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UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF ALASKA**

ALEUT COMMUNITY OF ST. PAUL )  
ISLAND, a federally recognized tribal )  
government, on its own behalf, and as a )  
natural resource trustee, and as *parens* )  
*patriae* on behalf of its members, )

Plaintiff, )

vs. )

EXCEL NAVIGATION, S.A., a )  
Panamanian corporation; KYOEI )  
KAIUN KAISHA, LIMITED, a )  
Japanese corporation; and OWNERS )  
and OPERATORS OF THE M/V )  
CITRUS, )

Defendants. )

Case No. A98-80 CV (JWS)

**ORDER FROM CHAMBERS**

[Re: Motion to Dismiss -  
Docket No. 13;  
Preliminary Order -  
Docket 22]

**I. MOTION PRESENTED**

At docket 22, the court noted probable lack of subject matter jurisdiction in a preliminary order and invited the parties to submit additional briefing. Plaintiff Aleut Community of St. Paul Island ("St. Paul") filed a supplemental memorandum at docket 23 essentially concurring with the court's preliminary order. Defendant Excel Navigation, S.A. ("Excel") filed objections to the court's proposed order at docket 24.

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## II. BACKGROUND

The court incorporates by reference its preliminary order at docket 22 for a brief statement of relevant background facts.

## III. STANDARD OF REVIEW

Subject matter jurisdiction may be challenged at any time by either party or the court *sua sponte*.<sup>1</sup> Removal statutes are strictly construed against removal, and any doubts regarding removal must be resolved against removal and in favor of remand.<sup>2</sup> If at anytime after removal “it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”<sup>3</sup> The removing party bears the burden of proof and persuasion.<sup>4</sup> Doubtful or close cases should be remanded.<sup>5</sup>

## IV. DISCUSSION

Excel correctly states the basic rule that neither the court nor plaintiff may order or seek remand for a defect in removal after thirty days has passed.<sup>6</sup> However, this case does not involve a defect in removal. The removal notice is based solely on diversity grounds.<sup>7</sup> There is no basis for diversity because a tribe is not a citizen of any state and may not sue or be sued in federal

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<sup>1</sup>2 James Moore, *Moore's Federal Practice*, § 12.30[1], at 12-33 (3d ed. 1998). Moore notes:

[E]ven if the litigants do not identify a potential problem in that respect, it is the duty of the court--at any level of the proceedings--to address the issue *sua sponte* whenever it is perceived.

*Id.*

<sup>2</sup>*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

<sup>3</sup>28 U.S.C. § 1447(c).

<sup>4</sup>14C Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, § 3739, at 424, 470 (3d ed. 1998) (“*Wright*”).

<sup>5</sup>*Wright*, § 3739, at 446.

<sup>6</sup>*Maniar v. Federal Deposit Ins. Corp.*, 979 F.2d 782, 785-86 (9th Cir. 1992).

<sup>7</sup>Docket 1.

court based on diversity.<sup>8</sup> Based on the record, including memoranda submitted by the parties, the court finds that the Aleut Community of St. Paul Island is a federally recognized tribe for the purposes of this motion. Although parties may waive defects in removal, parties cannot confer jurisdiction where Congress has not. Excel's contention that St. Paul should be considered an unincorporated association is the same argument considered and rejected by the Second Circuit in *Romanella v. Hayward*.<sup>9</sup> This court adopts the Second Circuit's reasoning.

Excel argues the court may retain jurisdiction on maritime grounds. However, this would effectively amend Excel's removal notice. Excel may not amend its removal notice to add a new basis for jurisdiction after the thirty-day time limit has passed.<sup>10</sup> In *Energy Catering Serv., Inc. v. Burrow*,<sup>11</sup> Burrow removed solely on the basis of diversity. After diversity was found lacking, Burrow sought to assert admiralty jurisdiction.<sup>12</sup> The court denied Burrow's proposed amendment. The court observed:

In the instant case, defendant Burrow seeks to amend his notice of removal to assert federal question jurisdiction under 28 U.S.C. § 1333. Nowhere in his original notice of removal did Mr. Burrow set forth any facts or allegations which invoked this Court's admiralty jurisdiction. Rather, the original notice focused solely upon the Court's diversity jurisdiction.

Based upon this comparison of the notice of removals, the Court finds that the amending notice of removal clearly goes far beyond curing technical defects in the jurisdictional allegations. Rather, Mr. Burrow has stated an entirely different jurisdictional basis, and has done so beyond the thirty day

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<sup>8</sup>*Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997); *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Veeder v. Omaha Tribe of Nebraska*, 864 F. Supp. 889, 898 (N.D. Iowa 1994); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 435 (D. S.D. 1995). Excel cites no contrary case law, and the court is aware of none.

