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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6 SAN JOSE DIVISION

7
8 JANE DOE, by and through her court-
appointed Guardian ad Litem, Lynne Snyder,
Esq.,

9 Plaintiff,

10 v.

11 COUNTY OF SANTA CLARA, et al.,
12 Defendants.

Case No. [5:15-cv-01725-EJD](#)

**ORDER DENYING MOTION TO
REMAND**

Re: Dkt. No. 21

13
14 Plaintiff Jane Doe (“Plaintiff”), a minor, filed the instant civil rights action against the
15 County of Santa Clara (“County”), various County employees, Kidango, Inc. (“Kidango”), and
16 certain private individuals. Presently before the court is Kidango’s Motion to Remand. See Mot.,
17 Dkt. No. 21. The County opposes the motion. See Opp’n, Dkt. No. 25. Defendant Deanne
18 Paredes filed a statement of non-opposition. See Dkt. No. 32. Plaintiff has filed no statement
19 supporting or opposing the motion.

20 Federal jurisdiction arises pursuant to 28 U.S.C. §§ 1331 and 1441(a). Oral argument on
21 this matter was held on November 19, 2015. Having carefully considered the pleadings in
22 conjunction with oral argument, the court finds, concludes, and orders as follows:

23 1. On March 18, 2015, Plaintiff filed this action in Santa Clara County Superior Court
24 through her guardian ad litem Lynne Snyder, Esq. See Dkt. No. 1. Plaintiff asserts seven
25 claims—two arise under 42 U.S.C. § 1983 and the remaining five arise under California state law.
26 On April 16, 2015, the County removed the action to this court claiming federal question
27 jurisdiction due to the § 1983 claims. See id. At the time of removal, Kidango had not been

1 served with the summons and complaint. See Mot. at 3. On July 6, 2015, Plaintiff served
2 Kidango with the complaint. See id. On July 30, 2015, Kidango filed the instant Motion to
3 Remand on the grounds that it did not consent to removal. See Mot.

4 2. A defendant may remove any civil action brought in a state court of which the
5 federal district court has original jurisdiction. 28 U.S.C. § 1441(a). The notice of removal must
6 be filed within 30 days after the defendant receives the complaint. 28 U.S.C. § 1446(b)(1).
7 “When a civil action is removed solely under § 1441(a), all defendants who have properly joined
8 and served must join in or consent to the removal of the action.” 28 U.S.C. § 1446(b)(2)(A). This
9 is known as the “rule of unanimity.” If there is a defect in the removal process other than lack of
10 subject matter jurisdiction, a motion to remand the case “must be made within 30 days after the
11 filing of the notice of removal.” 28 U.S.C. § 1447(c).

12 3. Three issues are before the court. First, the County contends Kidango’s motion is
13 untimely because it was filed more than 30 days after removal. Opp’n at 7. Kidango, however,
14 argues that its motion is timely because it was filed within 30 days after it was served with the
15 summons and complaint. Mot. at 4; Reply, Dkt. No. 26 at 2. To support its argument, Kidango
16 relies on 28 U.S.C. § 1448, which provides in pertinent part: “This section shall not deprive any
17 defendant upon whom process is served after removal of his right to move to remand the case.”

18 4. The Ninth Circuit has declined to address the issue of whether § 1448 authorizes a
19 defendant who was served after removal to remand the case within 30 days for lack of unanimity.
20 See Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 940 (9th Cir. 2010). One court in
21 this district has addressed the issue, and found that § 1448 permits a later served defendant to file a
22 motion to remand, exercising its right to choose the state forum. See Prickett v. Bonnier Corp.,
23 No. 15-cv-01230-MEJ, 2015 WL 1812798, at *2 (N.D. Cal. Apr. 20, 2015). In evaluating out-of-
24 district cases, the Fifth Circuit addressed a similar issue and also found that a later served
25 defendant could rely on § 1448 to file a motion to remand. See Getty Oil Corp. v. Ins. Co. of N.
26 Am., 841 F.2d 1254, 1263 (5th Cir. 1988) (“Indeed, if a removal petition is filed by a served
27 defendant and another defendant is served after the case is thus removed, the latter defendant may

1 still either accept the removal or exercise its right to choose the state forum by making a motion to
2 remand.”). Given the scant caselaw on the issue, the court finds these authorities persuasive.

3 5. Furthermore, in considering this case’s procedural history, the court finds
4 Kidango’s timeliness argument meritorious. At the time the County removed the case, Kidango
5 had not been served; indeed, Kidango was served 81 days after removal. Since Kidango was not
6 properly joined as a party until 81 days after the notice of removal was filed, it would have lacked
7 standing to file a motion to remand within the 30-day period following the removal. Plaintiff’s
8 delay in providing service should not deprive Kidango of exercising its right to file a motion to
9 remand. As such, the court concludes that Kidango’s motion is timely because it was filed within
10 30 days after it became a properly noticed party in this case.

11 6. The second issue before the court concerns the merits of the motion. The basis for
12 Kidango’s motion is that it did not, and does not, consent to the removal. Mot. at 2. To the extent
13 Kidango argues there is a defect in the removal process because the rule of unanimity was not
14 satisfied, it is misguided. Pursuant to the removal statute, when removal is based on federal
15 question, only the defendants against whom a federal claim is asserted are required to join in or
16 consent to the removal. 28 U.S.C. § 1441(c)(2). Moreover, the Ninth Circuit has found that
17 “defendants properly joined and served in the action” must consent to the removal. Emrich v.
18 Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988). Thus, “a party not served need not
19 be joined in a petition for removal.” Id. In this instance, Kidango’s consent for removal was
20 unnecessary because there are no federal claims asserted against it, and it was not yet served with
21 process at the time of removal. As such, the defect in the removal process claimed by Kidango
22 does not exist. In the absence of any other grounds for remanding the case, the court will deny
23 Kidango’s motion.

24 7. The third issue before the court concerns the County and Kidango’s apparent
25 agreement to sever and remand the one state law claim asserted solely against Kidango. See
26 Opp’n at 10; Reply at 5. The basis for this proposed remedy is 28 U.S.C. § 1441(c)(2), which
27 provides in part that upon removal of a federal question case, the district court shall sever from the

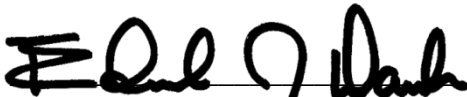
1 action all state law claims not within the original or supplemental jurisdiction of the federal district
2 court, and remand the severed claims to the state court. At oral argument, the court addressed this
3 proposed remedy with the parties. The County and Kidango continue to agree that such a result is
4 appropriate. Plaintiff, however, argues that it would be burdensome to litigate in both the federal
5 and state forums.

6 8. After careful consideration, the court declines to adopt the proposed remedy of
7 severing and remanding the one state law claim asserted solely against Kidango for several
8 reasons. First, the court agrees it would impose an undue burden and hardship for Plaintiff to
9 litigate in both forums. Second, given the severe factual allegations and involvement of a minor, it
10 is best to minimize Plaintiff's personal appearance and involvement in litigation. Third, it would
11 be judicially efficient for all claims to remain together to avoid inconsistent findings and rulings.
12 Lastly, pursuant to 28 U.S.C. § 1367(a), this court has supplemental jurisdiction over the state law
13 claims because they involve a common nucleus of operative facts—Plaintiff's alleged abuse while
14 in foster care, and defendants' failure to investigate and report the abuse. See Tr. of the Constr.
15 Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc., 333 F.3d
16 923, 925 (9th Cir. 2003) ("Nonfederal claims are part of the same 'case' as federal claims when
17 they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily
18 be expected to try them in one judicial proceeding.").

19 Accordingly, Kidango's Motion to Remand is DENIED. As indicated at the hearing, the
20 court advances the Case Management Conference scheduled for December 3, 2015, to **9:00 a.m.**
21 **on December 1, 2015.** The parties shall file an updated Joint Case Management Conference
22 Statement on or before **November 24, 2015.**

23
24 **IT IS SO ORDERED.**

25 Dated: November 20, 2015

26 
27 EDWARD J. DAVILA
United States District Judge