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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GERALD KOSEN, an individual;  
BRENDA KOSEN; an individual,  
  
Plaintiffs,  
  
vs.  
  
KATHLEEN RUFFING, an individual;  
ROSE PROCTOR, an individual;  
WILLIAM G. JURGENSON, an  
individual; MARK NOEL, an individual;  
ALLIED PROPERTY & CASUALTY  
INSURANCE, a business entity;  
NATIONWIDE MUTUAL INSURANCE  
COMPANY, a business entity; and DOES  
1 through 74,  
  
Defendants.

CASE No. 08cv0793-LAB (WMc)  
  
**ORDER GRANTING MOTION TO  
REMAND AND DENYING  
REQUESTS FOR COSTS**

[Doc. No. 12]

Plaintiffs Gerald and Brenda Kosen (collectively "Plaintiffs") filed an action in San Diego County Superior Court seeking damages, declaratory relief, and injunctive relief arising from an automobile accident which occurred in this judicial district. Mr. Kosen, a California resident, was the driver of one of the vehicles, and Mrs. Kosen was a passenger in the car. Defendant Kathleen Ruffing ("Ruffing"), a Pennsylvania resident, was the driver of the other vehicle. Plaintiffs initially named as defendants Ruffing, two insurance companies, and three individuals associated with the entity defendants. The defendants removed the case to this Court, alleging federal question jurisdiction based on Plaintiffs'

1 claim for violations of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C.  
2 §§ 1961, 1962, 1964 ("RICO"), and jurisdiction based on diversity of citizenship. The  
3 removing defendants have been dismissed from the case, so the only remaining defendant  
4 is Ruffing, against whom Plaintiffs pled no federal claim.

5 Plaintiffs filed a Motion to Remand the matter to state court and for fees and costs  
6 ("Motion") on May 12, 2008, one week after dismissing all named defendants except Ruffing.  
7 [Doc. No. 12.] Ruffing filed an Opposition to the Motion on June 9, 2008 [doc. no. 16], and  
8 Plaintiffs timely filed their Reply [doc. no. 23]. The Court found the issues presented in the  
9 Motion to be suitable for decision without oral argument pursuant to Civil Local Rule  
10 7.1(d)(1). [Doc. No. 24.] For the reasons discussed below, the Motion is **GRANTED**.

#### 11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 The underlying automobile accident occurred in La Jolla, California on  
13 February 24, 2006. Plaintiffs filed their Complaint in state court on February 21, 2008,  
14 naming as defendants Kathleen Ruffing (the driver), Allied Property & Casualty Insurance  
15 Company ("Allied"), Nationwide Mutual Insurance Company ("Nationwide"), and three  
16 individuals associated with the insurance companies (Rose Proctor, Mark Noel, and William  
17 Jurgensen).<sup>1</sup> On April 11, 2008, Plaintiffs filed a First Amended Complaint ("FAC"). The  
18 FAC alleged twelve causes of action for fraudulent and unfair business and advertising  
19 practices against Allied, Nationwide, Proctor, Noel, and Jurgensen; violations of RICO (18  
20 U.S.C. §§ 1961, 1962, 1964) against Jurgenson, Proctor, and Noel; general negligence  
21 under California law against all defendants; loss of consortium against defendant Ruffing;  
22 and civil conspiracy against individual defendants Proctor and Noel. (FAC ¶¶ 38-206.)

23 On April 14, 2008, shortly after the FAC was filed, Mr. Beavers (counsel for defendant  
24 Ruffing) made a general appearance for Ruffing in the state court action by filing an answer  
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28 <sup>1</sup> The April 30, 2008 Notice of Removal states that the state action "commenced" on  
April 1, 2008, the date the removing defendants claim to have first received a copy of the initial  
complaint through an attorney service. (Not. of Removal ¶¶ 1-2.)

1 to Plaintiffs' form complaint and a motion to strike the punitive damage request.<sup>2</sup> According  
2 to Plaintiffs, Beavers also served discovery requests on April 15, 2008. (Pls.' Mem. P. & A.  
3 3.)

4 Plaintiffs' counsel has filed two certificates of service from the state court action. One  
5 indicates that Ruffing was served with the summons and FAC by mail on April 24, 2008, at  
6 her address in Pittsburgh, Pennsylvania. [Doc. No. 13.] The other proof of service states  
7 that Mr. Jurgensen was similarly served on that date.<sup>3</sup> [Doc. No. 14.] On April 30, 2008, Mr.  
8 Beavers served Ruffing's answer to the FAC, and a notice that the motion to strike punitive  
9 damages would be taken off-calendar. (Pls.' Mem. P. & A. 3.) The answer and notice were  
10 filed in the state court on May 2, 2008. (Def.'s Opp'n 3.)

11 Attorney Anthony Cannon filed the Notice of Removal in this Court on April 30, 2008.  
12 The Notice of Removal identifies the removing defendants as the insurance companies  
13 (Allied and Nationwide) and individual defendants Proctor and Noel. The removal notice  
14 recites, "none of the Moving Defendants have been served with the summons and  
15 complaint," but their attorney, Anthony Lawrence Cannon, Esq., indicated that his firm  
16 (Cannon & Nelms) had been authorized to accept service on behalf of the four removing  
17 defendants. (Not. of Removal ¶ 5.) The Notice of Removal stated that defendant Ruffing  
18 (represented by separate counsel, R. Wesley Beavers, Esq.) "joins" in the Notice of  
19 Removal. Defendant Jurgenson did not join because he had not been served.

20 Federal jurisdiction in support of removal was predicated on 28 U.S.C. § 1332  
21 (diversity of citizenship) and 28 U.S.C. § 1441(b) (federal question removal jurisdiction) due  
22 to the RICO allegations. (Not. of Removal ¶ 4.) The Notice is accompanied by two exhibits.  
23 Exhibit A is a copy of the San Diego County Superior Court form Complaint. The exhibit is

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25 <sup>2</sup> Although these documents are mentioned in the Motion to Remand and the opposition  
26 papers, copies of the answer and motion to strike have not been provided to the Court. (See Pls.'  
27 Mem. P. & A. 3; Def.'s Opp'n 2-3.)

