

1 GAUTAM DUTTA, ESQ. (State Bar No. 199326)  
2 39270 Paseo Padre Parkway # 206  
3 Fremont, CA 94538  
4 Telephone: 415.236.2048  
5 Email: [Dutta@BusinessandElectionLaw.com](mailto:Dutta@BusinessandElectionLaw.com)  
6 Fax: 213.405.2416

7 Attorney for Plaintiff

8 HECTOR SOL, d/b/a VIVE SOL, and d/b/a PALO  
9 ALTO SOL

10  
11 IN THE UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 HECTOR SOL, d/b/a VIVE SOL,  
14 and d/b/a PALO ALTO SOL

15 *Plaintiff,*

16 vs.

17 PIVOTAL PAYMENTS, INC.; and  
18 DOES 1-20;

19 *Defendants.*

CASE NO. 5:11-CV-06430 EJD

**NOTICE OF MOTION AND  
MOTION FOR REMAND,  
ATTORNEY'S FEES, AND  
SANCTIONS; MEMORANDUM OF  
POINTS AND AUTHORITIES**

HEARING DATE: March 16, 2012  
HEARING TIME: 9 am  
JUDGE: Hon. Edward J. Davila  
COURTROOM: 1 (San Jose)

20 NOTICE OF MOTION

21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22 *Please take notice* that, on March 16, 2012, 9 am (or as soon as this matter  
23 may be heard before the Honorable Edward J. Davila in Courtroom 1), U.S.  
24 District Court for the Northern District of California, 280 South First Street,  
25 Courtroom 1, Fifth Floor, San Jose, California 95113, Plaintiff Hector Sol will  
26 move this Court to remand this case to the California Superior Court (Santa Clara  
27 County). Mr. Sol filed this Motion after ensuring that the hearing date was  
28 amenable to the Court and opposing counsel.

1           Plaintiffs' Motion is based on this Notice of Motion and Motion, along with  
2 the accompanying (1) Memorandum of Points and Authorities, (2) Declaration of  
3 Gautam Dutta, (3) all the other papers, documents, or exhibits on file or to be filed  
4 in this action, and (4) oral argument made at the hearing on this Motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

*Removal is a statutory privilege, rather than a right, and the removing party must comply with the procedural requirements mandated in the statute when desirous of availing the privilege.*

-- U.S. District Court (M.D. Ala.)<sup>1</sup>

**I. Introduction**

This case must be remanded because Defendant Pivotal Payments not only waived its right to remove this case, but filed a time-barred, defective notice of removal. Plaintiff Hector Sol filed this case in the California Superior Court after Defendant Pivotal Payments seized **\$19,234.78** from his restaurant's bank account without his consent. Subsequently, Pivotal Payments sandbagged Mr. Sol, when it removed this case after tricking Mr. Sol's counsel into believing that it would not file or serve any papers over the winter holidays. Even though it removed this case in bad faith and without any legal basis, Pivotal Payments refuses to voluntarily remand this case. Consequently, Mr. Sol was forced to bring this Motion for Remand, Attorney's Fees, and Sanctions.

**II. Background**

**A. Synopsis of Case**

At its core, this case seeks to vindicate the rights of a local business owner who fell victim to a large corporation's malicious, oppressive, and unscrupulous business practices. Plaintiff Hector Sol owns two local restaurants that provide authentic Mexican cuisine: Vive Sol (in Mountain View) and Palo Alto Sol (in Palo Alto).<sup>2</sup>

In 2007, Mr. Sol entered into two contracts (collectively, the "Contract") with Redwood City-based POS Card Systems, predecessor-in-interest to Defendant Pivotal Payments ("Pivotal"). Under the Contract, POS Card Systems would process the credit-card transactions of both of Mr. Sol's restaurants. Mr. Sol was

<sup>1</sup> *Adams v. Charter Communic. VII, LLC*, 356 F.Supp.2d 1268, 1271 (M.D. Ala. 2005) (emphases added) (citing, *inter alia*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941)).

<sup>2</sup> Both restaurants are not incorporated, and conduct business under fictitious names. Compl. ¶2.

