

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RCM INTERNATIONAL, LLC,	)	Case No. 14-CV-04788 SC
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	<u>MOTION TO REMAND</u>
v.	)	
	)	
ALPENTAL ENERGY PARTNERS, LLC;	)	
BLUE MOUNTAIN BIOGAS, LLC	)	
	)	
Defendants.	)	
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**I. INTRODUCTION**

Now before the Court is Plaintiff RCM International, LLC's ("RCM") motion to remand. ECF No. 8 ("Mot."). Defendants Blue Mountain Biogas, LLC ("Blue Mountain") and Alpentel Energy Partners, LLC ("Alpentel") oppose. ECF No. 18 ("Opp'n"). The motion is full briefed, ECF No. 20 ("Reply") and suitable for decision without oral argument under Civil Local Rule 7-1(b). For the reasons set forth below the motion is GRANTED.

///

1 **II. BACKGROUND**

2 In this case, RCM, a California limited liability company,  
3 alleges various causes of action arising out of the breach of a  
4 confidentiality agreement entered into as part of RCM's business  
5 relationship with Alpentel, a Utah limited liability company.

6 RCM designs, manufactures, and sells anaerobic digesters, a  
7 type of technology used to convert organic wastes like manure into  
8 energy and fertilizer. Alpentel and RCM entered into a deal  
9 whereby Alpentel would finance and own anaerobic digester projects  
10 designed by RCM, with a third party providing animal waste to be  
11 used to produce energy. As a condition of entering into this  
12 relationship, which would require the exchange of information RCM  
13 considers confidential or otherwise protectable, RCM required  
14 Alpentel to agree to certain confidentiality protections. After  
15 entering into such an agreement, RCM believes that Alpentel  
16 improperly used confidential information acquired under that  
17 agreement to develop and build the Blue Mountain Project, an  
18 anaerobic digester project in Utah.

19 In 2012, RCM filed this action in Alameda County Superior  
20 Court (the "Underlying Action"). The action was removable to  
21 federal court on the grounds of diversity of citizenship from the  
22 outset, although Alpentel chose not to exercise its right to  
23 remove. At some point during the pendency of the Underlying  
24 Action, Alpentel transferred its ownership of the Blue Mountain  
25 Project to its then-wholly-owned subsidiary, Blue Mountain Biogas  
26 LLC, a Delaware limited liability company. While RCM has always  
27 been aware of the existence of the Blue Mountain Project, discovery  
28 issues were significant in the Underlying Action, and at first, RCM

1 was unaware of the transfer of ownership or the existence of Blue  
2 Mountain Biogas LLC. Nonetheless, after learning of the transfer,  
3 RCM amended its complaint on October 7, 2014 to substitute Blue  
4 Mountain Biogas for one of the Doe entities named in the initial  
5 complaint. On October 28, 2014, Blue Mountain Biogas filed notice  
6 of removal on the grounds of diversity of citizenship. The  
7 Underlying Action is currently set for trial in state court  
8 beginning on January 26, 2015.

9 Now RCM moves for an order remanding the action to state  
10 court. Alpentel and Blue Mountain Biogas oppose.

11  
12 **III. LEGAL STANDARD**

13 28 U.S.C. Section 1441 provides that civil cases brought in  
14 state court over which "the district courts of the United States  
15 have original jurisdiction, may be removed by the defendant or the  
16 defendants, to the district court of the United States for the  
17 district and division embracing the place where such action is  
18 pending." 28 U.S.C. § 1441(a); see also Rodriguez v. AT&T Mobility  
19 Servs. LLC, 728 F.3d 975, 977 (9th Cir. 2013). In this instance,  
20 the basis for original jurisdiction is 28 U.S.C. Section 1332,  
21 which provides federal courts with subject-matter jurisdiction  
22 where diversity of citizenship exists among the parties and the  
23 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a).

24 Notice of removal must generally be filed by a defendant  
25 within thirty days of receipt "through service or otherwise, of a  
26 copy of the initial pleading setting forth the claim for relief  
27 upon which [the] action or proceeding is based . . . ." 28 U.S.C.  
28 § 1446(b)(1). The removal statute should be strictly construed

1 against removal. See Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir.  
2 1988).

3  
4 **IV. DISCUSSION**

5 None of the parties dispute that the Court has subject-matter  
6 jurisdiction over this action because diversity of citizenship  
7 exists between the parties and the amount in controversy is greater  
8 than \$75,000. Instead, this motion comes down to one question:  
9 does Blue Mountain Biogas have a right to remove this action  
10 despite Alpentel's earlier failure to do so?

11 In RCM's view the answer is no. RCM contends that the  
12 relationship between Alpentel and Blue Mountain Biogas is so close  
13 that Blue Mountain Biogas should not have an independent right of  
14 removal under 28 U.S.C. Section 1446(b)(2)(B) ("Section  
15 1446(b)(2)(B)"). Furthermore, RCM points to the advanced state of  
16 the Underlying Action, the discovery issues in state court, and  
17 tensions with the purposes of the removal statute.

18 Defendants disagree, arguing that since Destfino v. Reiswig,  
19 630 F.3d 952 (9th Cir. 2011) and Congress's adoption of the Federal  
20 Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L.  
21 No. 112-63, § 103, 125 Stat. 758, 760 (2011) (the "Jurisdiction and  
22 Venue Act"), federal courts nationwide have followed the "later-  
23 served rule" to find that defendants joined and served during the  
24 pendency of a state court action, as Blue Mountain Biogas is here,  
25 may file a notice of removal even if the first-served defendants  
26 did not do so. In Defendants' view, the adoption of the later-  
27 served rule, codified at Section 1446(b)(2)(B), admits no  
28 exceptions, and fully resolves the availability of removal in their

1 favor. Nonetheless, Defendants dispute RCM's allegations regarding  
2 the close relationship between Blue Mountain Biogas' and Alpentel.

3 The Court agrees with RCM. Because of Alpentel's litigation  
4 conduct and Blue Mountain Biogas' close affiliation with Alpentel,  
5 they cannot be properly considered different "defendant[s]" within  
6 the meaning of Section 1446(b)(2)(B). As a result, Alpentel's  
7 failure to remove within thirty days after service renders Blue  
8 Mountain Biogas' notice of removal untimely. 28 U.S.C. §  
9 1446(b)(1). Nevertheless, to understand the Court's conclusion, a  
10 review of the background of these rules and their underlying  
11 purposes is necessary.

12 A defendant seeking to remove a case from state to federal  
13 court must file notice of removal within thirty days of receiving a  
14 copy of the initial pleading. 28 U.S.C. § 1446(b)(1). As Judge  
15 Posner pointed out,

16 The purpose of the 30-day limitation is  
17 twofold: to deprive the defendant of the  
18 undeserved tactical advantage that he would  
19 have if he could wait and see how he was faring  
20 in state court before deciding whether to  
21 remove the case to another court system; and to  
22 prevent the delay and waste of resources  
23 involved in starting a case over in a second  
24 court after significant proceedings, extending  
25 over months or even years, may have taken place  
26 in the first court.

22 Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n, 668  
23 F.2d 962, 965 (7th Cir. 1982).

24 Prior to Destfino and the Jurisdiction and Venue Act, a split  
25 of authority existed between two potential approaches to  
26 determining whether a notice of removal met that thirty-day  
27 limitation. The first approach was the so-called "first-served  
28 rule," which held that "the thirty-day removal period begins to run

1 for all defendants on the date the first defendant receives the  
2 initial complaint . . . ." McAnally Enters., Inc. v. McAnally, 107  
3 F. Supp. 2d 1223, 1226 (C.D. Cal. 2000), abrogated by Destfino, 630  
4 F.3d at 956; see also Brown v. Demco, Inc., 792 F.2d 478 (5th Cir.  
5 1986). Courts adopted this approach for two reasons. First, the  
6 first-served rule is consistent with the requirement in multiple-  
7 defendant cases that all defendants unanimously join a removal  
8 petition. See Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178  
9 U.S. 245, 248 (1900); Emrich v. Touche Ross & Co., 846 F.2d 1190,  
10 1193 n.1 (9th Cir. 1988). Second, the first-served rule promotes  
11 the prompt determination of the proper forum. Brown, 792 F.2d at  
12 482.

