

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
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

**PLAINTIFF HECTOR SOL'S
CORRECTED REPLY BRIEF IN
SUPPORT OF MOTION FOR
REMAND, ATTORNEY'S FEES,
AND SANCTIONS**

HEARING DATE: March 16, 2012
HEARING TIME: 9 am
JUDGE: Hon. Edward J. Davila
COURTROOM: 4 (San Jose)

20 *The strong presumption against removal jurisdiction means that the
21 defendant always has the burden of establishing that removal is proper.*

22 -- The Ninth Circuit¹

23 **I. Introduction**

24 Ironically, Pivotal Payments' opposition papers only bolster the three main
25 reasons to grant Mr. Sol's Motion. First, Pivotal utterly failed to carry its burden of
26 proving that it had properly removed this case. In so doing, Pivotal tried to mislead
27 the Court by distorting the record. Second, Pivotal had been *repeatedly warned*
28 that its Notice of Removal suffered from fatal flaws. Finally, Pivotal deliberately

¹ *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphases added).

1 sandbagged Mr. Sol’s counsel in order to (a) delay this litigation, (b) raise Mr. Sol’s
 2 legal expenses, and (c) prejudice his right to propound discovery. In light of these
 3 compelling facts, the Court must grant Mr. Sol’s Motion for Remand, Attorney’s
 4 Fees, and Sanctions.

5 **II. Pivotal Tried to Mislead the Court by Distorting the Record**

6 Disturbingly, Pivotal’s papers shamelessly try to mislead the Court by
 7 distorting the undisputed record. First, Pivotal’s Notice of Removal falsely stated
 8 that it “did not see, receive, or learn of” Mr. Sol’s Complaint until Saturday,²
 9 November 19, 2011. However, as our Opening Brief showed, Pivotal had in fact
 10 received the Complaint *one week earlier*, on Monday, November 14, 2011.³

11 Second, Pivotal denies that it “respond[ed] to [Mr. Sol’s] discovery requests in state
 12 court[.]”⁴ However, Pivotal *did* provide responses⁵ to the discovery that Mr. Sol
 13 had propounded *in state court*.⁶

14 Third, Pivotal claims that its counsel Andrew Kislik “agreed to provide an
 15 extension for Plaintiff to file his remand papers[.]”⁷ To be sure, Mr. Kislik had
 16 offered to extend Mr. Sol’s deadline. Yet when Mr. Sol’s counsel followed up on
 17 his offer, Mr. Kislik *went back on his word*.⁸ As a result, Mr. Sol was forced to file
 18 his Motion on January 19, 2012 – a full two months before the Court is scheduled
 19 to hear this Motion.⁹

20 Fourth, Pivotal sought to convince the Court that Pivotal’s “high level

21 _____
 22 ² Pivotal does not indicate whether its offices are open on Saturdays. *See* Dec. 20, 2011
 Notice of Removal ¶2.

23 ³ Jan. 19, 2012 Opening Brief, at 4; Jan. 19, 2012 Dutta Declaration ¶3 & Exh. 1.

24 ⁴ Defendant’s Feb. 2, 2012 Opposition (“Opp’n”), at 2:21.

25 ⁵ Defendant’s discovery responses were non-substantive, for they solely consisted of
 objections to Plaintiff’s reasonable requests.

26 ⁶ Plaintiff’s Request for Judicial Notice (“RJN”), at 3:1-3:5 & Exhs. 2-5. Notably, *none* of
 Pivotal’s discovery responses were validly served, because their proofs of service were not
 signed. *Id.* Exhs. 2-5. *See also* Plaintiff’s Dec. 29, 2011 Notice of Untimely Service of Court
 Order, *attached as* Exhibit 2 to Jan. 19, 2012 Dutta Declaration, at 4 (Pivotal’s proof of service of
 this Court’s order was not signed).

27 ⁷ Opp’n, at 4:17-4:18.

28 ⁸ Feb. 9, 2012 Declaration of Gautam Dutta in Support of Reply Brief ¶¶3, 4 & Exh. 1.

⁹ *Id.* ¶5.

1 officers direct, control and coordinate its activities on a day-to-day basis” in New
 2 York.¹⁰ However, over three-quarters of Pivotal’s employees – including its *CEO*
 3 *and General Counsel* – work not in the State of New York, but in Montreal,
 4 Canada.¹¹

5 Finally, contrary to Pivotal’s claims, Pivotal did in fact mislead and deceive
 6 Mr. Sol’s counsel. It is undisputed that Mr. Sol agreed to extend Pivotal’s state-
 7 court deadlines. As his Opening Brief showed, Mr. Sol’s counsel was thus led to
 8 believe that Pivotal (1) had consented to the state court’s jurisdiction, and (2) would
 9 not file or serve any papers over the winter holidays.¹² Yet as Pivotal now admits,
 10 its counsel had begun preparing its removal papers the *very next day* (i.e., Dec. 14,
 11 2011).¹³ Despite the onset of the winter holidays, Pivotal’s counsel deliberately
 12 chose not to notify Mr. Sol’s counsel of its intentions. Due to their lack of
 13 professionalism, Mr. Sol’s counsel was forced to begin preparing this Motion over
 14 the winter holidays.