1 not required to pay any penalty or fee if he terminated the Contract after it had  
2 automatically renewed.<sup>3</sup>

3 On January 5, 2010, Pivotal announced that (1) it had acquired POS Card  
4 Systems, and (2) it would maintain POS Card Systems' Redwood City headquarters  
5 as a regional office for the Western United States. Pivotal also stated that it  
6 processes \$7 billion in credit-card transactions per year.

7 In October 2010, Mr. Sol terminated the Contract. Subsequently, Mr. Sol did  
8 not receive any correspondence from Pivotal regarding the Contract.<sup>4</sup>

9 On April 20, 2011, Pivotal seized \$19,234.78 from the bank account of Vive  
10 Sol without Mr. Sol's consent.<sup>5</sup> Subsequently, Mr. Sol filed this lawsuit in the  
11 California Superior Court (Santa Clara County) for breach of contract, breach of the  
12 covenant of good faith and fair dealing, unjust enrichment, conversion, punitive  
13 damages, and violation of the California Unfair Competition Law. Mr. Sol, who  
14 seeks a jury trial, has not specified the exact amount of damages that he seeks in the  
15 wake of Pivotal's wrongdoing.

16 The Complaint and Summons were mailed on November 9, 2011, and were  
17 received by Pivotal's agent for service of process on November 14, 2011. Pursuant  
18 to California law, service was effected on November 19, 2011. Shortly thereafter,  
19 Mr. Sol propounded discovery (the "Discovery") on Pivotal, and service of the  
20 Discovery was effected on December 5, 2011.<sup>6</sup>

21 Thus, Pivotal was required to respond to file a response to Mr. Sol's  
22 Complaint no later than **December 19, 2011** (i.e., 30 days after November 19,  
23 2011), and was required to respond to Mr. Sol's discovery no later than **January 4,**  
24 **2012** (i.e., 30 days after December 5, 2011).

25 **B. Pivotal's Response to the Complaint**

26 <sup>3</sup> Compl. ¶¶10, 17.

27 <sup>4</sup> Compl. ¶¶18, 20, 4 & Exh. 3.

28 <sup>5</sup> Compl. ¶21.

<sup>6</sup> Dutta Decl. ¶¶ 3, 4 & Exh. 1; Calif. Code of Civil Procedure §415.40 (service effected 10 days after summons and complaint are sent via certified mail to an address outside California).

1 Although it had received the Complaint on November 14, 2011, Pivotal did  
 2 not contact Mr. Sol's counsel until December 13, 2011: *six days before* it was  
 3 required to respond to the Complaint. Early that evening, Pivotal's counsel asked  
 4 Mr. Sol for an extension. Pivotal's counsel stated that he would be leaving town on  
 5 December 16, 2011 for an extended family vacation and would not return to his  
 6 office until December 29, 2011.<sup>7</sup>

7 Based on those representations and as a professional courtesy, Mr. Sol's  
 8 counsel agreed to extend the deadline to respond to the Complaint by over two  
 9 weeks, to **January 3, 2012**. Mr. Sol further agreed to extend the deadline to  
 10 respond to the Discovery by one week, to **January 11, 2012**. In an email, Pivotal's  
 11 counsel responded: "My whole family thanks you."<sup>8</sup> As a result, Mr. Sol's counsel  
 12 was led to believe that Pivotal (1) had consented to the state court's jurisdiction,  
 13 and (2) would not file or serve any papers over the winter holidays.<sup>9</sup>

14 C. Pivotal's Holiday Surprise: Notice of Removal

15 On December 19, 2011 – after the holiday season had begun – Pivotal filed  
 16 its answer in the California Superior Court.<sup>10</sup> The next day, Mr. Sol's counsel was  
 17 surprised to learn that Pivotal's counsel had filed an untimely, improper notice of  
 18 removal (the "Removal Notice").<sup>11</sup> On December 27, 2011, Pivotal declined to  
 19 have Hon. Howard R. Lloyd preside over this case. Subsequently, this case was  
 20 reassigned to this Court.

21 Although its agent for service of process received the Complaint and  
 22 Summons on November 14, 2011, Pivotal now claims that it "did not see, receive,  
 23 or learn of the Complaint in the State Court Action until November 19, 2011."<sup>12</sup>  
 24 According to its Removal Notice, federal law required Pivotal to file a notice of

25  
 26 <sup>7</sup> Dutta Decl. ¶6.

<sup>8</sup> Dutta Decl. ¶7 & Exh. 7.

<sup>9</sup> Dutta Decl. ¶7.

<sup>10</sup> Dec. 20, 2011 Notice of Removal (the "Removal Notice") ¶1 ("A true and correct copy of the Answer filed  
 by Defendant *in the State Court Action* is attached hereto as Exhibit B.") (italics added).

<sup>11</sup> Dutta Decl. ¶8.

<sup>12</sup> Removal Notice ¶2.

1 removal “*within thirty (30) days from November 19, 2011, the date upon which the*  
 2 *Complaint was served on [Pivotal].*”<sup>13</sup> However, Pivotal did not file its Removal  
 3 Notice with this Court until December 20, 2011 – *31 days* after Pivotal had been  
 4 served with Mr. Sol’s Complaint. Because it was not filed within 30 days of  
 5 November 19, 2011, the Removal Notice was time-barred.<sup>14</sup>

6 Furthermore, Pivotal failed to effect timely service of a December 20, 2012  
 7 court order. Although it was ordered to serve it along with its Notice of Removal,  
 8 Pivotal did not serve that court order until December 27, 2012.<sup>15</sup>

9 On a number of occasions before filing this Motion, Mr. Sol put Pivotal on  
 10 notice that it had improperly removed this case, because its Removal Notice  
 11 suffered from a number of fatal defects.<sup>16</sup> Specifically, Mr. Sol notified Pivotal that  
 12 its removal was time-barred, for the Removal Notice was filed one day late.  
 13 Furthermore, Mr. Sol notified Pivotal’s counsel that Pivotal’s Removal Notice had  
 14 not carried its burden of showing that the jurisdictional predicates for removal (i.e.,  
 15 amount in controversy and diversity of citizenship) had been met. Finally, Mr.  
 16 notified Pivotal’s counsel that Pivotal’s unjustifiable removal had prejudiced Mr.  
 17 Sol’s ability to propound and obtain discovery.

18 In response, Pivotal refused to remand this case, and refused to make any  
 19 substantive responses to Mr. Sol’s discovery request – forcing Mr. Sol to bring this  
 20 Motion.<sup>17</sup> Mr. Sol has filed this Motion within thirty days after December 20,  
 21 2011, when Pivotal’s Removal Notice was filed with the Court.<sup>18</sup>

### 22 **III. Legal Analysis**

23 *Federal courts are courts of limited jurisdiction. They possess only that*  
 24 *power authorized by Constitution or a statute, which is not be expanded by judicial*  
 25 *decree. It is to be presumed that a cause lies outside this limited jurisdiction and*  
*the burden of establishing the contrary rests upon the party asserting jurisdiction.*

26 <sup>13</sup> Pivotal Payment’s Dec. 20, 2011 Notice of Removal, Dkt. No. 1 ¶13 (italics added).

27 <sup>14</sup> See, e.g., *May v. Johnson Controls, Inc.*, 440 F.Supp.2d 879 (W.D. Tenn. 2006) (collecting cases).

28 <sup>15</sup> Dutta Decl. ¶13 & Exh. 2 (Dec. 29, 2011 Notice of Untimely Service, Dkt. No. 5).

<sup>16</sup> Dutta Decl. ¶¶14, 16; *May, supra*, 440 F.Supp.2d 879.

<sup>17</sup> Dutta Decl. ¶19.

<sup>18</sup> See 28 U.S.C. §1447(c).

1 -- U.S. Supreme Court<sup>19</sup>

2 In accordance with the limited jurisdiction of federal courts, the removal  
3 statute is strictly construed *against* removal jurisdiction.<sup>20</sup> “The strong presumption  
4 against removal jurisdiction means that the *defendant always has the burden of*  
5 *establishing that removal is proper.*”<sup>21</sup>

6 A. Pivotal Waived Its Right of Removal

7 At the outset, this case must be remanded because Pivotal had waived its  
8 right of removal *before* filing its Removal Notice. As the Ninth Circuit has made  
9 clear, “the right to remove is *waived* by acts which indicate an intent to proceed in  
10 state court[.]”<sup>22</sup> In a case approvingly cited by the Ninth Circuit, the defendant  
11 successfully sought and obtained a continuance from a state-court deadline. Yet in  
12 so doing, the defendant *did not disclose* to the plaintiff or the court *that it would use*  
13 *that extra time to file a notice of removal.* The court held that the defendant had  
14 thereby waived its right of removal and become liable for the plaintiff’s attorney’s  
15 fees:

16 [Defendant] has acted in a manner inconsistent with its intent to seek  
17 federal jurisdiction. In so doing it has *assented to the jurisdiction of the*  
18 *state court.*<sup>23</sup>

18 Here, Pivotal “assented to the jurisdiction of the state court” in two important  
19 ways. First, it successfully *extended the state-law deadlines* for filing its answer  
20 and discovery responses to January 4 and 11, 2012, respectively. Subsequently,  
21 Pivotal filed its answer not in this Court, *but in state court* – one day *before* it filed  
22 its Removal Notice with this Court. In so doing, Pivotal waived its right of removal  
23 by consenting to the jurisdiction of the California Superior Court. Therefore, this  
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25 <sup>19</sup> *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (emphases added); *see also Abrego Abrego v. Dow Chem.*, 443 F.3d 676, 684 (9<sup>th</sup> Cir. 2006).

26 <sup>20</sup> *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992); *see also Sygenta Crop Prot. v. Henson*, 537 U.S. 28, 32 (2002); *O’Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1380 (9<sup>th</sup> Cir. 1980).

27 <sup>21</sup> *Gaus, supra*, 980 F.2d at 566; *see also Nishimoto v. Federman-Bachrach & Assoc.*, 903 F.2d 709, 712 n.3 (9<sup>th</sup> Cir. 1990); *O’Halloran, supra*, 856 F.2d at 1380.

28 <sup>22</sup> *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9<sup>th</sup> Cir. 1992) (italics added); *see also Chicago Title & Trust Co. v. Whitney Stores, Inc.*, 583 F.Supp. 575, 577 (N.D. Ill. 1984).

<sup>23</sup> *Chicago Title & Trust, supra*, 583 F.Supp. at 577 (italics added); *see also Moore, supra*, 981 F.2d at 447.

1 case must be summarily remanded.

2 B. Pivotal's Notice of Removal Is Time-Barred

3 *Because state courts are well-equipped to handle diversity cases, there is no*  
 4 *reason to allow a defendant additional time[.]*

5 -- U.S. District Court (W.D. Tenn. & Ky.)<sup>24</sup>

6 Even if Pivotal did not waive its right of removal, this case must be  
 7 remanded because Pivotal's Removal Notice is time-barred. "The law places the  
 8 *burden on the defendant* to show that removal is in compliance with *procedural*  
 9 *requirements.*"<sup>25</sup> Federal law requires that (1) a civil action must be removed  
 10 within 30 days after the defendant has received notice of the action, and (2) a  
 11 motion to remand for procedural defects must be filed within 30 days after a notice  
 12 of removal has been filed in federal court.<sup>26</sup> "Failure of defendant to file removal  
 13 within the time required constitutes a *waiver of the right* of removal."<sup>27</sup> Citing a  
 14 litany of authorities, one federal court recently held that "failure to comply with the  
 15 [30-day] limitation is an *absolute bar* regardless of whether the removal would  
 16 have been proper if timely filed."<sup>28</sup>

17 Here, it is undisputed that Pivotal received the Complaint and Summons on  
 18 November 14, 2011, and that service of both documents was effected on November  
 19 19, 2011. It is also undisputed that Pivotal did not contact Mr. Sol regarding this  
 20 lawsuit until *six days before it was required to respond* to the Complaint. Finally,  
 21 it is undisputed that (1) the Removal Notice was filed *31 days* after Pivotal had  
 22 received notice of this lawsuit, (2) Pivotal served a December 20, 2012 court order  
 23 *one week late*, and (3) Mr. Sol filed this Motion within 30 days after the Removal

24 <sup>24</sup> *May, supra*, 440 F.Supp.2d at 883 (collecting cases) (*quoting McCraw v. Lyons*, 863 F.Supp. 430, 433  
 24 (W.D. Ky. 1994)).