13 The other approach, the later-served rule, was endorsed by  
14 Destfino and Congress out of concern for "[f]airness to later-  
15 served defendants." H.R. Rep. No. 112-10, at 14 (2011); see also  
16 Destfino, 630 F.3d at 955-56 (noting that courts that adopted the  
17 later-served defendant rule did so "for reasons grounded in  
18 statutory construction, equity and common sense"). The Destfino  
19 Court and Congress' concern with the first-served rule was that it  
20 enabled plaintiffs to pursue a strategy of not naming defendants  
21 they perceived as likely to remove until the initial thirty-day  
22 period for removal had lapsed. After that time ran, under the  
23 first-served approach, removal would be barred, even if the later-  
24 served defendant wished to remove. While the later-served rule  
25 does not "go so far as to give already-served defendants a new  
26 thirty-day period to remove whenever a new defendant is served," it  
27 does hold that "each defendant is entitled to thirty days to  
28 exercise his removal rights after being served." Destfino, 630

1 F.3d at 956. As a result, the later-served rule has the virtue of  
2 treating all defendants equally, and ensures that plaintiffs cannot  
3 "engage in unfair manipulation by delaying service on defendants  
4 most likely to remove" until after the initial thirty-day period  
5 has lapsed. Id. at 955-56.

6 After Destfino was decided, Congress passed the Jurisdiction  
7 and Venue Act, codifying the later-served rule in 28 U.S.C. Section  
8 1446(b). Section 1446(b) now provides that "[e]ach defendant shall  
9 have 30 days after receipt by or service on that defendant of the  
10 initial pleading or summons" to file notice of removal, and that if  
11 "defendants are served at different times, and a later-served  
12 defendant files a notice of removal, any earlier-served defendant  
13 may consent to the removal even though that earlier-served  
14 defendant did not previously initiate or consent to removal." 28  
15 U.S.C. § 1446(b)(2)(B)-(C).

16 In Defendants' view, the adoption and codification of the  
17 later-served rule makes clear that Blue Mountain Biogas has a right  
18 of removal without exception. Nevertheless, as others have  
19 recognized, the adoption of the later-served rule and its  
20 formulation in the Jurisdiction and Venue Act is not so clear-cut.  
21 See Paul E. Lund, The Timeliness of Removal and Multiple-Defendant  
22 Lawsuits, 64 Baylor L. Rev. 50, 98-111 (2012). Particularly  
23 relevant here are two issues related to the potential for  
24 substantial delays in removal. First, one of the traditional  
25 arguments in favor of the later-served rule is that while it might  
26 result in delays in removal, a plaintiff can avoid any delay by  
27 simply serving each potential defendant at the same time. See  
28 Destfino, 630 F.3d at 956 ("[P]laintiffs can bring about quick

1 determination of the forum by serving all defendants promptly.")  
2 This may well be true in most cases, however it assumes that  
3 plaintiffs will always have the ability to serve all the defendants  
4 at the outset of an action. In some cases even diligent plaintiffs  
5 may be unable to serve all the defendants at the commencement of  
6 the action because the identity of a defendant is unknown or a  
7 defendant is avoiding service.<sup>1</sup> See Lund, Timeliness, supra, at  
8 105-06. Second, and relatedly, it is not clear whether the  
9 adoption of the later-served rule is compatible with a conception  
10 of waiver. Id. at 108.

11 In this case, remand is appropriate for three reasons. First,  
12 because of Alpentel's litigation behavior and its close  
13 relationship with Blue Mountain Biogas, construing Section

14 <sup>1</sup> To that end, during a hearing on the Jurisdiction and Venue Act,  
15 Representative Adam Schiff posed the following question to Chief  
16 Judge Janet Hall of the United States District Court for the  
17 District of Connecticut, a member of the Judicial Conference's  
18 Committee on Federal-State Jurisdiction:

19 "Under one of the sections, the proposal would  
20 allow the latest-served defendant in a  
21 multiple-defendant case 30 days after service  
to file a removal petition in order to be fair  
to late-served defendants. How would this,  
though, affect the trial date, if a defendant  
were purposely evading service? And how do you  
deal with those circumstances?"

22 Federal Courts Jurisdiction Clarification Act: Hearing before the  
23 Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm.  
24 on the Judiciary, 109th Cong. (Nov. 15, 2005) at 67.  
25 Unfortunately, Judge Hall appears to have misunderstood the  
26 question and responded that the one-year limitation on removal for  
27 diversity cases now codified at 28 U.S.C. Section 1446(c)(1) would  
28 address this situation. RCM makes this point in its reply as well,  
however both Judge Hall and RCM are mistaken. Reply at 11-12. The  
one-year limitation for removals premised on diversity only applies  
to cases which were not removable as originally filed, Ritchey v.  
Upjohn Drug Co., 139 F.3d 1313, 1316 (9th Cir. 1998); see also 28  
U.S.C. Section 1446(c)(1). As discussed below, Representative  
Schiff's hypothetical identifies a problem similar to the one the  
Court must address here.



1 1446(b)(2)(B) to grant Blue Mountain Biogas an independent right of  
2 removal would be incompatible with any of the statute's underlying  
3 purposes and the Ninth Circuit's directive to construe the removal  
4 statutes strictly against removal. Gaus v. Miles, Inc., 980 F.2d  
5 564, 566 (9th Cir. 1992). Second, construing removal as timely  
6 despite these connections would also undermine the purpose of  
7 Section 1446(b)(1), by granting "the defendant of the undeserved  
8 tactical advantage . . . [of] wait[ing] [to] see how he was faring  
9 in state court before deciding whether to remove the case to  
10 another court . . . ." Wilson, 668 F.2d at 965. Third, denying  
11 remand would ignore the advanced state of the Underlying Action,  
12 and circumvent, if not fully undermine a pending sanctions motion  
13 in state court.

14 As mentioned before, the concern underlying the adoption of  
15 the later-served defendant rule is fairness to later-served  
16 defendants. However that rationale does not apply when the failure  
17 to join the later-served defendant sooner was the result of a  
18 later-served defendant's obfuscation or avoiding service. After  
19 all, there is no "manifest unfairness [in] depriving later-served  
20 defendants of a federal forum" where the later-served defendant is  
21 aware of the case and nonetheless seeks to avoid being joined.  
22 Destfino, 630 F.3d at 956. Other courts have recognized this  
23 problem, noting that "[t]he rationale for preserving the later-  
24 served defendant's removal right [does] not apply . . . in  
25 instances when defendants are actually part of the same operating  
26 entity rather than separate and distinct entities." Eltman, 151  
27 F.R.D. at 318 n.15; see also Pocono Springs Civic Ass'n Inc. v.  
28 Rich One, Inc., No. 00-CV-2034, 2001 WL 114390, at \*1 (M.D. Pa.

1 Jan. 29, 2001); Higgins v. Ky. Fried Chicken, 953 F. Supp. 266, 270  
2 (W.D. Wis. 1997).

3 Here, RCM's failure to serve Blue Mountain Biogas sooner was  
4 not an attempt to avoid the possibility of removal; instead it was  
5 the result of Alpentel's obfuscatory discovery behavior. RCM  
6 points to several instances during discovery where Alpentel should  
7 have revealed the existence of Blue Mountain Biogas, but  
8 nonetheless failed to do so. For example, RCM requested  
9 information about, among other things, limited liability companies  
10 with which Alpentel's Managing Partner, Paul Stephan, was  
11 affiliated. See ECF No. 21 ("Supp. Duda Decl.") Ex. O ("Special  
12 Interrogs.") at ¶ 19. In response, Alpentel claimed that "Paul  
13 Stephan is an executive director of Geopower Energy, but is  
14 affiliated with no other entity . . ." that met the definition set  
15 forth by RCM. Id. at Ex. P at 4. Yet, according to the Utah  
16 business records, one of the three registered principals of Blue  
17 Mountain Biogas, LLC is Paul Stephan. ECF No. 10 ("Duda Decl.")  
18 Ex. I. Similarly, RCM requested all documents "relating to  
19 Anaerobic Digester Technology that Alpentel provided to or shared  
20 with any entity" other than those of which RCM was aware. Supp.  
21 Duda Decl. Ex. N No. 25. Yet, in response to that request,  
22 "Alpentel provided no correspondence, contract, or proposals with,  
23 from, or to Blue Mountain Biogas, LLC." Id. at ¶ 8. To be sure,  
24 it does appear that two<sup>2</sup> documents were produced that referred to  
25 "Blue Mountain Biogas, LLC." See ECF No. 18-1 ("Dunkelberger  
26

27 <sup>2</sup> A third document states that "[o]ur facility name is Blue  
28 Mountain Biogas," however this is not particularly significant  
given that it is undisputed that the parties and others generally  
refer to the project as the "Blue Mountain Project."

1 Decl.") at ¶¶ 4(a)-(b). Nonetheless, this does not alter the  
2 Court's conclusion. To the contrary, only one of the emails was  
3 sent by Alpentel, and, illustrating the close relationship between  
4 the entities, all correspondence involved only individuals  
5 purporting to represent Alpentel and state regulators.  
6 Furthermore, falling back on the production of two emails  
7 containing passing references to Blue Mountain Biogas is misleading  
8 at best when Alpentel should have furnished more directly  
9 responsive answers in discovery.

10 While Defendants suggest, pointing to cases recognizing the  
11 applicability of the corporate veil to limited liability companies,  
12 that the Court should not impute Alpentel's actions to Blue  
13 Mountain Biogas, there is good reason to do so here. See Opp'n at  
14 12 (citing d'Elia v. Rice Dev. Inc., 147 P.3d 515, 521 (Utah Ct.  
15 App. 2006) and Feeley v. NHAOCG, LLC, 62 A.3d 649, 667 (Del. Ch.  
16 2012) for the proposition that the corporate veil applies to  
17 limited liability companies). For example, Alpentel is Blue  
18 Mountain Biogas' registered agent with the Utah Secretary of State.  
19 Duda Decl. Ex. I. Alpentel, its managing partner, and its vice  
20 president are Blue Mountain Biogas' only principals. Id. They  
21 share the same physical address, id., and the same counsel in this  
22 matter. Notice of Removal at 1. Defendants stake their argument  
23 largely on the current ownership structure of Blue Mountain Biogas,  
24 although they do not deny that at relevant times during this  
25 litigation Blue Mountain Biogas was a wholly-owned subsidiary of  
26 Alpentel. Duda Decl. Ex. D ("Manure Supply Agreement") at 1. Nor  
27 do they deny any of the other facts regarding Alpentel's  
28 relationship with Blue Mountain Biogas. Instead, focusing on the

1 Manure Supply Agreement (and ignoring all the other indicia of a  
2 close relationship between Alpentel and Blue Mountain Biogas), they  
3 argue that RCM's reliance on the Manure Supply Agreement represents  
4 "an egregious omission" in light of Blue Mountain Biogas' current  
5 ownership structure. Opp'n at 13. This is bluster. RCM's  
6 argument is that the relationship between Alpentel and Blue  
7 Mountain Biogas is so close that Alpentel's decision not to remove  
8 the case to federal court when first filed should be treated as a  
9 decision by both Alpentel and Blue Mountain Biogas. In assessing  
10 that argument, the ownership structure as it existed at the time  
11 Alpentel declined to remove the case is highly relevant, as it  
12 shows it would not be unfair to deny Blue Mountain Biogas the  
13 opportunity to remove now. Furthermore, even if the relevant time  
14 period was when Blue Mountain Biogas removed the action, the  
15 ownership structure of Blue Mountain Biogas does not alter the  
16 other undisputed facts demonstrating Alpentel's and Blue Mountain  
17 Biogas' close relationship and identity of interests.

18 Accordingly, the Court is convinced that Alpentel and Blue  
19 Mountain Biogas can properly be considered "part of the same  
20 operating entity rather than separate and distinct entities."  
21 Eltman, 151 F.R.D. at 318 n.15. As a result, the Court concludes  
22 that Blue Mountain Biogas lacks an independent right of removal  
23 under Section 1446(b)(2)(B).