15 **III. It Is Unrefuted That Pivotal Improperly Removed This Case**

16 Setting aside their lack of professionalism, Pivotal’s counsel have failed to
 17 redeem any part of their ill advised Notice of Removal.

18 **A. It Is Unrefuted That Pivotal Had Waived Its Right of Removal**

19 First, it is unrefuted that Pivotal had waived its right to remove this case. As
 20 the Ninth Circuit has made clear, “the right to remove is *waived* by acts which
 21 indicate an intent to proceed in state court[.]”¹⁴ In a case cited by Pivotal, the Ninth
 22 Circuit explained that a party could take action in a state-court proceeding without
 23 waiving its right of removal, but *only if* that action is required “to avoid a judgment

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 25 ¹⁰ Opp’n, at 9:11-9:16.

26 ¹¹ RJN, at 2:17-2:20; Feb. 9, 2012 Declaration of Gautam Dutta in Support of RJN Exh. 1;
 27 Feb. 9, 2012 Declaration of Gautam Dutta in Support of Reply Brief ¶6.

28 ¹² Opening Brief, at 5:11-5:13; Jan. 19, 2012 Dutta Decl. ¶7.

¹³ Feb. 2, 2012 Declaration of Kassra Nassiri ¶5.

¹⁴ *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992) (italics added); see also *Chicago Title & Trust Co. v. Whitney Stores, Inc.*, 583 F.Supp. 575, 577 (N.D. Ill. 1984); *RTC v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1995).

1 being entered automatically against him[.]”¹⁵ Thus, a party has waived its right of
 2 removal if it takes any unnecessary action in a state-court proceeding, such as
 3 responding to discovery *after* the case has been removed.

4 It is hornbook law that a state court loses jurisdiction over a case once it has
 5 been removed.¹⁶ Here, the state court lost jurisdiction over this case on December
 6 20, 2012, when Pivotal filed its improper Notice of Removal. Yet three weeks after
 7 it had removed this case, Pivotal served¹⁷ its discovery-related documents *using the*
 8 *caption and proof of service of the state-court case*.¹⁸ By taking that unnecessary
 9 action in the state-court proceeding, Pivotal thereby waived its right to remove this
 10 case.

11 **B. It Is Unrefuted That Pivotal’s Notice of Removal Is Time-Barred**

12 It is also unrefuted that Pivotal’s Notice of Removal is time-barred. “Failure
 13 of defendant to file removal within the time required constitutes a *waiver of the*
 14 *right of removal*.”¹⁹ Here, it is undisputed that Pivotal (1) received the Complaint
 15 on November 14, 2011, and (2) five weeks later, filed its Notice of Removal one
 16 day *late*.

17 To no surprise, Pivotal seeks to justify its fatal delay by invoking the doctrine
 18 of “constructive filing”. That is, Pivotal claims that its Removal Notice was timely,
 19 because it had allegedly (and unsuccessfully) *tried* to file those papers on the
 20 statutory deadline. Yet as our Opening Brief showed, the Ninth Circuit has
 21 confined the constructive-filing doctrine to the filing of complaints and appeals.²⁰

22 Yet unlike filing a complaint or an appeal, removing a case is a “privilege”,

23 ¹⁵ *Bayside Developers, supra*, 43 F.3d at 1240.

24 ¹⁶ *See id.* at 1238 (citations omitted).

24 ¹⁷ *See supra* note 6.

25 ¹⁸ Pivotal served those discovery-related documents on Jan. 11, 2012. RJN, at 3:2-3:3 &
 Exhs. 2-5.

26 ¹⁹ *May v. Johnson Controls, Inc.*, 440 F.Supp.2d 879, 881 (W.D. Tenn. 2006) (italics added)
 (citing 29A Fed. Proc., Lawyers Ed. §69.84 (June 2006)). *See also* Opening Brief, at 8:2-9:2.

27 ²⁰ *Cintron v. Union Pac. R. Co.*, 813 F.2d 917, 921 (9th Cir. 1987) (applying constructive-
 filing doctrine to complaints); *see also Loya v. Desert Sands U.S.D.*, 721 F.2d 279 (9th Cir. 1983)
 28 (same); *Klemm v. Astrue*, 43 F.3d 1139, 1143 (9th Cir. 2008) (applying constructive-filing
 doctrine to notices of appeal); Opening Brief, at 9:2 n.29.

1 not a right.²¹ “The law places the *burden on the defendant* to show that removal is
 2 in compliance with procedural requirements.”²² Because the Ninth Circuit has *not*
 3 extended the constructive-filing doctrine to the *privilege* of removing a case to
 4 federal court, Pivotal’s Notice of Removal is time-barred as a matter of law.²³

5 C. It Is Unrefuted That Pivotal Failed to Establish the Court’s Diversity
 6 Jurisdiction

7 Furthermore, it is unrefuted that Pivotal failed to establish the twin predicates
 8 for the Court to exercise diversity jurisdiction: amount in controversy and diversity
 9 of citizenship.

10 Amount in Controversy. Not one case invoked by Pivotal proves that it is
 11 “more likely than not” that Mr. Sol’s damages will exceed \$75,000. As our
 12 Opening Brief showed, Pivotal failed “to articulate why the *particular facts* that are
 13 alleged in the instant case might warrant extraordinary damages”.²⁴ Because its
 14 Notice of Removal failed to achieve that goal, Pivotal desperately tries again. At
 15 the outset, none of the emotional-distress cases proffered by Pivotal apply here, for
 16 their facts are not comparable to those of this case. In *Jimenez*,²⁵ local authorities
 17 strip-searched the plaintiff. In *Mills*,²⁶ an attorney burglarized \$100,000 from his
 18 client – a far greater amount than \$19,234.78.

19 In the same vein, none of the punitive-damages cases proffered by Pivotal
 20 apply here, for their facts are not comparable to those of this case. “[I]n light of the

21 _____
 22 ²¹ See *Adams v. Charter Communic. VII, LLC*, 356 F.Supp.2d 1268, 1271 (M.D. Ala. 2005);
Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100, 104 (1941).

23 ²² *May, supra*, 440 F.Supp.2d at 882 (italics added); see also *Groesbeck Investments v.*
Smith, 224 F.Supp.2d 1144, 1148 (E.D. Mich. 2002); *Parker v. Brown*, 570 F.Supp.2d 640, 642
 24 (S.D. Ohio 1983); *Messick v. Toyota Motor 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).

25 ²³ Because the Notice of Removal is time-barred as a matter of law, the Court should not
 take judicial notice of the Feb. 2, 2012 Declaration of Chris Alton. See Plaintiff’s Opposition to
 Defendant Pivotal Payment’s Request for Judicial Notice, at 2:3-2:12.

26 ²⁴ *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.
 27 1996)); Opening Brief, at 10:6-11:1.

28 ²⁵ *Jimenez v. Wood County, Tex.*, 660 F.3d 841, 843 (5th Cir. 2011) (en banc).

²⁶ *Mills v. Kahuanui*, 2006 WL 6319677 (Alameda Sup.Ct. 2006).

1 high burden” for a plaintiff to even qualify for punitive damages, a defendant
 2 *cannot* prove that the amount in controversy has been satisfied merely because a
 3 plaintiff seeks punitive damages.²⁷ Tellingly, the facts from Pivotal’s punitive-
 4 damages cases are not comparable to those of this case in one important way.
 5 Unlike Pivotal, the defendants in those cases did originally have the right to
 6 *lawfully hold* the plaintiffs’ funds.²⁸

7 Finally, Pivotal has failed to establish the dollar value of the injunction
 8 sought by Mr. Sol. Having already seized \$19,234.78 of Mr. Sol’s funds, *only*
 9 *Pivotal* knows how much *more* of Mr. Sol’s funds it would like to seize – i.e., the
 10 amount of money that it must be enjoined from seizing. Since Pivotal has chosen
 11 not to disclose that information, it has failed to establish the value of the desired
 12 injunctive relief. “Given the strong presumption against removal jurisdiction and in
 13 favor of remand,” Pivotal has failed to carry its burden of establishing the amount
 14 in controversy.²⁹

15 Diversity of Citizenship. Similarly, Pivotal has failed to prove that its
 16 principal place of business is located in New York. “When challenged on
 17 allegations of jurisdictional facts, the parties must support their allegations *by*
 18 *competent proof*.”³⁰ Significantly, the U.S. Supreme Court has made it clear that if
 19 a company’s “headquarters” consist of “nothing more than a mail drop box”, then it
 20 does *not* qualify as its principal place of business.³¹

21 _____
 22 ²⁷ Opening Brief, at 10:8-10:13 (*quoting Conrad Associates, supra*, 994 F.Supp. at 1201).