25 <sup>25</sup> *May, supra*, 440 F.Supp.2d at 882 (italics added); *see also Groesbeck Investments v. Smith*, 224 F.Supp.2d  
 25 1144, 1148 (E.D. Mich. 2002); *Parker v. Brown*, 570 F.Supp.2d 640, 642 (S.D. Ohio 1983); *Messick v. Toyota Motor*  
 25 *Mfg.*, 45 F.Supp.2d 578, 580 (E.D. Ky. 1999); *Schwartz v. FHP Int'l Corp.*, 947 F.Supp. 1354, 1360 (D. Ariz. 1996).

26 <sup>26</sup> 28 U.S.C. §1446(b) (30-day deadline for filing notice of removal); 28 U.S.C. §1447(c) (30-day deadline for  
 26 filing motion to remand).

27 <sup>27</sup> *May, supra*, 440 F.Supp.2d at 881 (italics added) (*citing* 29A Fed. Proc., Lawyers Ed. §69.84 (June 2006)).

28 <sup>28</sup> *May, supra*, 440 F.Supp.2d at 881 (italics added); *see also Sanborn Plastics Corp. v. St. Paul Fire & Marine*  
 28 *Ins. Co.*, 753 F.Supp. 660, 664 (N.D. Ohio 1990); *Finley v. The Higbee Co.*, 1 F.Supp.2d 701, 702 (N.D. Ohio 1997);  
 28 *Green v. Clark Refining & Marketing*, 972 F.Supp. 423, 424 (E.D. Mich. 1997); *McCraw v. Lyons*, 863 F.Supp. 430,  
 28 434 (W.D. Ky. 1994).

1 Notice was filed. Because Pivotal failed to file its Removal Notice within the 30-  
2 day statutory window, this case must be remanded.<sup>29</sup>

3 C. Pivotal's Removal Notice Fails to Establish the Court's Jurisdiction

4 Furthermore, Pivotal's Removal Notice fails to establish the Court's  
5 jurisdiction, for it satisfies neither jurisdictional predicate for removal. It is  
6 hornbook law that the defendant must carry the burden of establishing removal  
7 jurisdiction, both for showing the amount in controversy and diversity of  
8 citizenship.<sup>30</sup>

9 1. Pivotal Fails to Establish the Amount in Controversy

10 As a starting point, Pivotal has failed to establish that the amount in  
11 controversy exceeded \$75,000 at the time of its removal.<sup>31</sup> To determine whether  
12 that jurisdictional amount has been satisfied, “[t]he district court may consider  
13 whether it is ‘facially apparent’ from the complaint that the jurisdictional amount is  
14 in controversy. If not, the court may consider *facts in the removal petition*, and  
15 may ‘require parties to submit *summary-judgment-type evidence* relevant to the  
16 amount in controversy at the time of removal.’”<sup>32</sup> If the complaint “does not  
17 specify the amount of damages sought”, the defendant must “prove by a  
18 preponderance of the evidence” that the amount in controversy has been satisfied.<sup>33</sup>  
19 Toward that end, the defendant must show that it is “*more likely than not* that the

20  
21 <sup>29</sup> See authorities cited at *supra* note 28. Pivotal may seek to justify its fatal delay by invoking the doctrine of  
22 “constructive filing”. That is, Pivotal may claim that its Removal Notice was timely, because it had allegedly (and  
23 unsuccessfully) tried to file those papers on the statutory deadline (December 19, 2011). However, the Ninth Circuit  
24 has confined the constructive-doctrine filing doctrine to *complaints* or notices of *appeal* – ensuring that litigants “are  
25 not denied a forum” where their grievances can be heard. See, e.g., *Cintron v. Union Pac. R. Co.*, 813 F.2d 917, 921  
26 (9<sup>th</sup> Cir. 1987) (applying constructive-filing doctrine to complaints); *Loya v. Desert Sands U.S.D.*, 721 F.2d 279 (9<sup>th</sup>  
27 Cir. 1983) (same); *Klemm v. Astrue*, 43 F.3d 1139, 1143 (9<sup>th</sup> Cir. 2008) (applying constructive-filing doctrine to  
28 notices of appeal). Indeed, unlike filing a complaint or an appeal, removing a case is a “privilege”, not a right. See  
*Adams, supra*, 356 F.Supp.2d at 1271; *Sheets, supra*, 313 U.S. at 104. Because the Ninth Circuit has not extended  
the constructive-filing doctrine to the privilege of removing a case to federal court, Pivotal's Removal Notice is time-  
barred as a matter of law.