28 <sup>3</sup> Plaintiffs recite the actual service date as April 28, 2008, apparently accounting for mail  
service. (Pls.' Mem. P. & A. 3.) Neither the remand packet nor the docket post-removal contains  
proof that the two entity defendants or the other two named individual defendants -- all represented  
by Mr. Cannon -- were ever served.

1 signed by Plaintiffs' counsel, Douglas J. Crawford, Esq., and bears a state court file stamp  
2 date of February 21, 2008. Exhibit B is Plaintiffs' First Amended Complaint.<sup>4</sup> The copy of  
3 the FAC bears Mr. Crawford's signature and a signature date of April 11, 2008, but no court  
4 file stamp date. No proof of service of either the Complaint or the FAC and no other  
5 pleadings or filings from the state court action were provided in the removal packet.  
6 Additionally, a copy of the state court docket was not provided.

7 On May 5, 2008, three court days after removal, Plaintiffs' counsel filed Notices of  
8 Voluntary Dismissal Without Prejudice of all the named defendants except Ruffing, none of  
9 whom had yet answered the original Complaint or the FAC. [See Doc. Nos. 3-7.] Thus,  
10 Ruffing is the only named defendant remaining in this action, and the only remaining causes  
11 of action from the FAC are the two relating to Ruffing: general negligence and loss of  
12 consortium.

13 In their remand motion, Plaintiffs argue the following: (1) Removal was untimely; (2)  
14 Defendants waived their right to remove; (3) Defendants failed to comply with all the  
15 procedural requirements for removal; and (4) the federal court "has discretion to remand the  
16 case back to State court [when] subject matter jurisdiction is no longer present," apparently  
17 referring to the absence of federal question jurisdiction through Plaintiffs' dismissal of all  
18 defendants against whom Plaintiffs had alleged RICO violations. (Pls.' Mem. P. & A. 4-6.)  
19 They also ask the Court to award the costs and attorneys' fees they incurred to oppose the  
20 "untimely and procedurally defective removal from state court." (Id. at 6-7.)

21 Ruffing opposes remand because she asserts removal was timely, she has not  
22 waived her right to remove the case, and the Court retains diversity jurisdiction over this  
23 dispute because Plaintiffs and Defendant are citizens of different states and the amount in  
24 controversy exceeds \$75,000. (Def.'s Opp'n 5-9.) Ruffing seeks recovery of her attorneys'  
25 fees spent opposing the motion to remand.

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28 <sup>4</sup> Plaintiffs' counsel indicates the purpose of the FAC was to add one additional defendant  
(Noel). (Pls.' Mem. P. & A. 3.)

1 **II. DISCUSSION**

2 **A. Legal Standards for Removal Jurisdiction and Remand**

3 "When a plaintiff files in state court a civil action over which the federal district courts  
4 would have original jurisdiction based on diversity of citizenship, the defendant or defendants  
5 may remove the action to federal court . . . ." Caterpillar Inc. v. Lewis, 519 U.S. 61, 68  
6 (1996); see 28 U.S.C. § 1441. The removing party bears the burden of demonstrating  
7 removal was proper. Abrego Abrego v. Dow Chemical Co., 443 F.3d 676, 685 (9th Cir.  
8 2006) (examining the propriety of removal under the Class Action Fairness Act); United  
9 Computer Sys. v. AT & T Corp., 298 F.3d 756, 763 (9th Cir. 2002); Gaus v. Miles, Inc., 980  
10 F.2d 564, 566 (9th Cir. 1992).

11 A plaintiff objecting to the removal may file a motion asking the district court to  
12 remand the case to state court. Caterpillar, 519 U.S. at 69. The removal statutes are strictly  
13 construed, and doubts about the propriety of removal are resolved in favor of remand.  
14 Abrego Abrego, 443 F.3d at 685, 690 (citations omitted); Gaus, 980 F.2d at 566; Takeda v.  
15 Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985). A plaintiff may move for  
16 remand when removal to federal court was procedurally defective, although procedural  
17 defects do not necessarily deprive the court of subject matter jurisdiction.<sup>5</sup> 28 U.S.C. §  
18 1447(c). The timeliness of the removal raises a procedural defect. Huffman v. Saul  
19 Holdings Ltd. P'ship, 194 F.3d 1072, 1077 (10th Cir. 1999) (citing Snapper, Inc. v. Redan,  
20 171 F.3d 1249, 1253 (11th Cir. 1999)).

21 "[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of  
22 removal without reference to subsequent amendments. . . . Because of this rule, a plaintiff  
23 may not compel remand by amending a complaint to eliminate the federal question upon  
24 which removal was based." Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159  
25 F.3d 1209, 1213 (9th Cir. 1998) (citing Pfeiffer v. Hartford Fire Ins. Co., 929 F.2d 1484, 1488  
26 (10th Cir. 1991)). Here, Plaintiffs have dismissed their RICO claims, which were the only

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28 <sup>5</sup> "[A] district court's error in failing to remand a case improperly removed is not fatal to the  
ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered."  
Caterpillar, 519 U.S. at 64.

1 basis for federal question jurisdiction. Nevertheless, as will be discussed further below, even  
2 if the Court were to find that diversity jurisdiction is lacking, a remand would not be required  
3 because federal question jurisdiction was present at the time of removal.