23 ²⁸ *See, e.g., Gonzalez v. Guerrero*, 1997 WL 875077, 4 Trials Digest 3d 74 (Cal.Sup.Ct.
 24 1997) (bail bondsman refused to return plaintiff’s collateral); *Professional Seminar Consultants,*
 25 *Inc. v. SATEC*, 727 F.2d 1470, 1473 (9th Cir. 1984) (defendant converted funds that should have
 26 been used to arrange tour accommodations); *9152 Alden LLC v. George Elkins Property Mgt.*,
 27 2007 WL 5065122, 14 Trials Digest 11th 4 (Cal.Sup.Ct. 2007) (management company refused to
 28 give owner revenues generated by real property); *Andrews v. Raphaelson*, 346 Fed.Appx. 198 (9th
 Cir. 2009) (defendant refused to give partner her share in joint venture); *Salvino v. Pfefferman*,
 1997 WL 875117, 4 Trials Digest 3d 118 (Cal.Sup.Ct. 1997) (defendants defrauded plaintiffs
 during sale of business franchise).

²⁹ *See Conrad Associates, supra*, 994 F.Supp. at 1201 (*quoting Gaus, supra*, 980 F.2d at
 566).

³⁰ *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010) (italics added).

³¹ *Id.* at 1181.

1 Here, instead of providing any “competent proof”, Pivotal argues that its
 2 principal place of business *must* lie in New York, simply because its headquarters
 3 are located in New York. However, *over three-quarters* of Pivotal’s employees –
 4 including its *CEO and General Counsel* – work not in the State of New York, but
 5 in Montreal, Canada.³² Furthermore, it is undisputed that Pivotal maintains a
 6 regional office in Redwood City, which provides a major base from which it earns
 7 its multi-billion-dollar credit-card-transaction revenues.³³ Having failed to prove
 8 that *any* of its top executives actually work in New York, Pivotal cannot prove that
 9 its principal place of business is located in New York. Consequently, it had no
 10 legal basis whatsoever to remove this case from state court.

11 **IV. It Is Unrefuted That Pivotal Must Pay Mr. Sol’s Attorney’s Fees**

12 Simply put, Pivotal must pay Mr. Sol’s attorney’s fees, because it improperly
 13 removed this case from state court. A party is entitled to attorney’s fees if “the
 14 removing party lacked an objectively reasonable basis for seeking removal.”³⁴ As
 15 Mr. Sol’s papers have shown, Pivotal insisted on removing this case – even though
 16 it had *already* waived its right of removal and even though it could not satisfy the
 17 twin predicates of diversity jurisdiction. Furthermore, Pivotal refused to voluntarily
 18 remand this case, even after Mr. Sol had *repeatedly* warned that its Notice of
 19 Removal was both time-barred and fatally defective. In light of these compelling
 20 circumstances, the Court must award Mr. Sol his attorney’s fees.

21 **V. Mr. Sol Is Entitled to Sanctions**

22 Finally, Mr. Sol is entitled to sanctions because Pivotal has acted in
 23 disturbingly bad faith. As Mr. Sol has shown, Pivotal has not only acted in bad
 24 faith towards Mr. Sol and his counsel, but tried to hide its misdeeds from the Court.
 25 Using the pretext of a family vacation, Pivotal’s counsel tricked Mr. Sol’s counsel
 26 into not only granting them an extension, but into believing that they would not file

27 ³² See *supra* note 11.

28 ³³ Opening Brief, at 11:15-11:18.

³⁴ *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

1 or serve any papers over the winter holidays. Subsequently, Pivotal's counsel went
2 back on their word after loudly offering to extend Mr. Sol's deadline to file this
3 Motion. Finally, by improperly and unprofessionally removing this case, Pivotal
4 deliberately escaped from its *legal duty* to provide substantive responses to the
5 discovery that Mr. Sol had propounded in state court. Given such egregious and
6 calculated conduct, the interests of justice *require* that Pivotal be sanctioned.

7 **VI. Conclusion**

8 *No good deed goes unpunished.*

9 -- Clare Booth Luce

10 This Motion presents a morality tale. Although Mr. Sol's counsel had
11 generously extended their state-court deadline, Pivotal's counsel bit the hand that
12 had helped them. Instead of alerting Mr. Sol's counsel that they might remove this
13 case, they deliberately hid their intentions in order to run roughshod over a solo
14 practitioner during the winter holidays. Yet despite their lack of professionalism,
15 Mr. Sol's counsel still gave them a second chance. In a series of detailed
16 correspondence, he showed Pivotal that its removal papers were both time-barred
17 and substantively flawed. Yet even then, Pivotal's counsel refused to voluntarily
18 remand this case. Instead, they sought to mislead the Court by shamelessly
19 distorting the record. It now falls on the Court to right this wrong. By granting this
20 Motion, the Court will ensure that Mr. Sol and his counsel are not punished for the
21 misdeeds of another.

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1 DATED: Feb. 9, 2012

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