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

MARISSA CUEN and PATRICIA J.  
GONGORIA,  
  
Plaintiffs,  
  
vs.  
  
JAMES TUCKER, Individual and Doing  
Business As J.T. Towing Company, et al.,  
  
Defendants.

CASE NO. 09cv1904 DMS (BLM)  
  
**ORDER DENYING MOTION TO  
REMAND**  
  
[Docket No. 5]

This matter comes before the Court on Plaintiffs’ motion to remand this case to El Centro Superior Court. Defendants County of Imperial and Richard E. Sotelo have filed oppositions to the motion. Plaintiffs did not file a reply. After reviewing the parties’ briefs, the Court requested supplemental briefing on whether Plaintiffs had effected service of process of the Third Amended Complaint upon Defendants Tucker and Dorame. Plaintiffs filed their supplemental brief on November 9, 2009. Defendants Sotelo and County of Imperial filed their supplemental briefs on November 13, 2009. After a thorough review of the issues, the Court denies Plaintiffs’ motion.

**I.  
BACKGROUND**

On November 1, 2007, Officers from the Narcotics Task Force (“NTF”) of the Imperial Valley Sheriff’s Department, including Defendant Richard Sotelo, raided Plaintiff Marisa Cuen’s home in El Centro, California, and arrested her, her husband Luis Cuen, and Plaintiff Patricia Gongoria for

1 possession of controlled substances for sale or purchase in violation of California Health and Safety  
2 Code § 11351. (Mem. of P. & A. in Supp. of Mot. at 2.) The Department of Social Services removed  
3 Plaintiff Cuen's four children from the home. (*Id.*) On orders from the NTF, Defendant J.T. Towing  
4 Co. removed Plaintiff Gongoria's 2004 Ford F-150, and took the vehicle to its impound lot. (*Id.*)

5 The following day, Plaintiffs went to the impound lot. (*Id.*) Defendant Nikki Dorame was  
6 working at the lot, and she released the vehicle to Plaintiff Gongoria without receiving or requesting  
7 any paperwork or fees. (*Id.*)

8 On November 5, 2007, Defendant Sotelo went to the impound lot and learned that the vehicle  
9 had been released. (*Id.* at 2-3.) Defendant Dorame told him that Plaintiffs had presented a release  
10 document, but the document was no longer in the file. (*Id.* at 3.) Defendant Sotelo assumed that  
11 Plaintiffs had presented false documents to Defendant Dorame, and then took the documents with  
12 them. (*Id.*) Defendant Sotelo filed a probable cause affidavit stating Plaintiffs had committed fraud,  
13 burglary, forgery and obtaining property by false pretenses. (*Id.*)

14 On November 6, 2007, Defendant Sotelo and other member of the NTF stopped Plaintiff  
15 Gongoria's vehicle and arrested Plaintiffs. (*Id.*) The following day, Plaintiffs appeared in Juvenile  
16 Court, and the Court informed them that it would have released the children back to Plaintiff Cuen  
17 absent the second arrest. (*Id.*) In light of that arrest, the children were not returned until January 28,  
18 2008. (*Id.* at 4.)

19 The criminal case arising out of the return of the vehicle was dismissed on May 23, 2008.  
20 (*Id.*)

21 On October 31, 2008, Plaintiffs filed the present case against Defendants Sotelo, Dorame,  
22 James Tucker, individually and doing business as J.T. Towing, and the County of Imperial in El  
23 Centro Superior Court. The original complaint alleged claims for negligence, false imprisonment,  
24 battery, assault and malicious prosecution. The Superior Court entered defaults against Defendants  
25 Dorame and Tucker on January 12, 2009, and May 15, 2009, respectively.

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3 On July 14, 2009, Plaintiffs filed a Second Amended Complaint in Superior Court.<sup>1</sup> That  
4 complaint reasserted the claims of negligence, false imprisonment, battery and assault, but deleted the  
5 malicious prosecution claim and added a claim for violation of the Unruh Act against Defendants  
6 Sotelo and the County, as well as the State of California.