24 Amplifying this conclusion are two other pragmatic  
25 considerations. First, permitting removal here would unjustifiably  
26 permit forum shopping by allowing first-served defendants to  
27 litigate in state court for extended periods of time while hiding  
28 subsidiaries or closely affiliated entities, only to reveal them on

1 the eve of trial and start the litigation anew in a different  
2 forum. Here, Alpentel has been litigating in state court for more  
3 than two years. The waste of judicial resources, and potential for  
4 substantial delays and expense in resolving this case under these  
5 circumstances is enormous. As a result, interpreting Section  
6 1446(b)(2)(B) to grant Blue Mountain Biogas an independent right of  
7 removal would undermine the twin purposes of the thirty day  
8 limitation in Section 1446(b)(1). See Wilson, 668 F.2d at 965.  
9 Second, a motion for sanctions is pending in the Underlying Action  
10 related to the discovery abuses cited above. Without more  
11 information, the Court cannot be certain of the merits of that  
12 motion, but given that the Court likely "lack[s] authority to  
13 impose sanctions for pleadings filed in state court prior to  
14 removal," this only amplifies the Court's concerns about removal.  
15 See Pollard v. City & Cnty. of San Francisco, 261 F. App'x 16, 17  
16 (9th Cir. 2007) (citing Buster v. Greisen, 104 F.3d 1186, 1190 n.4  
17 (9th Cir. 1997)). It is almost inconceivable that a party facing a  
18 motion for sanctions for state court misconduct should be able to  
19 remove the case, thus divesting the state court of an opportunity  
20 to impose sanctions, while simultaneously removing to a court  
21 without jurisdiction to impose sanctions for the underlying  
22 misconduct.

23 Defendants view these considerations as improper. In their  
24 view, the adoption of the later-served Defendant rule overruled the  
25 line of cases applying equitable principles in determining whether  
26 removal is timely or appropriate. See, e.g., Yellow Cab Co. v.  
27 Gasper, 994 F. Supp. 344, 348 (W.D. Pa. 1998); Samura v. Kaiser,  
28 715 F. Supp. 970, 971 (N.D. Cal. 1989); Transp. Indem. Co. v. Fin.

1 Tr. Co., 339 F. Supp. 405, 409 (C.D. Cal. 1972). The Court  
2 disagrees. In fact, one of these cases is almost directly on  
3 point, and determined remand was appropriate without reference to  
4 either the first-served or later-served defendant approaches.  
5 Instead, in Yellow Cab Company of Pittsburgh v. Gasper, the court  
6 remanded a case in which "all of the entities joined as defendants  
7 in this case . . . are closely held corporations owned and  
8 controlled by one man," all the entities involved were represented  
9 by the same counsel, substantial proceedings had already taken  
10 place in state court, permitting removal would allow for the  
11 relitigation of several issues, and a motion to hold defendants in  
12 contempt was pending in state court. 994 F. Supp. at 349. While  
13 Defendants point to a subsequent case criticizing consideration of  
14 "equities, discretionary reasons and/or policy considerations" in  
15 determining whether to remand a case, Safway Steel Scaffolds Co. v.  
16 Safway Steel Prods., 2:06-cv-312, 2006 U.S. Dist. LEXIS 28373, at  
17 \*3 (W.D. Pa. May 11, 2006), the Court believes the best approach  
18 would allow for the consideration of these weighty practical  
19 consequences in determining whether remand is appropriate.  
20

21 **V. CONCLUSION**

22 Because the Court concludes Blue Mountain Biogas lacks an  
23 independent right of removal under Section 1446(b)(2)(B), the  
24 notice of removal was untimely. 28 U.S.C. § 1446(b)(1).  
25 Accordingly, remand is appropriate and the motion is GRANTED. See  
26 28 U.S.C. § 1447(c). The Clerk is hereby directed to mail a  
27 certified copy of this order to the clerk of the Alameda County  
28 Superior Court, terminate the motion to dismiss, ECF No. 23, and

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close the case. See id.

IT IS SO ORDERED.

Dated: December 4, 2014

  
UNITED STATES DISTRICT JUDGE