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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

THOMAS FOLEY,	)	SA CV 03-1761 AHS (ANx)
	)	
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION AND ORDER
	)	DENYING PLAINTIFF'S MOTION TO
ALLIED INTERSTATE, INC.,	)	REMAND
et al.,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

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I.

INTRODUCTION

Plaintiff's motion for remand asks the Court to find that one of the removing defendants (Allied Interstate, Inc., hereinafter, "Allied") did not legitimately, through an authorized representative, join in the removal, but, in the event that joinder is found to be unanimous, to further find that the same defendant waived its right to removal by continuing to litigate the matter in state court.

No case appears to have addressed these precise issues,

1 but given the evidence adduced by the parties at this juncture,  
2 the Court finds that defendants' evidence tends to prove that the  
3 "general counsel" was duly authorized to join in the removal and  
4 the Court cannot find that plaintiff has produced any evidence  
5 that the joinder was not valid. The circumstances urged for  
6 finding waiver, while remarkable, do not find support in the  
7 cases justifying an order of remand.

8 **II.**

9 **PROCEDURAL BACKGROUND**

10 On November 7, 2003, pro se plaintiff Thomas Foley  
11 (hereinafter "plaintiff") filed a complaint against defendants in  
12 the Orange County Superior Court, Case No. 03CC13431, alleging  
13 violations of state and federal law. On December 10, 2003,  
14 defendant Creditors Interchange filed a timely notice of removal.  
15 On the same date, all other defendants filed a notice of joinder in  
16 Creditors Interchange's removal notice.

17 On January 9, 2004, plaintiff filed a motion to remand on  
18 the ground that removal was improper. On January 26, 2004,  
19 defendant Creditors Interchange filed its opposition. Also on  
20 January 26, 2004, defendant Triadvantage Credit Services, Inc.  
21 joined the opposition. Plaintiff filed his reply on February 2,  
22 2004.

23 The Court heard oral argument on the motion on February  
24 9, 2004, and took the matter under submission.

25 Having considered the parties' submissions, the arguments  
26 presented at the hearing, and after conducting independent  
27 research, the Court denies plaintiff's motion to remand.

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III.

FACTUAL BACKGROUND

On November 7, 2003, plaintiff filed a state court action against four collection agencies (defendants) alleging unfair debt collection practices and other violations of state and federal law. Defendant Creditors Interchange was served on November 10, 2003. On December 10, 2003, Creditors Interchange filed a timely notice of removal. On the same date, counsel for Creditors Interchange, Larissa Nefulda, unsuccessfully attempted to contact counsel for co-defendant Allied Interstate, Inc. ("Allied") in order to obtain Allied's consent to the removal action. Without any appearance of counsel in the state court record to contact to seek consent to joinder of removal, Nefulda contacted Allied's offices directly and was referred to Allied's general counsel, Mike Nugent. Nugent confirmed that he was, in fact, general counsel for Allied and that he was authorized to consent to removal on Allied's behalf. On December 10, 2003, Nugent signed and filed joinder in the removal action on behalf of Allied. All other defendants also joined in the removal action on the same date.

Allied's consent to joinder in the removal action took place unbeknownst to Allied's about-to-be counsel in the state court for this matter, Attorney Francis Licata. Mr. Licata claims that the Complaint in state court was date stamped as received by his office on December 10, 2003, the same day that the removal action was filed, and did not reach his desk until a few days thereafter. On December 16, 2003, Creditor's Interchange served Nugent with a notice of ruling suspending the state court action in light of the removal. However, Licata asserts that he did not

1 receive a copy of the notice of ruling and did not actually become  
2 aware that the matter had been removed until he received  
3 plaintiff's motion to remand on January 12, 2004.

4           Mr. Licata asserts that he believed that the time to  
5 remove had expired in light of the fact that he received the  
6 complaint after December 10, 2003. Consequently, Licata proceeded  
7 to represent Allied in the state court by filing an answer, serving  
8 form interrogatories, and requesting an extension of time to  
9 respond to plaintiff's discovery. Licata contends, in a separate  
10 declaration filed with the Court, that he would not have taken  
11 these actions in state court had he been aware of the removal  
12 action. Licata further declares that he did not and would not  
13 knowingly or intentionally waive Allied's right of removal and that  
14 he would have joined in the removal action had he been aware of it.  
15 See, Francis Licata Decl., p. 12.

16           Shortly after the case had been removed, plaintiff became  
17 concerned about the legitimacy of Allied's joinder in the removal  
18 action and questioned whether Nugent was authorized to consent to  
19 removal on Allied's behalf. On January 5, 2004, plaintiff wrote  
20 Nefulda, counsel for Creditors Interchange, notifying her that he  
21 could not reach Nugent at the telephone number listed on the proof  
22 of service. Plaintiff also informed Nefulda that the proof of  
23 service listed Nugent as working at Intellirisk, an entity that  
24 plaintiff claims is related to but legally separate from Allied.  
25 On January 8, 2004, Nefulda confirmed with Nugent that he was  
26 general counsel for Allied and that he was authorized to consent to  
27 removal. Nefulda then contacted plaintiff to advise him of those  
28 facts.



1 the right of removal is not lost by action in the state court short  
2 of proceeding to an adjudication on the merits.”).

3 Plaintiff offers two arguments in support of his motion  
4 to remand: (1) defendant Allied did not provide valid consent to  
5 joinder in the removal action and (2) defendant Allied waived its  
6 right of removal by litigating on the merits in the state court  
7 after the removal action had been filed.

8 **A. Validity of Allied’s Consent to Joinder in the**  
9 **Removal Action**

10 Plaintiff asserts that removal was improper because  
11 Allied did not provide valid consent to joinder. Plaintiff attacks  
12 Nugent’s authority to consent on Allied’s behalf on the following  
13 grounds: (1) plaintiff questions Nugent’s declaration that he is  
14 general counsel for Allied; (2) plaintiff questions whether Nugent  
15 is an employee of Allied; and (3) assuming that Nugent is general  
16 counsel for Allied, plaintiff asserts that general counsel for a  
17 corporation is unauthorized to consent to joinder in a removal  
18 action on its behalf when it has retained separate counsel of  
19 record.

20 Regarding the first two objections to the validity of  
21 general counsel’s consent, plaintiff offers no evidence to support  
22 his allegations that Nugent is not Allied’s general counsel or  
23 employee. The record, particularly the declarations of Nefulda and  
24 Nugent, supports the finding that Nugent is general counsel for  
25 Allied. The record further supports a finding that Nugent was  
26 authorized by Allied to consent to joinder on its behalf.  
27 Accordingly, Allied’s joinder is not improper on these grounds.

28 As to plaintiff’s third argument concerning the authority

1 of general counsel to consent to removal on its behalf where it has  
2 retained separate counsel of record, no authority that the Court  
3 has considered has squarely addressed this precise issue.

4 Nevertheless, federal courts have agreed that a corporation's  
5 consent to remove an action may be signed by someone other than a  
6 corporation's counsel of record, provided that such person has  
7 authority to bind the corporation. See, e.g., Getty Oil Corp. v.  
8 Ins. Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir. 1988); see also,  
9 Codapro, 997 F. Supp. at 326. While courts generally do not  
10 require all defendants to sign the removal petition itself, a  
11 corporation may consent to removal by "some timely filed written  
12 indication from each defendant, or some person or entity purporting  
13 to formally act on its behalf in this respect and to have authority  
14 to do so, that it has actually consented to such action." Getty  
15 Oil Corp., 841 F.2d at 1262 n.11. Based on the authority cited by  
16 the parties and on the Court's research, no authority appears to  
17 preclude the ability of general counsel to consent to removal of an  
18 action under 28 U.S.C. § 1446, so long as general counsel has  
19 authority to act on the corporation's behalf.

20 It is well established that corporations may appear in  
21 federal court only through licensed counsel. In re Highley, 459  
22 F.2d 554, 555 (9th Cir. 1972) ("A corporation can appear in a court  
23 proceeding only through an attorney at law."); see also, Codapro  
24 Corp. v. Wilson, 997 F. Supp. 322, 327 (E.D.N.Y. 1998) ("A  
25 corporation, which is an artificial entity that can act only  
26 through agents, cannot proceed *pro se.*"). However, this rule does  
27 not appear to preclude the ability of general counsel for a  
28 corporation to consent to removal on its behalf. General counsel

1 has implied power to conduct and approve actions concerning the  
2 legal affairs of the corporation.<sup>1</sup> While the role and actual  
3 authority of a corporation's general counsel will vary depending on  
4 the corporation's articles and bylaws, the record supports a  
5 finding that general counsel for Allied had actual implied  
6 authority to consent to removal on behalf of Allied. See, e.g.,  
7 18B AM. JUR. 2D Corporations, §§ 1525 - 1526 (2004).<sup>2</sup>

8 Applying these standards to the facts here, the Court  
9 finds that a corporation may consent to removal by some timely  
10 written indication from its general counsel. The record supports  
11 the fact that Nugent, as general counsel for Allied, was authorized  
12 to consent to the removal and signed the Joinder on December 10,  
13 2003. See, Mike Nugent Decl., p. 10. Accordingly, Allied's  
14 joinder in the removal action, executed with the sworn authority of  
15 its general counsel, Nugent, is valid.

16 Allied's written consent to removal at the hand of  
17 general counsel is buttressed, after the fact, by Mr. Licata's  
18 express ratification of the general counsel's joinder for removal.  
19 See, e.g., Francis Licata Decl., pp. 12 ("[H]ad I known that  
20 Creditors Interchange intended to remove this case, I would have  
21 consented and signed the Joinder to remove the action.").