<sup>9</sup>224 F.3d 15, 16 (2d Cir. 1997).

<sup>10</sup>*Wright*, § 3733, at 357-61.

<sup>11</sup>911 F. Supp. 221 (E.D. La. 1995).

<sup>12</sup>*Id.* at 222.

limit for removal of cases. Therefore, the Court must deny the motion to amend the notice of removal.<sup>13</sup>

This same principle applies when formal amendment is not sought. In *Stein v. Sprint Communications Co., L.P.*,<sup>14</sup> Sprint removed on the basis of diversity. Four months later Stein moved to remand, arguing the court had no subject matter jurisdiction on diversity grounds. Sprint then asserted federal question jurisdiction as a new or additional basis for jurisdiction in its response to the motion to remand. The court held Sprint's attempt to rely on a new or additional basis for jurisdiction was untimely.<sup>15</sup>

Excel cites *Pierpoint v. Barnes*,<sup>16</sup> *In Re Digicon Marine, Inc.*,<sup>17</sup> and *Baris v. Sulpicio Lines, Inc.*,<sup>18</sup> and argues that improper removal of a maritime case is only a defect in removal procedure which, if not raised in thirty days, cannot form the basis for remand. However, these cases are distinguishable because removal was based on a maritime claim. The plaintiff therefore had notice of the improper removal grounds. Here, in contrast, the removal notice only specified diversity, a nonwaivable defect. Excel cites no case where a party objecting to removal was held to have waived any defect even though the grounds asserted were not stated in the removal notice. The court is aware of no such case. It seems problematic to argue St. Paul has waived its right to object to a basis of jurisdiction never before asserted by Excel.<sup>19</sup> The *Stein* court noted in similar circumstances:

Alternatively, defendant argues plaintiff has waived its right to object to defendant's untimely assertion of federal question jurisdiction because plaintiff did not file its motion to remand within 30 days after defendant

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<sup>13</sup>*Id.* at 223.

<sup>14</sup>968 F. Supp. 371 (N.D. Ill. 1997).

<sup>15</sup>*Id.* at 375-76.

<sup>16</sup>94 F.3d 813, 815-19 (2d. Cir. 1996).

<sup>17</sup>966 F.2d 158, 160 (5th Cir. 1992).

<sup>18</sup>932 F.2d 1546 (5th Cir. 1991).

<sup>19</sup>*Stein v. Sprint Communications Co., L.P.*, 968 F. Supp. 371, 376 (N.D. Ill. 1997).

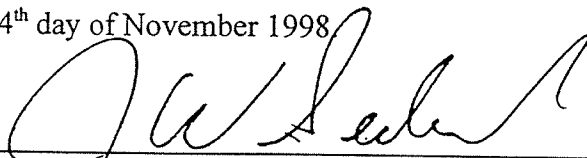
filed its notice of removal (October 10, 1996). Although, under 28 U.S.C. § 1447(c), a plaintiff must file a motion to remand based on any defect in removal procedure “within 30 days after the filing of the notice of removal under section 1446(b),” it defies logic to require plaintiff to have objected to defendant’s untimely attempt to allege federal question jurisdiction by November 10, 1996, when defendant did not even assert federal question jurisdiction until February 25, 1997. Defendant, not plaintiff, has missed its 30-day deadline.<sup>20</sup>

Perhaps more importantly, the underlying rationale of *Pierpoint*, *Digicon* and *Baris* is suspect. The specific jurisdictional grant from Congress in 28 U.S.C. § 1333(1) recognizes and protects a plaintiff’s right to select a forum. The court’s ability to exercise original jurisdiction is inextricably intertwined with a plaintiff’s election under the jurisdictional grant conferred by the savings to suitor clause. *Pierpoint*, *Digicon*, and *Baris* ignore the fact that, although a plaintiff could have filed suit originally in federal court, the plaintiff elected not to do so. If *Pierpoint*, *Digicon*, and *Baris* are correct, plaintiffs are forced to make the same election twice over for no logical reason. If the plaintiff does not object once a defendant files a notice of removal, he or she loses the right to have the suit heard in the selected forum. This rewrites the statutory grant of jurisdiction conferred by Congress even where, as here, the grounds initially asserted for removal jurisdiction are nonexistent. In short, this case is closer to the principle that remand is appropriate “if the federal court could never have exercised original jurisdiction.”<sup>21</sup>

#### V. CONCLUSION

For the foregoing reasons, the court holds it is without subject matter jurisdiction. The case is therefore **REMANDED** to state court.

DATED at Anchorage, Alaska, this 4<sup>th</sup> day of November 1998

  
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JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE

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<sup>20</sup>*Id.* at 376.