<sup>30</sup> See, e.g., *Abrego Abrego, supra*, 443 F.3d at 682-85.

<sup>31</sup> 28 U.S.C. §1332(a).

<sup>32</sup> *Abrego Abrego, supra*, 443 F.3d at 690 (italics added) (quoting *Singer v. State Farm Mut. Auto Ins. Co.*, 116  
F.3d 373, 377 (9<sup>th</sup> Cir. 1997)).

<sup>33</sup> *Abrego Abrego, supra*, 443 F.3d at 683. “The *irony* of the parties' claims vis-à-vis the amount in  
controversy is not lost on us: The Plaintiff here has diminished or disparaged the amount she is seeking, while the  
Defendant seeks to augment or aggrandize that amount.” *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999  
n.5 (9<sup>th</sup> Cir. 2007) (italics added).

1 amount in controversy” exceeds \$75,000.<sup>34</sup>

2 Here, Mr. Sol, who brought this suit after Pivotal seized \$19,234.78 from his  
3 restaurant’s bank account, has not specified the exact amount of damages that he  
4 seeks. Thus, Pivotal’s Removal Notice was required to provide concrete *facts* – in  
5 the Ninth Circuit’s words, “summary-judgment-type *evidence*”<sup>35</sup> – that it is “more  
6 likely than not” that the amount in controversy exceeds \$75,000. However, the  
7 Removal Notice “fails to articulate why the *particular facts* that are alleged in the  
8 instant case might warrant extraordinary damages”.<sup>36</sup> Furthermore, as this Court  
9 has made clear, a defendant *cannot* prove that the jurisdictional amount has been  
10 satisfied merely because a plaintiff seeks punitive damages:

11 Defendant’s burden cannot be met simply by pointing out that the  
12 complaint seeks punitive damages and that any damages awarded  
13 under such a claim *could* total a large sum of money, particularly in  
14 light of the high burden that must be met in order for a plaintiff even to  
15 be eligible for receipt of discretionary punitive damages.<sup>37</sup>

16 Although Pivotal cites cases involving punitive damages and emotional  
17 distress, it “made no effort to compare the *facts* of those cases with the alleged facts  
18 of this case.”<sup>38</sup> Indeed, the facts from those cases “bear little or no resemblance to  
19 this litigation.”<sup>39</sup> In one case cited by Pivotal, the plaintiff was awarded mental-  
20 anguish damages after she was strip-searched by police.<sup>40</sup> In another, punitive  
21 damages were awarded in an auto-parts case stemming from copyright and  
22 trademark infringement.<sup>41</sup>

23 Thus, Pivotal has failed to provide any *evidence* that it is “more likely than  
24 not” that Mr. Sol’s claims will exceed \$75,000. “Given the strong presumption  
25 against removal jurisdiction and in favor of remand,”<sup>42</sup> Pivotal has failed to carry its

24 <sup>34</sup> *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9<sup>th</sup> Cir. 1996) (italics added).

25 <sup>35</sup> *Abrego Abrego, supra*, 443 F.3d at 690 (italics added) (quoting *Singer, supra*, 116 F.3d at 377).

26 <sup>36</sup> *Conrad Associates v. Hartford Acc. & Indem. Co.*, 994 F.Supp.1196, 1201 (N.D. Cal. 1998) (italics in  
original) (quoting *Hasich v. Allstate Ins. Co.*, 942 F.Supp. 1245, 1248 (D.Ariz. 1996)).

27 <sup>37</sup> *Conrad Associates, supra*, 994 F.Supp. at 1201 (italics in original).

28 <sup>38</sup> *See id.* at 1201 (italics added).

<sup>39</sup> *See id.* at 1201.

<sup>40</sup> Removal Notice ¶7 (citing *Jimenez v. Wood County, Tex.*, 660 F.3d 841, 843 (5<sup>th</sup> Cir. 2011) (en banc)).

<sup>41</sup> Removal Notice ¶7 (citing *Transgo, Inc. v. Ajac Transmission Parts*, 768 F.2d 1001, 1024 (9<sup>th</sup> Cir. 1985)).