4 In the case of removal based on diversity jurisdiction, there must be complete diversity  
5 at the time the action was filed and at the time of removal. Ryan ex rel. Ryan v. Schneider  
6 Nat'l. Carriers, Inc., 263 F.3d 816, 819 (8th Cir. 2001) (citations omitted); United Food &  
7 Comm. Workers Union v. Centermark Properties Meridien Square, Inc., 30 F.3d 298, 301  
8 (2nd Cir. 1994); see also Freeport-McMoRan, Inc. v. KN Energy, Inc., 498 U.S. 426, 428  
9 (1991) (stating that jurisdiction is either established or not at the time the action is  
10 commenced; if it exists "at the time the action is commenced, such jurisdiction may not be  
11 divested by subsequent events."). District courts have diversity jurisdiction over civil actions  
12 between citizens of different states when the amount in controversy exceeds \$75,000,  
13 exclusive of interest and costs. 28 U.S.C. § 1332(a). There is no dispute that the diversity-  
14 of-citizenship element is satisfied in this case; rather, the parties' dispute over diversity  
15 jurisdiction concerns the amount in controversy.

16 **B. Merits of the Motion to Remand**

17 Plaintiffs move for remand on the following four bases: (1) The removal was  
18 untimely; (2) Defendants waived their right to remove by litigating the merits of the case in  
19 state court; (3) Defendants failed to comply with the procedural requirements of the federal  
20 removal statutes; and (4) the Court has discretion to remand the case because original  
21 subject matter jurisdiction is lacking. For the reasons discussed below, each of these  
22 arguments is rejected.

23 **1. Timeliness Of Removal**

24 A defendant desiring to remove a civil action from state court need only file a notice  
25 of removal containing "a short and plain statement of the grounds for removal, together with  
26 a copy of all process, pleadings, and orders served upon each defendant or defendants in  
27 such action." 28 U.S.C. § 1446(a). The defendant must file the notice of removal "within  
28 thirty days after the receipt by the defendant, through service or otherwise, of a copy of the

1 initial pleading setting forth the claim for relief upon which such action or proceeding is based  
2 . . . ." 28 U.S.C. § 1446(b). Failure to file a notice of removal within the statute's time period  
3 is a sufficient ground on which to remand an action to state court. See Things Remembered  
4 v. Petrarca, 516 U.S. 124, 128 (1995) (stating that remand based on untimely removal is  
5 "precisely the type of removal defect contemplated by § 1447(c)."); see also 28 U.S.C. §§  
6 1446(b), 1447(c).

7 With respect to the alleged untimeliness of the removal in this case, Plaintiffs argue  
8 that removal occurred "over thirty days after Def. Ruffing's attorney, Mr. Beavers, accepted  
9 service on her behalf." (Pls.' Mem. P. & A. 4.) Plaintiffs arrive at that trigger date not in  
10 reliance on any proof of service, but based on their counsel's representation that he had a  
11 conversation with Mr. Beavers in "mid-March" during which Beavers purportedly agreed to  
12 accept service on Ruffing's behalf. Additionally, Plaintiffs contend in summary fashion that  
13 a copy of the summons and the form complaint were sent to Beavers.<sup>6</sup>

14 The only proof of service that has been presented to the Court indicating that Ruffing  
15 was served is the certificate of service filed by Plaintiffs' counsel on May 27, 2008 [doc. no.  
16 13]. That document establishes only that Kathleen Ruffing was formally served with the  
17 summons and FAC by mail, postmarked April 24, 2008. The fact that Ruffing was personally  
18 served on April 24, 2008, undermines any argument that Mr. Beavers had previously  
19 "accepted service" on behalf of Ruffing in "mid-March" pursuant to any discussions with Mr.  
20 Crawford. (See Pls.' Mem. P. & A. 3.) Had Beavers accepted service of the Complaint in  
21 mid-March, Crawford would have known that Ruffing was represented by counsel, and  
22 accordingly, he likely would have served the First Amended Complaint on her via Mr.  
23 Beavers. April 24, 2008 was less than one week before the removing defendants (who had  
24 not been served) removed the action to federal court. Moreover, Mr. Beavers declares in  
25 opposition to the remand motion that Mr. Crawford is mistaken about an alleged "mid-

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27 <sup>6</sup> Specifically, the Motion alleges: "[Attorney] Beavers established contact with Plaintiff[s]  
28 attorney in the [sic] mid-March and agreed to accept service on behalf of Def. Ruffing," and at some  
unspecified time, "[a] copy of the Summons, Form Complaint, Notice of Case Assignment, Civil Case  
Cover Sheet, and Stipulation to Use of Alternative Dispute Resolution were sent to Beavers on behalf  
[sic] Def. Ruffing." (Pls.' Mem. P & A. 2.)

1 March" conversation, and he denies accepting service of the Complaint on Ruffing's behalf  
2 at that time.

3 The record reveals that attorney Beavers filed Ruffing's answer to the Complaint in  
4 the state court action on April 14, 2008. He represents by way of explanation: "On April 3,  
5 2008, the lawsuit was assigned to me and on April 4, 2008, my secretary . . . acknowledged  
6 the assignment of the defense of the lawsuit to our claims customer . . . Allied Insurance  
7 Company." (Beavers Decl. ¶ 9.) He further declares that he first learned of the "impending  
8 lawsuit assignment" on April 1, 2008, and he called his claims customer contact on that date  
9 "to ask for a copy of the Summons and form Complaint." (*Id.* ¶ 10; Def.'s Opp'n 2.) Mr.  
10 Beavers disputes Mr. Crawford's reference to a "mid-March" contact or agreement, asserting  
11 there would not have been any contact between counsel before April "because there was  
12 no file or assignment" before then.<sup>7</sup> (Def.'s Opp'n 2.)

13 Plaintiffs have not presented any evidence that Ruffing or her attorney was notified  
14 of the lawsuit or served with the Complaint in mid-March. Ruffing or her counsel received  
15 a copy of the original Complaint prior to the formal Proof of Service reflecting mail service  
16 on April 24, 2008 of the Summons and FAC, as evidenced by her Answer to the original  
17 Complaint filed April 14, 2008. Nevertheless, actual receipt standing alone does not trigger  
18 § 1446(b)'s thirty-day window for filing a notice of removal. See *Murphy Bros., Inc. v.*  
19 *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) ("[A] named defendant's time to  
20 remove is triggered by simultaneous service of the summons and complaint, or receipt of the  
21 complaint 'through service or otherwise,' after and apart from service of the summons, but  
22 not by mere receipt of the complaint unattended by any formal service.").

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24 <sup>7</sup> Mr. Beavers represents he first heard from Mr. Crawford by phone on April 17, 2008, three  
25 days after Mr. Beavers filed Ruffing's Answer to the Complaint, asking him to accept service of the  
26 FAC. (Def.'s Opp'n 3.) Mr. Beavers represents that he told Mr. Crawford he could not agree to  
27 accept service "without first discussing it with his client." (Pls.' Mem. P. & A. 3.) Mr. Beavers  
28 provides as an Exhibit to the Opposition a document he characterizes as a confirming letter from Mr.  
Crawford to substantiate his representations. (See Def.'s Opp'n 3; Beavers' Decl. ¶ 12, Ex. A.)  
However, as observed by Mr. Crawford, the letter from Mr. Crawford memorializing an April 17, 2008  
conversation is addressed to Mr. Cannon, who was counsel for the named defendants other than  
Ruffing, and the text refers to "clients" in the plural, without ever mentioning Ruffing or Mr. Beavers  
in particular. [Doc. No. 18-2.] This letter does not provide any useful evidence about the content of  
communications between Plaintiffs' counsel and Mr. Beavers.



1 Plaintiffs are correct in their assertion that "the time clock starts at the moment the  
2 first defendant is served or an agent (Beavers) accepts service on behalf of a defendant  
3 (Def. Ruffing)." (Pls.' Mem. P. & A. 4); see United Computer Sys., 298 F.3d at 762  
4 ("Because all defendants must join [the § 1446(b) motion], the 30-day period for removal  
5 [under § 1446(b)] commences to run from the date the first defendant receives a copy of the  
6 complaint") (citation omitted). However, there is no proof before the Court that any  
7 defendant was served with the Complaint or otherwise had notice of it prior to April 1, 2008.  
8 Mr. Cannon, counsel for the removing defendants, recited in the removal notice that he  
9 obtained pre-service copies of Plaintiffs filings on April 1, 2008 through an attorney service  
10 he engaged for that purpose. The Court therefore rejects Plaintiffs' argument that the case  
11 was not timely removed. The Court finds the April 30, 2008 Notice of Removal was timely  
12 filed on behalf of all the defendants, including Ruffing, within the 30-day statutory period.

## 13 **2. Waiver of Right to Remove**

14 Plaintiffs next argument is that "defendants waived their right to remove" because  
15 defendant Ruffing actually began litigation her defense in state court, which constitutes a  
16 waiver of the right to remove an action to federal court. (Pls.' Mem. P. & A. 4-5.) Plaintiffs  
17 urge the Court to view "the 'totality' of Beavers' acts in state court in deciding whether or not  
18 he waived his right to remove to federal court[,]" even though Defendant Ruffing was not the  
19 defendant who initiated the removal. (Id. at 5.) According to Plaintiffs, Ruffing committed  
20 the following conduct, which is substantial enough to effect a waiver: "filing an answer to  
21 form complaint & an answer to the first amended complaint; scheduling with the Court &  
22 serving motion to strike; request for statement of damages, propounding numerous  
23 discovery, etc."<sup>8</sup> (Id.)

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25 \_\_\_\_\_  
26 <sup>8</sup> Plaintiffs urge the Court to entertain other considerations which are well beyond the  
27 pertinent record, such as to "take into consideration the fact that these attorneys are not working  
28 independently but in concert for Nationwide, their employer." Plaintiffs contend that Mr. Beavers is  
an employee of Nationwide (one of the dismissed defendants) who is "operating under the guise of  
Law Office of Goates & Beavers." (Pls.' Mem. P. & A. 2 & n.1, 5.) These allegations are not relevant  
to the current Motion and the Court will not entertain such immaterial considerations at this time.

1 A defendant may waive their right to remove a case to federal court by “tak[ing]  
2 actions in state court that manifest his or her intention to have the matter adjudicated there,  
3 and to abandon his or her right to a federal forum.” Resolution Trust Co. v. Bayside  
4 Developers, 43 F.3d 1230, 1240 (9th Cir. 1994). However, “[i]t has been recognized on  
5 numerous occasions that actions which are preliminary and not conclusive in character and  
6 which do not actually submit the merits of a claim for a binding decision do not constitute a  
7 waiver of defendant’s right to remove . . . .” Beasley v. Union Pac. R.R. Co., 497 F. Supp.  
8 213, 216 (D. Neb. 1980). When “a party takes necessary defensive action to avoid a  
9 judgment being entered automatically against him, such action does not manifest an intent  
10 to litigation in state court, and accordingly, does not waive the right to remove.” Resolution  
11 Trust, 43 F.3d at 1240 (citations omitted). Actions taken in state court to preserve the status  
12 quo are necessary defensive actions that do not cause a waiver of the right to remove. Id.  
13 Likewise, merely filing a pleading in response to the complaint will not result in waiver.  
14 Acosta v. Direct Merchants Bank, 207 F. Supp. 2d 1129, 1131 (S.D. Cal. 2002) (finding  
15 defendant waived removal by filing a cross-complaint, and thus, invoking the jurisdiction of  
16 the state court as a plaintiff).