22 The Court concludes that defendant shows that it is more  
23 likely than not that the removal of the state court action was  
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25 <sup>1</sup> See, e.g., 18B AM. JUR. 2D Corporations, § 1587 (2004).

26 <sup>2</sup> Id., at § 1525 ("The implied authority of an officer or  
27 agent of a corporation includes all such incidental authority as  
28 is necessary, usual, and proper to effectuate the main authority  
expressly conferred.").

1 timely made and was properly joined by all defendants in this  
2 action in accordance with the rule of unanimity. Put another way,  
3 the Court concludes that plaintiff has not made a persuasive case  
4 that the joinder was other than unanimous.

5 **B. Waiver of the Right of Removal Through Actions in**  
6 **State Court**

7 Plaintiff also asserts that removal was improper because  
8 Allied waived its right of removal by litigating on the merits in  
9 state court. Acosta v. Direct Merch. Bank, 207 F. Supp. 2d 1129,  
10 1131-32 (S.D. Cal. 2002). Plaintiff points, in particular, to the  
11 extent of Allied's actions in the state court, namely, filing an  
12 answer, serving form interrogatories and requesting a time  
13 extension to respond to discovery. In plaintiff's view, such  
14 tactics rose to the level of litigating on the merits, thereby  
15 constituting waiver.

16 A defendant may inadvertently waive its right of removal  
17 by taking actions in the state court "that are deemed to constitute  
18 a submission to its jurisdiction." Chicago Title & Trust Co. v.  
19 Whitney Stores, Inc., 583 F. Supp. 575, 577; accord Acosta, 207 F.  
20 Supp. 2d at 1131-32. Further, such waiver may occur after the  
21 filing of a notice of removal, citing Draper v. Erb, 1994 WL  
22 478821, \*3 n.2 (N.D. Cal. 1994) (suggesting, in dicta, that a  
23 defendant who has already filed a removal action may subsequently  
24 waive its right of removal by filing a motion to quash in state  
25 court).

26 While the Court agrees with plaintiff that a defendant  
27 may inadvertently waive its right of removal by litigating on the  
28 merits in state court, actions short of proceeding to an

1 adjudication on the merits will not result in waiver. Bayside  
2 Developers, 43 F.3d at 1240 (quoting Beighley, 868 F.2d at 782);  
3 see also, Chicago Title, 583 F. Supp. at 577. As to the contention  
4 that filing an answer in state court constitutes waiver, "it is  
5 well settled that merely filing a responsive pleading does not  
6 invoke the state court's jurisdiction so as to constitute a waiver  
7 of the right to remove." Acosta, 207 F. Supp. 2d at 1131; accord  
8 Bayside Developers, 43 F.3d at 1240. Therefore, the defendant's  
9 act of filing an answer in state court does not constitute waiver.

10 Plaintiff also claims that filing form interrogatories  
11 and requesting an extension of time to respond to discovery  
12 constitutes litigation on the merits and results in waiver of the  
13 right to remove. Neither of these actions constitute litigation on  
14 the merits because they did not result in adjudication on the  
15 merits and were not addressed directly to the court. See, id.

16 "A party's waiver of its right to remove generally  
17 depends on its intent to do so." Chicago Title, 583 F. Supp. at  
18 577; Bayside Developers, 43 F.3d at 1240. Furthermore, because  
19 access to a federal forum is a significant right, "a waiver of the  
20 right of removal must be clear and unequivocal." Bayside  
21 Developers, 43 F.3d at 1240 (citing Beighley, 868 F.2d at 782).  
22 However, a defendant may not experiment in state court and then  
23 seek to remove upon receipt of an adverse ruling. See Moore v.  
24 Permanente Med. Group, Inc., 981 F.2d 443, 447 (9th Cir. 1992);  
25 Acosta, 207 F. Supp. 2d at 1131.

26 The following factors counsel against a finding that  
27 Allied intended to waive its right of removal: 1) Allied, through  
28 its general counsel, filed a timely joinder in the removal action,

1 2) Allied's counsel of record, Licata, was not served with notice  
2 of the removal action, 3) Licata, upon receiving the complaint  
3 after December 10, 2003, believed the time to remove had lapsed and  
4 was unaware of the removal action when he undertook his actions in  
5 state court, and 5) Allied's actions in state court were not  
6 experimentation and did not result in rulings on the merits.

7 Under these facts, the Court finds that defendant Allied  
8 did not waive its right to remove the action to federal court.

9 v.

10 CONCLUSION

11 Accordingly, and for the foregoing reasons, the Court  
12 denies plaintiff's motion to remand the action to state court.

13 IT IS SO ORDERED.

14 IT IS FURTHER ORDERED that the Clerk shall serve a copy  
15 of this Order on counsel for all parties in this action.

16 DATED: March \_\_\_, 2004.

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ALICEMARIE H. STOTLER  
UNITED STATES DISTRICT JUDGE