<sup>42</sup> *Conrad Associates, supra*, 994 F.Supp. at 1201 (quoting *Gaus, supra*, 980 F.2d at 566).

1 burden of establishing the amount in controversy.

2           2.     Pivotal Fails to Establish That Its Principal Place of Business  
3                    Lies Outside California

4           Equally telling, Pivotal cannot establish diversity of citizenship, because it  
5 has failed to prove that its principal place of business lies outside California. The  
6 Ninth Circuit has held that a corporation’s principal place of business in the state  
7 where it conducts a majority of its business activity, “*even if the corporate*  
8 *headquarters are located in other state*”.<sup>43</sup> Toward that end, the Ninth Circuit  
9 evaluates a number of factors, including the location of employees, tangible  
10 property, production activities, along with “the locations where income is earned,  
11 purchases are made, and sales take place.”<sup>44</sup>

12           A party’s citizenship must be established by a *preponderance* of the  
13 evidence.<sup>45</sup> “When jurisdiction is challenged, courts generally do not accept the  
14 *carte blanche* naked allegations of diverse citizenship or bald assertions of  
15 jurisdictional facts.”<sup>46</sup> Without providing any data or evidence, Pivotal simply  
16 claims that its principal place of business lies in New York. However, it is  
17 undisputed that Pivotal maintains a regional office in Redwood City, which  
18 provides a major base from which Pivotal earns its credit-card-transaction  
19 revenues.<sup>47</sup>

20           In this light, Pivotal has failed to prove, by a preponderance of the evidence,  
21 that its principal place of business lies in New York. Consequently, Pivotal has not  
22 only failed to carry its burden of establishing diversity of citizenship, but failed  
23 altogether to carry its burden of establishing diversity jurisdiction for this case.

24           D.     Mr. Sol Is Entitled to Attorney’s Fees

25 <sup>43</sup> *Ind. Tectonics v. Aero Alloy*, 912 F.2d 1090, 1094 (9<sup>th</sup> Cir. 1990) (italics added).

26 <sup>44</sup> *Id.* at 1094.

27 <sup>45</sup> *See, e.g., Roche v. Lincoln Property Co.*, 373 F.3d 610, 616 (4<sup>th</sup> Cir. 2004); *Mas v. Perry*, 489 F.2d 1396 (5<sup>th</sup>  
28 Cir. 1974); *Janzen v. Goos*, 302 F.2d 421 (8<sup>th</sup> Cir. 1962).

<sup>46</sup> *See, e.g., Roche, supra*, 373 F.3d at 617; *Dixon v. Coburg Dairy*, 369 F.3d 811 (4<sup>th</sup> Cir. 2004) (en banc);  
*Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660 (4<sup>th</sup> Cir. 1998).

<sup>47</sup> Compl. Exh. 3. Contrary to Pivotal’s claims, Mr. Sol has not “admit[ted]” that Pivotal’s principal place of  
business lies in New York. Instead, the Complaint states that Pivotal’s *corporate headquarters* is located in New  
York. Compl. ¶4; *contra*, Removal Notice ¶5.

1 Having proven that this case was improperly removed, Mr. Sol is entitled to  
 2 attorney's fees. As the Ninth Circuit has made clear, a district court may properly  
 3 award attorney's fees if a case was improperly removed, regardless of whether the  
 4 removing defendant showed any bad faith.<sup>48</sup> What is more, the Ninth Circuit has  
 5 expressly ruled that attorney's fees are *strongly warranted* if a defendant has  
 6 waived its right of removal.<sup>49</sup>

7 Here, as Part IIIA of this Motion shows, Pivotal improperly removed this  
 8 case after it had waived its right of removal. Moreover, Pivotal filed its Removal  
 9 Notice late, even though it had received the Summons and Complaint *over five*  
 10 *weeks earlier*. Finally, Pivotal refused to voluntarily remand this case, even after  
 11 Mr. Sol had put Pivotal on notice that its Removal Notice was both time-barred and  
 12 substantively defective. In light of these compelling circumstances, the Court must  
 13 award Mr. Sol attorney's fees.<sup>50</sup>