17 Defendant Ruffing did not waive her right to remove the case to this Court by filing her  
18 answer and motion to strike punitive damage request in state court. Filing an answer and  
19 a motion to strike the punitive damage allegations does not demonstrate the “clear and  
20 unequivocal” desire to adjudicate the merits of the case in state court. See Acosta, 207 F.  
21 Supp. 2d at 1131 (citing Resolution Trust, 43 F.3d at 1240). In addition to the filing of the  
22 answer and motion to strike, Plaintiffs also assert that Mr. Beavers served numerous  
23 discovery requests. The Court notes that other than the bald assertion in Plaintiffs’ moving  
24 papers, there is no evidence suggesting that discovery was in fact served. But even if  
25 Beavers did serve discovery on Ruffing’s behalf, the Court does not believe this is sufficient  
26 to constitute a waiver. See Anderson v. Kaz, Inc., 2008 WL 2477559, at \*2-3 (D. Or. June  
27 12, 2008) (finding plaintiff who requested one set of discovery from defendant after removal  
28 to federal court did not waive his right to move for remand); Bolden v. Healthspring of Ala.,

1 Inc., 2007 WL 4403588, at \*1 (S.D. Ala. Oct. 2, 2007) (finding the serving of deposition  
2 notices and written discovery requests was not substantial defensive action that would waive  
3 the right to remove case to federal court); Nixon v. Wheatley, 368 F. Supp. 2d 635, 641 (E.D.  
4 Tex. 2005) (same). Therefore, this argument is unavailing.

### 5 **3. Subject Matter Jurisdiction**

6 The Notice of Removal asserts subject matter jurisdiction over this lawsuit based on  
7 both diversity of citizenship and a federal question. (Not. of Removal ¶ 4.) The federal  
8 question raised in Plaintiff's lawsuit was a RICO claim asserted against defendants  
9 Jurgenson, Proctor, and Noel, all of whom were voluntarily dismissed shortly after removal.  
10 Thus, there are no longer any federal claims remaining in the lawsuit, and federal question  
11 jurisdiction is no longer present. Plaintiffs contend that in addition, the Court lacks diversity  
12 jurisdiction because the amount-in-controversy requirement is not met. (Pls.' Mem. P. & A.  
13 6.)

14 Even if this Court agrees and finds that subject matter jurisdiction is currently lacking,  
15 it is not required to remand the case. "[A] plaintiff may not compel remand by amending a  
16 complaint to eliminate the federal question upon which removal was based." Sparta Surgical  
17 Corp., 159 F.3d at 1213. Because federal question jurisdiction was present at the time of  
18 removal, the Court has acquired pendant jurisdiction over Plaintiffs' related state-law claims.  
19 Lindsey v. Dillard's, Inc., 306 F.3d 596, 598-99 (8th Cir. 2002); Bright v. Bechtel Petroleum,  
20 Inc., 780 F.2d 766, 771 (9th Cir. 1986) ("Once the federal court acquires jurisdiction of a  
21 case on removal, it also acquires jurisdiction over pendant state law claims."). The  
22 subsequent dismissal of the RICO allegations does not deprive this Court of jurisdiction over  
23 the case because the Court is entitled to continue to exercise pendant jurisdiction. See id.

24 The Court has discretion to remand a case in which removal was based on federal  
25 question jurisdiction which is no longer present. Carnegie-Mellon Univ. v. Cohill, 484 U.S.  
26 343, 357 (1988); Nishimoto v. Federman-Bachrach & Assoc., 903 F.2d 709, 715 (9th Cir.  
27 1990). The Court does not have discretion to remand, however, if the Court has original  
28 jurisdiction over the case on another basis, such as where diversity of citizenship is present.

1 Williams v. Costco Wholesale Corp., 471 F.3d 975, 977 (9th Cir. 2006) (citing United States  
2 v. Rubenstein, 971 F.2d 288, 293 (9th Cir. 1992)). Here, Defendant Ruffing asserts that the  
3 Court has acquired diversity jurisdiction over the dispute because the parties are of diverse  
4 citizenship and the amount in controversy exceeds \$75,000. (Def.'s Opp'n 7-8.) Thus,  
5 Defendant claims the Court lacks discretion to remand the case. Plaintiffs, on the other  
6 hand, contend that Defendant has not met her burden of proving the amount in controversy  
7 is satisfied, so the Court has discretion to decline the exercise of jurisdiction over the  
8 pendant state law claims, and a remand is appropriate.

9 Thus, the Court must determine whether the requirements for diversity jurisdiction are  
10 met. All parties acknowledge there is diversity of citizenship because Plaintiffs are citizens  
11 of California and Ruffing is a citizen of Pennsylvania. However, the parties dispute whether  
12 the jurisdictional amount in controversy is satisfied (or continues to be satisfied) in this case.  
13 Plaintiffs' motion alleges, "At this point, Plaintiff makes no representation either way about  
14 the amount in controversy. Plaintiffs' counsel will affirmatively represent that he did not  
15 dismiss the bulk of the defendant[s] to oust this Court of jurisdiction, but simply to eliminate  
16 defendant[s]' counsel, Anthony L. Cannon, from the equation." (Id.)

17 Plaintiffs did not provide a specific damage figure in either the Complaint or the First  
18 Amended Complaint. "Where the complaint does not specify the amount of damages  
19 sought, the removing defendant must prove by a preponderance of the evidence that the  
20 amount in controversy requirement has been met." Abrego Abrego, 443 F.3d at 683 (citing  
21 Gaus, 980 F.2d at 566-67; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir.  
22 1996)). To meet the "preponderance of the evidence" burden, the defendant must establish  
23 "that it is 'more likely than not' that the amount in controversy exceeds that amount."  
24 Sanchez, 102 F.3d at 404 (quoting Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357  
25 (11th Cir. 1996)). The Court may "consider[] facts presented in the removal petition as well  
26 as any 'summary-judgement-type evidence relevant to the amount in controversy at the time  
27 of removal.'" Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir.

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1 2003) (quoting Singer v. State Farm Mut. Automobile Ins. Co., 116 F.3d 373, 377 (9th Cir.  
2 1997)).

3 Defendant Ruffing attempts to meet this burden by asking the Court to take judicial  
4 notice of Mr. Crawford's May 5, 2008 filing, after removal, of an application for temporary  
5 waiver from compliance with the mandatory electronic filing policies and procedures in this  
6 district, in which Plaintiffs' counsel states the following:

7 Filed concurrently with this Notice are the dismissals without prejudice  
8 as to all Defendants except Def. Ruffing. Diversity jurisdiction lies to Def.  
9 Ruffing because she is a resident of Pennsylvania and the amount in  
10 controversy exceeds \$75,000.

11 Therefore, [Plaintiffs' counsel] could have prosecuted this case in this  
12 court, but chose not to because [he] recognizes the tremendous work load  
13 placed on this Court's jurists by drug smuggling and immigration cases.

14 (Beavers Decl. ¶ 15 (quoting Application for Waiver [doc. no. 2] at 3).) Plaintiffs contend that  
15 the Court should not consider this evidence because it is nothing more than "contradicted,  
16 inadmissible hearsay testimony which does not satisfy the evidentiary standards necessary  
17 for removal." (Pls.' Reply 3 (citing Valdez, 372 F.3d at 1117; Gaus, 980 F.2d at 566)).

18 In determining whether the amount in controversy is met, the Court may consider  
19 "summary-judgment-type evidence," including judicial admissions. Valdez v. Allstate Ins.  
20 Co., 372 F.3d 1115, 1117 (9th Cir. 2004) (citations omitted); see also Singer, 116 F.3d at  
21 376. "Judicial admissions are formal admissions in the pleadings which have the effect of  
22 withdrawing a fact from issue and dispensing with the need for proof of the fact." American  
23 Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). Additionally, "statements  
24 of fact contained in a brief may be considered admissions of the party in the discretion of the  
25 district court." Id. at 227 (emphasis omitted). But, "[w]here . . . the party making an  
26 ostensible judicial admission explains the error in a subsequent pleading or by amendment,  
27 the trial court must accord the explanation due weight." Sicor Ltd. v. Cetus Corp., 51 F.3d  
28 848, 859-60 (9th Cir. 1995) (citing Lacelaw, 861 F.2d at 226).

The Court finds Mr. Crawford's representation as to the amount in controversy against  
Defendant Ruffing to be an enforceable judicial admission on the issue of amount in

1 controversy at the time of removal. The admission was made on the very day that counsel  
2 dismissed all the named defendants except for Ruffing (May 5, 2008), and it was a clear  
3 statement that Plaintiff is seeking over \$75,000 in damages from Ruffing.<sup>9</sup> Plaintiffs do not  
4 attempt to refute the judicial admission made by their attorney that the amount in controversy  
5 exceeds \$75,000, instead stating only that “Plaintiff makes no representations either way  
6 about the amount in controversy.” (Pls.’ Mem. P. & A. 6.) Based on the evidence that has  
7 been presented, the Court finds by a preponderance of the evidence that the amount in  
8 controversy exceeds \$75,000, and accordingly, the Court has diversity jurisdiction over  
9 Plaintiffs’ claims. Because the Court has original jurisdiction over the case, it does not have  
10 discretion to remand based on the dismissal of the federal claims. See Carnegie-Mellon  
11 Univ., 484 U.S. at 356; Williams, 471 F.3d at 977.<sup>10</sup>

#### 12 **4. Procedural Defects in Removal Notice**

13 Plaintiffs contend that the removal of the case to federal court was not effective  
14 because the Notice of Removal contained two procedural defects: (1) Defendants failed to  
15 attach copies of all process, pleadings, and state court orders to the Notice of Removal; and  
16 (2) Defendants did not file a copy of the Notice of Removal in the state court. (Pls.’ Mem.  
17 P. & A. 5.) Therefore, Plaintiffs urge the Court to remand the case because it was never  
18 properly removed.

##### 19 **a. Failure to Attach State Court Process and Pleadings**

20 A defendant desiring to remove a civil action from state court must file a notice of  
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22 <sup>9</sup> Defendant also argues that Mr. Crawford made statements to Mr. Beavers on June 6,  
23 2008, about the amount in controversy exceeding \$75,000. (Beavers Decl. ¶ 16; Def.’s Opp’n 8.)  
24 Plaintiffs’ counsel refutes this assertion. (Crawford Decl. ¶¶ 6-8.) The Court has not evidence before  
it to determine what was discussed during the June 6 conversation, and the Court declines to make  
a credibility determination regarding the competing declarations.

25 <sup>10</sup> Even if the Court had discretion to remand based on the dismissal of the federal claims,  
26 the case likely would not be remanded on this basis. “A district court can consider whether the  
27 plaintiff has engaged in any manipulative tactics when it decides whether to remand a case. If the  
28 plaintiff has attempted to manipulate the forum, the court should take this behavior into account . .  
. . . “ Carnegie-Mellon Univ., 484 U.S. at 357. Plaintiffs’ prompt dismissal of all federal claims after  
removal, along with Plaintiffs’ refusal to take a position on the issue of the amount in controversy,  
could be construed as an attempt to manipulate the forum, which would justify the Court’s exercise  
of discretion to deny remand.

1 removal containing "a short and plain statement of the grounds for removal, together with  
2 a copy of all process, pleadings, and orders served upon each defendant or defendants in  
3 such action." 28 U.S.C. § 1446(a). Plaintiffs argue the removing defendants' Notice of  
4 Removal was procedurally defective for failure to include copies of "all process, pleadings,  
5 and orders served" in the state court action, and for failure to cure that defect by filing an  
6 amended Notice of Removal within the thirty-day time frame for removal. 28 U.S.C. §  
7 1446(a). As noted above, the April 30, 2008 Notice of Removal contained no copy of the  
8 summons, no copies of any answer to the Complaint or First Amended Complaint, and no  
9 orders from the state court (although in the absence of a copy of the docket from the state  
10 court action, it is impossible to substantiate whether any orders were actually issued). The  
11 only documents attached to the Notice of Removal are the Complaint and the FAC.

12 Plaintiffs rely on Kisor v. Collins, 338 F. Supp. 2d 1279 (N.D. Ala. 2004), for the  
13 proposition that failure to include a copy of the summons is a jurisdictional defect that cannot  
14 be remedied after the expiration of the thirty-day removal period. (Pls.' Mem. P. & A. 5.) In  
15 Kisor, the plaintiff timely moved for remand on the basis that the notice of removal did not  
16 include a copy of the summons served on one of the two defendants or copies of either  
17 return of service, so the defendants "failed to meet one of the mandatory prerequisites set  
18 forth in 28 U.S.C. § 1446(a), namely, that all 'process' be included." Kisor, 338 F. Supp. 2d  
19 at 1279. In opposition, the Kisor defendants argued their procedural error was merely  
20 technical and innocuous, but they also purported to amend their notice of removal to add a  
21 copy of the state court summons that was served on one of the defendants and a copy of  
22 the return of service on him. Id. In strictly construing the removal statute, the Kisor court  
23 concluded: "there is no shame in a plaintiff's insistence on full and complete compliance  
24 with [statutes] by a defendant who wants to flee to federal court." Id. at 1281. Further, the  
25 court found, "defendants' amendment to their notice of removal comes too late, [so] it cannot  
26 be considered and cannot counter [plaintiff's] motion to remand. Id.

27 However, there is a split of authority among the federal courts on this issue. See  
28 Yellow Transp., Inc. v. Apex Digital, Inc., 406 F. Supp. 2d 1213, 1215 (D. Kan. 2005). The

1 Fifth, Seventh, and Eleventh Circuits have adopted the opposite view, finding that “the  
2 removing party’s failure to file the required state court papers is ‘curable in the federal court  
3 if there is a motion to remand.” Id. (quoting 14C Charles Alan Wright et al., Federal Practice  
4 & Procedure § 3733, at 350-51 (3d ed. 1998). In Yellow Transportation, the court examined  
5 the "two different viewpoints" reflected in the case law on the "pivotal issue . . . whether the  
6 proper remedy for defendant's failure to attach the summons is to remand the case or allow  
7 defendant to cure the defect by filing an amended notice of removal notwithstanding  
8 expiration of the thirty-day removal period." Id. at 1214. The court noted that under the  
9 current version of 28 U.S.C. § 1447(c), "there are essentially 'two types of improperly  
10 removed cases: those in which the federal court has no subject matter jurisdiction and those  
11 with defects in the removal procedure itself." Id. at 1217 (quoting Huffman v. Saul Holdings  
12 Ltd. P’ship, 194 F.3d 1072, 1076 (10th Cir. 1999)). The court noted that nothing in the  
13 removal statute or its legislative history suggested a failure to comply with the technical  
14 requirements of removal (i.e. attaching copies of the state court documents) was meant to  
15 deprive the court of jurisdiction to determine whether remand was appropriate under the  
16 circumstances. Id. at 1218-19. Accordingly, the court declined to remand the case, despite  
17 an error in failing to attach a copy of the state court summons to the removal papers,  
18 because the error was inadvertent, it did not burden the court, it did not reflect a complete  
19 failure to follow removal procedure, and there was no prejudice to the plaintiff. Id. at 1219.

20 Plaintiffs argue the Court should follow the Kisor approach because it is in line with  
21 the Ninth Circuit’s practice of strictly construing statutes against removal jurisdiction. (Pls.’  
22 Reply 2 (citing Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1988) (strictly construing the  
23 removal statute codified at 28 U.S.C. § 1441(c) and noting the court looks to the plaintiff’s  
24 pleadings to assess whether the claims were properly removable); Libhart v. Santa Monica  
25 Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979) (strictly construing the removal statute  
26 codified at 28 U.S.C. § 1441(b))).

27 The Court, however, is not persuaded to follow the Kisor line of cases. The Ninth  
28 Circuit has found that defects in removal procedure are not jurisdiction defects, so they may



1 be waived or corrected. See *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212-13 (9th  
2 Cir. 1980). The defect alleged here – the failure to attach the process and pleadings to the  
3 Notice of Removal – are technical defects that do not deprive the Court of jurisdiction.  
4 Indeed, the removal statute provides a mechanism for the Court to obtain the record  
5 materials directly from the state court, further supporting the idea that the statute was not  
6 intended to deprive the Court of jurisdiction if all required documents were not attached to  
7 the removal notice. This Court believes that *Yellow Transportation* and the cases cited  
8 within it reflect the majority view on this subject, and this is the view that will also be adopted  
9 by this Court. Accordingly, the failure of Defendants to attach all necessary documents to  
10 the Notice of Removal does not necessitate remand.

11 **b. Failure to File Notice of Removal in State Court**

12 Plaintiffs' second assignment of procedural error, however, is more persuasive.  
13 Plaintiffs claim that the removal was procedurally defective because the defendants failed  
14 to file a copy of the notice of removal with the clerk of the Superior Court of California,  
15 County of San Diego. (Pls.' Mem. P. & A. 5.) 28 U.S.C. § 1446(d) requires that removing  
16 defendants promptly "file a copy of the notice with the clerk of such State court, which shall  
17 effect the removal and the State court shall proceed no further unless and until the case is  
18 remanded." Mr. Crawford represents that as of May 9, 2008 (nine days after removal and  
19 three days before Plaintiffs' Motion to Remand was filed), the Superior Court Clerk had no  
20 record of the notice of removal. (Pls.' Mem. P. & A. 5.) Defendant Ruffing did not address  
21 this argument in her opposition brief, so the Court has no information about her position  
22 about whether the notice was ever properly filed in state court.

23 28 U.S.C. § 1446(d) provides that the state court must be provided with notice of  
24 removal "promptly" after the notice of removal is filed in federal court. The term "promptly"  
25 has not been clearly defined, but remand is appropriate if there has been "undue delay" in  
26 filing the notice of removal in the state court. 14C Charles Alan Wright et al., *Federal*  
27 *Practice & Procedure* § 3736 (2006). "The purpose of filing a copy of the removal petition  
28 with the state court 'is to inform the state district judge that he can no longer proceed with

1 the case until the federal court decides whether it will retain jurisdiction or not.” Nixon, 368  
2 F. Supp. 2d at 640 (quoting Adair Pipeline Co. v. Pipeliners Local Union, 203 F. Supp. 434,  
3 437 (S.D. Tex. 1962)).

