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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Aqua Connect, Inc.,	)	CV 11-5764 RSWL (MANx)
	)	
Plaintiff,	)	
	)	<b>ORDER Re: Plaintiff Aqua</b>
v.	)	<b>Connect, Inc.'s Motion</b>
	)	<b>to Remand [11]</b>
	)	
Code Rebel LLC, Arben	)	
Kryeziu, and Vladimir	)	
Bickov,	)	
	)	
	)	
	)	
Defendants.	)	
	)	
	)	

On October 12, 2011, Plaintiff Aqua Connect, Inc.'s Motion for Remand came on for regular calendar before this Court [11]. The Court, having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW**

**FINDS AND RULES AS FOLLOWS:**

The Court hereby **DENIES** Plaintiff's Motion to Remand.

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1 **I. BACKGROUND**

2 **A. Factual Background**

3 Plaintiff brings this current Action against  
4 Defendants for claims arising from Defendants' alleged  
5 reverse engineering of Plaintiff's software and  
6 subsequent distribution of an allegedly infringing  
7 software product. Plaintiff is a Nevada corporation  
8 that sells software and has its principal place of  
9 business in California.

10 Defendant Code Rebel LLC ("Code Rebel") also sells  
11 software and is a limited liability corporation  
12 organized under the laws of Hawaii, with its principal  
13 place of business in Hawaii. Defendant Arben Kryeziu  
14 ("Kryeziu"), a citizen of Hawaii, is the managing  
15 partner and only member of Defendant Code Rebel.  
16 According to the Complaint, Defendant Bickov is a  
17 resident of Russia, who worked as an agent of Defendant  
18 Code Rebel, at the behest of Defendant Kryeziu.  
19 Defendant Bickov has not been served.

20 **B. Procedural Background**

21 On May 25, 2011, Plaintiff filed this Action  
22 against Defendants in the Superior Court of California,  
23 County of Los Angeles [1]. Defendants Code Rebel and  
24 Kryeziu were served with a Summons and Complaint on  
25 June 6, 2011. On July 12, 2011, Defendants Code Rebel  
26 and Kryeziu allege they received a letter from unserved  
27 Defendant Bickov, in which Defendant Bickov claimed to  
28 be a citizen of Ukraine and consented to removal.

1 Consequently, on July 13, 2011, Defendants Code Rebel  
2 and Kryeziu jointly filed a Notice of Removal on  
3 diversity grounds. Thereafter, on August 12, 2011,  
4 Plaintiff filed this present Motion to Remand [11].  
5

## 6 **II. LEGAL STANDARD FOR REMAND**

7 In deciding whether to remand a case, this Court  
8 must determine whether the case was properly removed to  
9 this Court. The right to remove a case to federal  
10 court is governed by 28 U.S.C. § 1441, which in  
11 relevant part states that "any civil action brought in  
12 a State court of which the district courts of the  
13 United States have original jurisdiction, may be  
14 removed by the defendant or the defendants. . . ." 28  
15 U.S.C. § 1441(a). District courts have diversity  
16 jurisdiction over all civil actions between citizens of  
17 different states where the amount in controversy  
18 exceeds \$ 75,000, exclusive of interest and costs. 28  
19 U.S.C. § 1332.

20 Section 1446(b) governs the timing of removal. If  
21 the initial pleading shows that the case is "removable  
22 on its face," then a defendant has thirty days from  
23 receipt of the pleading to remove the case. Carvalho  
24 v. Equifax Info. Servs., LLC, 629 F.3d 876, 885  
25 (quoting Harris v. Bankers Life & Cas. Co., 425 F.3d  
26 689, 694 (9th Cir. 2005)). If, however, no basis for  
27 removal is apparent in that pleading, the requisite  
28 thirty-day removal period does not begin until the

1 defendant receives "a copy of an amended pleading,  
2 motion, order or other paper" from which removability  
3 may first be ascertained. 28 U.S.C. § 1446(b).

4 The Court may remand a case to state court for lack  
5 of subject matter jurisdiction or defects in removal  
6 procedure. 28 U.S.C. § 1447(c). The defendant has the  
7 burden of proving that removal is proper and that all  
8 of the prerequisites are satisfied. If at any time  
9 before final judgment it appears that the district  
10 court lacks subject matter jurisdiction over a case  
11 that has been removed to federal court, the case must  
12 be remanded. 28 U.S.C. § 1447(c). The Ninth Circuit  
13 strictly construes the removal statute against removal  
14 jurisdiction, and federal jurisdiction must be rejected  
15 if there is any doubt as to the right of removal in the  
16 first instance. See Shamrock Oil & Gas Corp. v.  
17 Sheets, 313 U.S. 100, 108-09 (1941) (stating that  
18 removal statutes should be construed narrowly in favor  
19 of remand to protect jurisdiction of state courts).