#### 14 E. Mr. Sol Is Entitled to Sanctions

15 Finally, Mr. Sol is entitled to sanctions, for Pivotal removed this case in bad  
 16 faith. The Ninth Circuit has made it clear that Rule 11 sanctions are warranted if a  
 17 case is removed in bad faith.<sup>51</sup> Simply put, Pivotal – which processes at least \$7  
 18 billion in credit-card transactions *per year*<sup>52</sup> – deliberately sandbagged Mr. Sol.  
 19 First, Pivotal's counsel successfully sought and obtained a two-week extension to  
 20 respond to the Complaint, on the pretext of a family vacation.<sup>53</sup> As a result, Mr.  
 21 Sol's counsel was led to believe that (1) Pivotal had consented to the jurisdiction of  
 22 the state court, and (2) would not file or serve any papers over the winter holidays.<sup>54</sup>

23 \_\_\_\_\_  
 24 <sup>48</sup> *Moore, supra*, 981 F.2d at 447; *Gibson v. Chrysler Corp.* 261 F.3d 927, 950 (9<sup>th</sup> Cir. 2001); *see also* 28 U.S.C. §1447(c).

<sup>49</sup> *Moore, supra*, 981 F.2d at 447.

<sup>50</sup> *Id.* at 447; *Gibson, supra*, 261 F.3d at 950.

<sup>51</sup> *See, e.g., Moore, supra*, 981 F.2d at 446-47; *see also* 28 U.S.C. §1446(a) (by signing notice of removal, counsel certifies that he or she has complied with FRCP 11); FRCP 11(b)(1) (requiring counsel to certify that a document has not been "presented for any *improper purpose*, such as to harass, cause unnecessary delay, or needlessly increase in the cost of litigation." (italics added)).

<sup>52</sup> Compl. Exh. 3.

<sup>53</sup> *See* December 13, 2011 email from Pivotal's counsel to Mr. Sol's counsel, *attached as* Compl. Exh. 7 ("My whole family thanks you.").

<sup>54</sup> Dutta Decl. ¶7.

1 One week later, Pivotal filed its Removal Notice on December 20, 2011, without  
2 giving Mr. Sol's counsel any notice whatsoever. After then serving the Court's  
3 December 20, 2011 order *one week late*, Pivotal then refused to respond to Mr.  
4 Sol's discovery request – which had been due January 11, 2012.

5 By improperly removing this case and acting in bad faith, Pivotal has  
6 deliberately delayed this litigation, raised Mr. Sol's legal expenses, and prejudiced  
7 his rights under California law (including his right to propound discovery 10 days  
8 after service of the Summons and Complaint). Consequently, Pivotal must be  
9 sanctioned for its egregious conduct.

#### 10 **IV. Conclusion**

11 *[W]e emphasize[] the importance of guarding against premature and*  
12 *protective removals and minimizing the potential for a cottage industry of removal*  
*litigation.*

13 -- The Ninth Circuit<sup>55</sup>

14 This case should never have been removed. As this Motion has shown,  
15 Pivotal waived its right of removal, filed a time-barred, fatally defective Removal  
16 Notice, and then disregarded a court order by serving certain removal documents  
17 *one week late*. Even more troubling, Pivotal *tricked* Mr. Sol's counsel into  
18 believing that it would not file or serve any papers (let alone remove this case) over  
19 the winter holidays. Finally, Pivotal refused to voluntarily remand this case even  
20 after Mr. Sol warned that its Removal Notice suffered from fatal flaws. In light of  
21 such glaring facts, one can reach only one conclusion: Pivotal has engaged in  
22 shameless gamesmanship at the expense of Mr. Sol, the Court, and the public.  
23 Accordingly, the Court should not only remand this case, but award him attorney's  
24 fees and sanctions to the fullest extent allowable by law.

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28 <sup>55</sup> *Abrego Abrego, supra*, 443 F.3d 676 (9<sup>th</sup> Cir. 2006) (quotation marks omitted) (*quoting Harris v. Bankers*  
*Life & Casualty Co.*, 425 F.3d 689, 697 (9<sup>th</sup> Cir. 2005)).

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DATED: Jan. 19, 2012

*/s/* \_\_\_\_\_  
GAUTAM DUTTA, ESQ.  
COUNSEL FOR PLAINTIFF  
HECTOR SOL, d/b/a VIVE SOL,  
and d/b/a PALO ALTO SOL