4 Most courts that have considered the issue have found that short delays in filing the  
5 notice of removal with the state court did not warrant remand. See, e.g., Nixon v. Wheatley,  
6 368 F. Supp. 2d 635, 640 (E.D. Tex. 2005) (finding twenty-two-day delay in filing notice with  
7 state court was “reasonably prompt”); Calderon v. Pathmark Stores, Inc., 101 F. Supp. 2d  
8 246, 246-47 (S.D.N.Y. 2000) (delay of one month did not necessitate remand). One court  
9 even found a delay of six months did not require a remand, because the federal court did not  
10 lack jurisdiction and the state court did not take action during that delay, beyond issuing a  
11 preliminary scheduling order, so the purpose of the removal statute was not thwarted.  
12 Whitney v. Wal-Mart Stores, Inc., 2004 WL 1941345, at \*1-2 (D. Me. Aug. 31, 2004). Other  
13 courts, however, have found that even short delays have violated § 1446(d) and warranted  
14 remand. See, e.g., Colettie v. Ovaltine Food Prods., 274 F. Supp. 719, 723 (D.P.R. 1967)  
15 (delay of five days in notifying plaintiff of removal was sufficient to warrant remand).

16 In the present case, the Court is not aware of any action that has been taken by the  
17 San Diego Superior Court since the Notice of Removal was filed in this Court. However, at  
18 this point it appears that the defendants have completely failed to comply with § 1446(d)’s  
19 requirement that they file notice of removal in the state court. The Notice of Removal is  
20 dated April 30, 2008, and to date the Court has not been provided with any evidence  
21 showing the notice has been filed in the state court. The removal notice had not yet been  
22 filed in the state court by May 9, 2008, and it appears unlikely that the notice would be filed  
23 after that date because by that time the defendants who filed the removal papers, all  
24 represented by Mr. Cannon, had been dismissed from the lawsuit. In this situation, the Court  
25 finds it appropriate to remand the case to the state court, because the removal process was  
26 never properly completed. See 14C Federal Practice & Procedure § 3737; In re Diet Drugs,  
27 282 F.3d 220, 231 n.6 (3d Cir. 2002) (“Removal is effective upon filing a notice of removal

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1 in both the relevant federal and state courts, and providing notice to the other parties.”)  
2 (emphasis added) (citing 28 U.S.C. §§ 1446(a), (d))).

3 **C. Fees And Costs**

4 In the Motion to Remand, Plaintiffs ask the Court to award them the attorneys’ fees  
5 incurred as a result of Defendant’s improper removal. (Pls.’ Mem. P. & A. 6-7.) In her  
6 opposition to the remand motion, Defendant Ruffing argues she is entitled to an award of  
7 the attorneys’ fees she incurred in opposing the motion because it is frivolous and based  
8 upon the contradictory statements of Plaintiffs’ counsel, it was not brought in good faith, and  
9 Plaintiffs’ counsel has purportedly made either intentional or inadvertent misrepresentations  
10 to the court.<sup>11</sup> (Def.’s Opp’n 9-10.)

11 Each side relies on 28 U.S.C. § 1447(c) as support for their requests for costs and  
12 attorneys’ fees. (Pls.’ Mem. P. & A. 6; Def.’s Opp’n 10.) That section provides, in pertinent  
13 part, “An order remanding the case may require payment of just costs and any actual  
14 expenses, including attorneys’ fees, incurred as a result of the removal.” 28 U.S.C. §  
15 1447(c). On its face, however, §1447(c) does not authorize an award of fees to a defendant  
16 who successfully avoids a motion to remand. In Martin v. Franklin Capital Corp., 546 U.S.  
17 132, 141 (2005), the Supreme Court held that “[a]bsent unusual circumstances, courts may  
18 award attorney’s fees under § 1447(c) only where the removing party lacked an objectively  
19 reasonable basis for seeking removal.” There is no strong presumption in favor of awarding  
20 fees. Id. at 138-39.

21 “The appropriate test for awarding fees under § 1447(c) should recognize Congress’  
22 desire to deter removals intended to prolong litigation and impose costs on the opposing  
23 party, while not undermining Congress’ basic decision to afford defendants a right to remove  
24 as a general matter, when the statutory criteria are satisfied.” Id. at 133. In this present  
25 case, the Court finds that neither party is entitled to attorneys’ fees and costs. Defendant

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26  
27 <sup>11</sup> “It is suggested that plaintiffs’ attorney is not entirely accurate as a historian of fact. He  
28 claims an agreement for service occurred when it could not have occurred. He claims the amount  
in controversy is above \$75,000 in one pleading and in another pleading he coyly claims there is no  
representation as to amount in controversy. Plaintiffs’ counsel then claims on June 6, 2008 that the  
amount in controversy is above \$75,000.” (Def.’s Opp’n 10.)

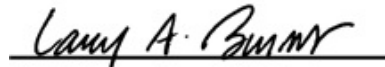
1 Ruffing's request for attorneys' fees is DENIED because the removal statutes do not  
2 authorize fee awards to parties who oppose motions to remand. Plaintiffs' request for fees  
3 is also DENIED because Defendants' removal of the case to this Court was not objectively  
4 unreasonable. As discussed, the Court has jurisdiction over the case, and were it not for the  
5 procedural defect in failing to promptly notify the state court of removal, the case would not  
6 have to be remanded. The majority of Plaintiffs' arguments were unsuccessful. Thus, this  
7 is not a case of "unusual circumstances" that would warrant the awarding of attorneys' fees.

8 **III. CONCLUSION AND ORDER**

9 For all the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to  
10 Remand is **GRANTED**. Additionally, the requests for fees and costs made by both Plaintiffs  
11 and Defendant Ruffing are **DENIED**.

12 **IT IS SO ORDERED.**

13 DATED: January 5, 2009

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15 **HONORABLE LARRY ALAN BURNS**  
16 United States District Judge

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