

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 08-3739-GHK (PJWx)

Date June 27, 2008

Title *Hypertouch, Inc. v. Azoogole, Inc., et al.*

Presiding: The Honorable

GEORGE H. KING, U.S. DISTRICT JUDGE

Beatrice Herrera

N/A

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

(none)

(none)

**Proceedings: (1) Notice of Potential Procedural Defect; and (2) Order to Show Cause**

On April 15, 2008, Plaintiff Hypertouch, Inc. (“Plaintiff”) filed the above-captioned Complaint in California state court against four defendants: (1) AzoogoleAds.com, Inc. (“Azoogole”)<sup>1</sup>; (2) Intuit Inc. (“Intuit”)<sup>2</sup>; (3) Quicken Loans, Inc. (“Quicken Loans”); and, (4) Rock Holdings, Inc. (“Rock Holdings”) (collectively, “Defendants”).

On June 6, 2008, Azoogole filed a Notice of Removal in this Court on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441, in which Intuit and Quicken Loans joined (collectively “Removing Defendants”). The Notice of Removal states that Plaintiff is a California corporation with its principal place of business in California. The Notice of Removal also states that Azoogole is a corporation incorporated in Delaware with its principal place of business in New York; that Intuit is a corporation incorporated in Delaware with its principal place of business in California; that Quicken Loans is a corporation incorporated, and with its principal place of business, in Michigan; and that Rock Holdings is a corporation incorporated, and with its principal place of business, in Michigan.

As a court of limited jurisdiction, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), we construe removal statutes restrictively and resolve doubts as to removability in favor of remanding to state court. *See Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The removing party carries the burden of establishing the propriety of removal. *See Duncan*, 76 F.3d at 1485; *Gaus*, 980 F.2d at 566.

**I. Potential Procedural Defect in Removal and Plaintiff’s Right to File Motion for Remand**

<sup>1</sup> The Notice of Removal states that Plaintiff improperly referred to Azoogole as “Azoogole, Inc.” in the Complaint. (Notice of Removal 2.)

<sup>2</sup> On June 17, 2008, Plaintiff filed a Notice of Dismissal as to Intuit only.

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All defendants who may properly join in the removal of an action *must* join in the notice of removal. *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9th Cir. 1986). Rock Holdings has not joined in the Notice of Removal. (Notice of Removal ¶ 14.) The Notice of Removal states that Rock Holdings has not been properly served. (Notice of Removal ¶ 4.) If Rock Holdings had been properly served at the time of removal, the Notice would be procedurally, although not jurisdictionally, defective.

In *Kelton Arms Condominium Owners Ass'n, Inc. v. Homestead Insurance Co.*, 346 F.3d 1190 (9th Cir. 2003), the Ninth Circuit held that a district court does not have authority to remand a case *sua sponte* for a non-jurisdictional procedural defect under 28 U.S.C. § 1447(c). *Id.* at 1193. “[P]rocedural requirements exist primarily for the protection of the parties.” *Id.* at 1192. A plaintiff may waive the procedural requirements in section 1446(a) if the plaintiff wishes “to remain in federal court even though he or she originally filed in state court.” *Id.*

In the event that Plaintiff wishes to preserve the right to object based upon any procedural defects in the Notice of Removal, Plaintiff **MUST** do so by filing an appropriate motion for remand on or before **July 7, 2008**. See 28 U.S.C. § 1447(c). The meet and confer requirement of Local Rule 7-3 is waived for this potential motion only.

## **II. Order to Show Cause**

### **1. Corporate Citizenship**

For purposes of assessing diversity, a corporation has dual citizenship. “[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .” 28 U.S.C. § 1332(c)(1).

There are two rules used to establish a corporation’s principal place of business. “First, the ‘place of operations test’ locates a corporation's principal place of business in the state which contains a substantial predominance of corporate operations. Second, the ‘nerve center test’ locates a corporation's principal place of business in the state where the majority of its executive and administrative functions are performed.” *Tosco Corp. v. Cmty. for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001) (internal citations and some quotation marks omitted). However, “[t]he ‘nerve center’ test should be used only when no state contains a substantial predominance of the corporation's business activities.” *Id.* (emphasis omitted). Thus, following the Ninth Circuit rule, we apply the place of operations test unless the party seeking to establish jurisdiction shows that the activities of a corporate party do not substantially predominate in any one state.