### 21 III. ANALYSIS

#### 22 A. Evidentiary Objection

23 Plaintiff moves to strike a letter from unserved  
24 Defendant Bickov as inadmissible hearsay. See Removal,  
25 ¶ 9, Ex. B. Hearsay does not encompass all  
26 extrajudicial statements but only those offered for the  
27 purpose of proving the truth of matter asserted in the  
28 statement. Fed. R. Evid. 801(c). Here, Defendants

1 Code Rebel and Kryeziu offer the letter for two  
2 purposes: (1) to prove Defendant Bickov's citizenship  
3 and his consent to removal; and (2) to prove that they  
4 received notice of removability on July 12, 2011.

5 As for the first purpose, the Court finds that  
6 Defendants Code Rebel and Kryeziu may not use the  
7 contents of the letter to prove Defendant Bickov's  
8 citizenship and his consent to removal. Such use is  
9 hearsay, and thus, Plaintiff's evidentiary objection as  
10 to Bickov's letter is **SUSTAINED in part**.

11 As for the second purpose, the Court finds that  
12 Defendants Code Rebel and Kryeziu may offer the letter  
13 to prove that they received notice of removability on  
14 July 12, 2011. Such use is a non-hearsay use of the  
15 letter, as it is only being offered for the effect on  
16 the listener. United States v. Dorsey, 418 F.3d 1038,  
17 1044 (9th Cir. 2005) ("If the significance of an offered  
18 statement lies solely in the fact that it was made, no  
19 issue is raised as to the truth of anything asserted,  
20 and the statement is not hearsay." (quoting Fed. R.  
21 Evid. 801(c) advisory committee's note)). Thus,  
22 Plaintiff's evidentiary objection as to Bickov's letter  
23 is **OVERRULED in Part**.

#### 24 **B. Motion to Remand**

25 In its Motion, Plaintiff argues that this Action  
26 should be remanded to state court for the following  
27 reasons: (1) Defendants Code Rebel and Kryeziu's  
28 removal was untimely; (2) Defendants Code Rebel and

1 Kryeziu have failed to make the required showing for  
2 diversity jurisdiction; and (3) Defendants Code Rebel  
3 and Kryeziu failed to join Defendant Bickov in their  
4 Notice of Removal. This Court **DENIES** Plaintiff's  
5 Motion to Remand because Defendants Code Rebel and  
6 Kryeziu's removal was proper.

7 1. Timing of removal

8 This Court finds that Defendants Code Rebel and  
9 Kryeziu's removal was timely under 28 U.S.C. § 1446(b).  
10 Specifically, the Court finds that service of the  
11 Complaint did not trigger the thirty-day removal period  
12 because Defendants Code Rebel and Kryeziu could not  
13 have ascertained the removability of the Action without  
14 knowing the citizenship of unserved Defendant Bickov.  
15 The Complaint, served upon Defendants Code Rebel and  
16 Kryeziu, only alleged Defendant Bickov's residence;  
17 however, for the purpose of giving notice of  
18 removability, the Ninth Circuit has held that a person  
19 "residing in a given state is not necessarily domiciled  
20 there, and thus is not necessarily a citizen of that  
21 state." Kantor v. Wellesley Galleries. Ltd., 704 F.2d  
22 1088, 1090 (9th Cir. 1983). As such, the Court finds  
23 that the face of the Complaint did not give notice of  
24 removability to Defendants Code Rebel and Kryeziu, and  
25 thus, the thirty-day removal period could not have  
26 started when they were served with the Complaint. See  
27 Harris v. Bankers Life and Cas. Co., 425 F.3d 689, 695  
28 (9th Cir. 2005)(holding service of the complaint did

1 not trigger the thirty-day removal period because the  
2 complaint only alleged an unserved defendant's  
3 residence).

4       Rather, the Court finds that the Notice of Removal  
5 was timely because the thirty-day removal period did  
6 not start until Defendants Code Rebel and Kryeziu  
7 received unserved Defendant Bickov's letter on July 12,  
8 2011. See § 1446(b) (If no basis for removal is  
9 apparent in the initial pleading, the thirty-day  
10 removal period does not begin until a defendant  
11 receives "a copy of an amended pleading, motion, order  
12 or other paper" from which removability may first be  
13 ascertained.); see, e.g., Harris v. Bankers Life and  
14 Cas. Co., 425 F.3d 689, 691-92 (9th Cir. 2005)(the  
15 defendant timely removed the case within thirty days of  
16 discovering additional information about an unserved  
17 defendant). The Court finds that Defendant Bickov's  
18 letter alerted Defendants Code Rebel and Kryeziu that  
19 complete diversity existed and that this case was  
20 removable. Therefore, Defendants Code Rebel and  
21 Kryeziu timely filed their Notice of Removal on July  
22 13, 2011.

23       2. Diversity Jurisdiction

24       The parties do not dispute whether diversity  
25 jurisdiction exists; rather, Plaintiff argues that  
26 Defendants Code Rebel and Kryeziu failed to prove  
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1 diversity jurisdiction by a preponderance of evidence.<sup>1</sup>

2 Generally, on a motion to remand, the defendant has  
3 the burden of proving by a preponderance of evidence  
4 that diversity jurisdiction exists. Gaus, 980 F.2d at  
5 565 (holding that the defendant must prove by a  
6 preponderance of evidence that the amount in  
7 controversy exceeded \$50,000); Guryev v. Life Investors  
8 Ins. Co. of Am., No. 00-2679, 2000 U.S. Dist. LEXIS  
9 18079, at \*2 (N.D. Cal. Dec. 4, 2000). However, on a  
10 motion to remand, alleging a party's residence in the  
11 complaint creates a presumption that the party  
12 continues to reside in that state and puts "the burden  
13 of coming forward with contrary evidence on the party  
14 seeking to prove otherwise," which is Plaintiff in this  
15 case. Baumann v. American Family Mut. Ins. Co., 2011  
16 WL 2709121, \*2 (D. Colo. July 12, 2011) (quoting State  
17 Farm Mut. Auto. Ins. Co. v. Dyer, 19 F.3d 514, 519  
18 (10th Cir. 1994)); Harrell v. Kepreos, 2005 WL 730639,  
19 \*2 (D. Or. March 30, 2005)(holding that a person's  
20 residence is presumed to be the person's domicile or  
21 place of citizenship).<sup>2</sup>

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23 <sup>1</sup>As discussed previously, Defendant Bickov's letter  
24 is hearsay; thus, Defendants Code Rebel and Kryeziu may  
25 not use its contents to prove Defendant Bickov's  
citizenship.

26 <sup>2</sup>If a complaint states that a person is a resident  
27 of a state, there is a presumption that the person is  
28 also a citizen of that state. State Farm Mut. Auto.  
Ins. Co. v. Dyer, 19 F.3d 514, 520 (10th Cir. 1994);

1 Here, Plaintiff alleges in the Complaint that  
2 Defendant Bickov is a resident of Russia. As such,  
3 Plaintiff's allegation created a presumption that  
4 Russia is Defendant Bickov's domicile and consequently  
5 created a presumption of complete diversity.  
6 Therefore, Plaintiff, as the party challenging  
7 diversity jurisdiction here, has the burden of  
8 disproving this presumption of complete diversity. See  
9 Lew v. Moss, 797 F.2d 747, 751 (9th Cir. 1986) (holding  
10 that the proponent of jurisdiction bears the burden of  
11 proof, but the presumption of continued residence  
12 shifts the burden of production onto the party seeking  
13 to prove otherwise).

14 The Court finds that Plaintiff has failed to  
15 produce any evidence to challenge the presumption of  
16 complete diversity, and thus, Plaintiff failed to meet  
17 its burden.

### 18 3. Joining in Notice of Removal

19 The Court finds removal was proper because  
20 Defendants Code Rebel and Kryeziu did not need consent  
21 of unserved Defendant Bickov to remove. Case law  
22 generally requires all defendants to join or consent to  
23 the notice of removal, but an exception exists when a

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25 Gonzalez v. First NLC Financial Servs., 2009 WL  
26 2513670, \*2 (C.D. Cal. June 12, 2009). However, as  
27 discussed in the previous section, residence in a  
28 complaint is not enough to give a defendant sufficient  
notice of removability.

1 non-joining defendant has not been served in state  
2 court. See Community Bldg. Co. v. Maryland Casualty  
3 Co., 8 F.2d 678 (9th Cir. 1925); Lopez v. BNSF Ry. Co.,  
4 614 F. Supp. 2d 1084, 1087 (E.D. Cal. 2007). Because  
5 Defendant Bickov has not been served, the Court finds  
6 that this exception to joining or consenting to removal  
7 applies here. Thus, the Court finds removal was  
8 proper.

9 4. Attorney's Fees

10 Plaintiff requests attorney's fees in connection  
11 with bringing this Motion. Defendants Code Rebel and  
12 Kryeziu argue that the Court should instead award them  
13 attorney's fees to punish Plaintiff for making  
14 misleading arguments and misstatements of fact and law.

15 The Court finds that neither party should be  
16 awarded attorney's fees. Fee awards are left to the  
17 district court's discretion, but section 1447(c)  
18 provides for attorney's fees "only where the removing  
19 party lacked an objectively reasonable basis for  
20 seeking removal." Martin v. Franklin Capital Corp.,  
21 546 U.S. 132, 141 (2005). Defendants Code Rebel and  
22 Kryeziu had an objectively reasonable basis for seeking  
23 removal, and there is no evidence that Plaintiff filed  
24 this Motion to Remand in bad faith.

25 Accordingly, the Court **DENIES** Plaintiff and  
26 Defendants Code Rebel and Kryeziu's requests for  
27 attorney's fees.

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1 **IV. CONCLUSION**

2 For the reasons stated above, the Court **DENIES**  
3 Plaintiff's Motion to Remand. Furthermore, the Court  
4 **DENIES** Plaintiff and Defendants Code Rebel and  
5 Kryeziu's requests for attorney's fees.  
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8 DATED: October 25, 2011

9 **IT IS SO ORDERED.**

10  
11 **RONALD S.W. LEW**

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**HONORABLE RONALD S.W. LEW**

13 Senior, U.S. District Court Judge  
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