7 On August 6, 2009, Plaintiffs filed a Third Amended Complaint in Superior Court, which  
8 realleged the claims in the Second Amended Complaint and added a claim for violation of 42 U.S.C.  
9 § 1983 against Defendants Sotelo and the County. The Third Amended Complaint also dropped the  
10 State of California as a Defendant. Plaintiffs did not serve a copy of the Third Amended Complaint  
11 on Defendant Tucker or Dorame.

12 On August 31, 2009, Defendant Sotelo removed the case to this Court, with the consent of  
13 Defendant County of Imperial. In response, Plaintiffs filed the present motion to remand. Defendants  
14 Sotelo and County of Imperial have since filed a motion to dismiss, which is currently scheduled for  
15 hearing on December 4, 2009.

16 **II.**

17 **DISCUSSION**

18 Plaintiffs assert Defendants failed to comply with the unanimity requirement for removal,  
19 therefore the case should be remanded to state court.<sup>2</sup> Specifically, Plaintiffs argue Defendants failed  
20 to obtain the consent of Defendants Dorame and Tucker. Defendants respond that they did not need  
21 to obtain the consent of these Defendants because the Superior Court entered their defaults, and  
22 Plaintiffs failed to serve them with a copy of the Third Amended Complaint.

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25 <sup>1</sup> Although Plaintiffs titled this document “Second Amended Complaint,” it appears to have  
26 been the first amendment, and therefore, should have been titled “First Amended Complaint.” For the  
27 sake of consistency and ease of reference, the Court will refer to this document as the “Second  
28 Amended Complaint.” The same applies to the Third Amended Complaint.

<sup>2</sup> Plaintiffs also argue the case should be remanded because El Centro Superior Court is a more  
convenient forum for the litigation. This argument, however, does not provide grounds for remand.  
Accordingly, the Court will not discuss that argument further in this Order.

1 It is settled law that “[a]ll defendants must join in a removal petition with the exception of  
2 nominal parties.” *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232-33 (9<sup>th</sup> Cir. 1986) (citations omitted).  
3 “This general rule applies, however, only to defendants properly joined and served in the action.”  
4 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 n.1 (9<sup>th</sup> Cir. 1988). Here, Plaintiffs failed to serve  
5 a copy of the Third Amended Complaint on Defendants Tucker and Dorame. Therefore, these  
6 Defendants were not required to consent to the removal.

7 Plaintiffs argue that their failure to serve Defendants Tucker and Dorame with the Third  
8 Amended Complaint does not relieve the other Defendants from obtaining their consent to the removal  
9 because, at the time of removal, the defaulted Defendants could have moved to set aside the defaults.  
10 The opportunity to set aside the defaults, however, does not cure Plaintiffs’ failure to serve the Third  
11 Amended Complaint on these Defendants, and it is the Third Amended Complaint that gave rise to  
12 the removal. Plaintiffs’ decision to withhold service of the Third Amended Complaint on the  
13 Defaulted Defendants is a strong indicator that Plaintiffs intend to rely on the defaults rather than  
14 litigate their claims against these Defendants. Under these circumstances, Defendants Sotelo and the  
15 County were not required to obtain the consent of Defendants Tucker and Dorame to the removal of  
16 this case. Their explanation for failing to obtain the consent of these Defendants is sufficient.

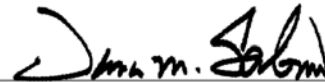
17 **III.**

18 **CONCLUSION**

19 In light of the above, the Court finds there was no defect in the removal of this case from state  
20 court. Accordingly, Plaintiffs’ motion to remand is denied.

21 **IT IS SO ORDERED.**

22 DATED: November 20, 2009

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24 HON. DANA M. SABRAW  
25 United States District Judge