In applying the operations test, we determine a corporation’s principal place of business by examining an entity’s entire activities. See *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990). We consider a corporation a citizen of the state where it “conducts the most activity that is visible and impacts the public” and where there is the “greatest potential for litigation.” *Id.* When a corporation conducts business in more than one state, we regard as its principal place of

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business that state which “contains a substantial predominance of the corporation’s business activities.” *Id.* at 1092. Important factors in making this determination are the locations where income is earned, purchases are made, and sales take place, as well as the location of employees, tangible property, and production activities. *Id.* at 1094. “Substantial predominance” does not require that the *majority* of a corporation’s business take place in one state, only that the amount of a corporation’s business activity in one state be significantly larger than that in any other state in which the corporation conducts business. *Tosco Corp.*, 236 F.3d at 500. The relevant comparison, then, is between the amount of business activity in the state at issue and the amount conducted in other states, not between the amount of activity conducted in the state at issue and the corporation’s total activity. In other words, the issue is not the percentage of a corporation’s activity conducted in a given state, taken alone, but that percentage in comparison to the percentage of activity the corporation conducts in other states.

In order to properly determine corporate citizenship, we require information from Defendants, for each of the top five states in which a corporate party conducts business, in at least the following categories: (1) the number of employees it has in each state;<sup>3</sup> (2) the gross percentage of its sales originating in each state; (3) the gross percentages of its assets held in each state.<sup>4</sup> We also require information on the location of a corporate party’s headquarters, but we will revert to the use of the ‘nerve center’ test only if the response information shows that a corporate entity’s operations do not predominate in a single state.

**2. Order**

The party seeking to establish jurisdiction bears the burden of proving such. *Kokkonen*, 511 U.S. at 377. Here, the Notice of Removal is insufficient to do so because Defendants have not provided the required information noted above regarding their own and Plaintiff’s citizenship. Therefore, Defendants are **ORDERED TO SHOW CAUSE**, in writing, **WITHIN TWELVE (12) DAYS**, as to why this matter should not be remanded because this court lacks subject matter jurisdiction.

Defendants’ failure to timely and adequately show cause as required herein shall be deemed Defendants’ admission that this Court lacks subject matter jurisdiction. In that event, this action shall be remanded to the state court from which it was removed.

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<sup>3</sup>We seek to determine where a party “conducts the most activity that is visible and impacts the public.” *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990). Thus, our definition of “employees” for the purpose of subject matter jurisdiction includes not only salaried and hourly employees, but also, as relevant, independent agents, and any other person in whatever capacity who interacts with the public in behalf of a party.

<sup>4</sup>As with the number of employees, our definition of assets is broad, including assets held by anyone defined in footnote 3 as an employee in furtherance of a party’s business.

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**III. Conclusion**

If Plaintiff believes there is a basis for and wishes to file a motion to remand based on the potential procedural defect noted above in Part I, Plaintiff must do so on or before **July 7, 2008**.

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Defendants have not provided the required information noted above in Part II regarding their own and Plaintiff's citizenship. Therefore, Defendants are **ORDERED TO SHOW CAUSE**, in writing, **WITHIN TWELVE (12) DAYS**, as to why this matter should not be remanded because this Court lacks subject matter jurisdiction.<sup>5</sup>

Defendants' failure to timely and adequately show cause as required herein shall be deemed Defendants' admission that this Court lacks subject matter jurisdiction. In that event, this action shall be remanded to the state court from which it was removed.

**IT IS SO ORDERED.**

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<sup>5</sup> Defendants also allege that Plaintiff fraudulently joined Rock Holdings for the purpose of establishing venue in California. Because there are open questions as to whether there is a potential procedural defect in removal and whether we have subject matter jurisdiction over this action, as set forth in Parts I and II above, at this time we decline to reach the issue of the propriety or convenience of venue in this district.