<sup>21</sup>*Wright*, § 3739, at 431-32.

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Deputy

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KAJUN KAISHA, LIMITED, a Japanese )  
corporation; and OWNERS and )  
OPERATORS OF THE *M/V CITRUS*, )

Defendants. )

Case No. A98-80 CV (JWS)

PRELIMINARY ORDER  
CONCERNING POSSIBLE  
REMAND TO STATE COURT

I. INTRODUCTION

The court probably lacks jurisdiction over this action. The following sections of this memorandum set out the court's preliminary view of the jurisdictional issue. The court's only reservation concerning what is said below is whether or not plaintiff is, in fact, a federally recognized tribe. The court is strongly inclined to believe that it is based upon 62 Federal

Register 55, 275 (October 23, 1997), but some uncertainty is created by the somewhat imprecise reference to plaintiff in the list of tribes.

Each party is directed to review the following sections of this order. On or before October 30, 1998, each party shall file such additional proof or argument as it can muster which bears upon the question of whether plaintiff is a tribe. To the extent that a party may disagree with the reasoning set out below, the filing may also include argument aimed at persuading the court that its reasoning is incorrect.

## II. BACKGROUND

The *MV CITRUS* collided with another vessel near St. Paul Island on February 16, 1996. Bunker oil spilled. St. Paul filed suit in state court on its own behalf and as *parens patriae* on behalf of its tribal members for economic damages resulting from lost subsistence opportunities. Excel removed based on diversity.

## III. STANDARD OF REVIEW

Subject matter jurisdiction may be challenged at any time by either party or the court *sua sponte*.<sup>1</sup> Removal statutes are strictly construed against removal and any doubts regarding removal must be resolved against removal and in favor of remand.<sup>2</sup> If at anytime after removal "it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."<sup>3</sup>

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*Id.*

<sup>2</sup>*Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

<sup>3</sup>28 U.S.C. § 1447(c).

#### IV. DISCUSSION

St. Paul alleges it is a federally recognized tribal entity. Excel states the “status of the Tribe remains unresolved . . . ,”<sup>4</sup> but does not otherwise contest St. Paul’s characterization of itself as a tribe. Excel’s removal is based on diversity.<sup>5</sup> A tribe is not a citizen for diversity purposes and may not sue or be sued in federal court based on 28 U.S.C. § 1332.<sup>6</sup> This court therefore has no subject matter jurisdiction on diversity grounds. St. Paul’s complaint includes a claim for violation of maritime laws. This court has subject matter jurisdiction over maritime claims.<sup>7</sup> Federal courts have exclusive jurisdiction of *in rem* maritime lien claims.<sup>8</sup> Under the “savings to suitor” clause, other *in personam* maritime claims may be filed in state or federal court.<sup>9</sup> St. Paul’s maritime tort claims are *in personam* claims.<sup>10</sup> Such claims, once filed in state court, may not be removed unless there is an independent basis for invoking federal jurisdiction.<sup>11</sup> There is none in St Paul’s complaint.

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<sup>4</sup>Docket 21, at 2.

<sup>5</sup>Docket 1.

<sup>6</sup>*Romanella v. Hayward*, 933 F. Supp. 163, 166-67 (D. Conn. 1996), *aff’d*, 114 F.3d 15, 16 (2d Cir. 1997); *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997).

<sup>7</sup>28 U.S.C. § 1333.

<sup>8</sup>*Guidry v. Durkin*, 834 F.2d 1465, 1469 (9th Cir. 1987).

<sup>9</sup>14A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*. § 3672, at 307-09 (3d ed. 1998)(“Wright”).

<sup>10</sup>*Id.* at 312-20 (discussing distinction between *in rem* and *in personam* claims).

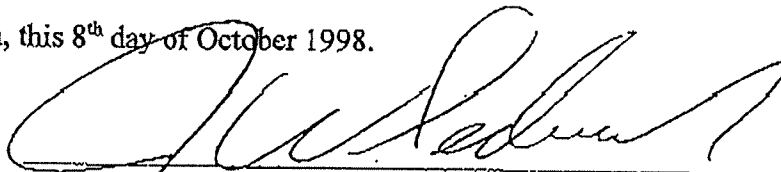
<sup>11</sup>*Zoila-Ortego v. BJ-Titan Services Co.*, 751 F. Supp. 633, 636-37 (E.D. La 1990); *Wright*, § 3674, at 366-67; *see also Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L.Ed.2d 368 (1959) (*dictum*).



V. CONCLUSION

Unless the parties timely present evidence or authorities showing why sections II through IV above are in error, this case will be remanded to state court

Dated at Anchorage, Alaska, this 8<sup>th</sup> day of October 1998.



JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE