court is aware of none that
10 support it. Pursuant to the record of filings, the notice was filed on July 1, 2011. (ECF No.
11 2.) The postmark date is of no importance.

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13 **V. OBJECTIONS TO JOINDER**

14 All Defendants have joined in and consented to Defendant Giurbino's Notice of
15 Removal. (ECF Nos. 2, 5, 9, 13, & 27.) Plaintiff filed Objections to each notice of joinder
16 and consent to removal. (ECF Nos. 17, 20, 21, & 26.) In his Objections, Plaintiff makes
17 the exact same arguments as in his Motion to Remand which are dealt with above.

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19 **VI. CONCLUSION AND ORDER**

20 Accordingly, the Court HEREBY RECOMMENDS that Plaintiff's Motion to Remand
21 be DENIED.

22 These Findings and Recommendation will be submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
24 thirty (30) days after being served with these Findings and Recommendation, the parties
25 may file written objections with the Court. The document should be captioned "Objections
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1 to Magistrate Judge’s Findings and Recommendation.” The parties are advised that failure
2 to file objections within the specified time may waive the right to appeal the District Court’s
3 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 IT IS SO ORDERED.

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6 Dated: August 29, 2011


UNITED STATES MAGISTRATE JUDGE

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