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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Doe I, et al., Plaintiffs vs. Grant, et al., Defendants.	No. 2:20-CV-1142-SMB **PLAINTIFFS' MOTION TO REMAND AND STAY PROCEEDINGS** (Assigned To Hon. Susan M. Brnovich)

This action should be remanded to the Superior Court of Arizona from which it was improperly removed because this Court lacks subject matter jurisdiction over this case. First, Defendants Grant, *et al.*, all d/b/a Rapsheetz.com and Bailbondcity.com ("Defendants") concede that complete diversity does not exist. Second, Defendants' reliance upon the fraudulent joinder doctrine completely lacks merit. Moreover, because no "objectively reasonable basis for seeking removal" exists, the Court should also award attorney fees and costs to Plaintiffs John Doe I, *et al.* ("Plaintiffs"). Plaintiffs respectfully move this Court for an order (i) remanding this case back to Arizona State Court, (ii) awarding Plaintiffs' costs and attorney fees pursuant to 28 U.S.C. § 1447(C), and, alternatively, (iii) staying all proceedings until the Remand Motion is decided.

I. Introduction

Defendants are quintessential mugshot website operators that exploit arrest information and misappropriate images in booking photos to solicit third party

advertising for their mugshots websites for their pecuniary gain. [Doc. 1-2 at ¶¶ 1-2, 7]. On May 1, 2020, Plaintiffs filed a complaint ("Complaint") in the Maricopa County Superior Court against Defendants. [Doc. 1-2]. The Complaint asserts causes of action for: (1) violation of the Arizona Mugshot Act (A.R.S. 44-7901/7902) ("Arizona Mugshot Act"), (2) invasion of privacy based on appropriation, (3) intentional infliction of emotional distress, (4) unlawful appropriation/right of publicity, and (5) punitive damages. [Doc. 1-2, ¶¶ 60-93].

Although this case raises no federal question and, as Defendants concede, complete diversity is lacking,[1] Defendants filed a Notice of Removal shortly after Superior Court Judge Janice Crawford denied their Notice of Change of Judge [Doc. 1-6]. Defendants' sole basis for removal is their unsupported contention that the Florida Plaintiffs' citizenship does not defeat diversity because they were "fraudulently joined in this action." [Doc. 1 at 6].[2] Defendants do not even attempt to demonstrate fraudulent joinder of the Florida Plaintiffs, instead contending that "[a] full and complete discussion of this issue is beyond the scope of this Notice of Removal." [*Id.*].

Defendants are wrong. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992) ("the defendant bears the burden of actually proving the facts to support jurisdiction"). Moreover, there is a "general presumption against fraudulent joinder," which must be proven by "clear and convincing evidence." *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir.2007). Defendants' Notice of Removal does not even come close to satisfying Defendants' heavy burden. Defendants' failure to

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[1] Defendants and Plaintiff John Does 8, 9, and 10 ("Florida Plaintiffs") are all residents of Florida. [Doc. 1 at 3-6].

[2] "The term 'fraudulent joinder' is a bit misleading, inasmuch as the doctrine requires neither a showing of fraud ... nor joinder." *Carper v. Adknowledge, Inc.*, No. 13-CV-03921-JST, 2013 WL 5954898, at *3 (N.D. Cal. Nov. 6, 2013) (ellipses in original) (*quoting Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999)).

demonstrate fraudulent joinder by the required clear and convincing evidence is fatal and requires remand without any further analysis. *See Hunter v. Philip Morris USA*, 582 F.3d 1039, 1045 (9th Cir. 2009) (remanding improperly removed case because "it is not obvious from the face of the complaint that [the plaintiff] has failed to state a claim against [the defendant].").

Defendants' basis for removal is objectively unreasonable. Defendants contend, in vague and conclusory fashion that, under Arizona's choice of law principles, the Florida Plaintiffs cannot assert a cause of action under Arizona law and therefore cannot join in the Arizona action. [Doc. 1-4 at 16.] This is not the law. Although conflict-of-laws principles can be perplexing, one thing is absolutely certain: A complaint is not dismissed simply because choice-of-law rules require application of the law of a state other than the forum state, especially where, as here, the common nucleus of operative facts giving rise to the litigation are connected to multiple jurisdictions and where multiple laws could potentially apply.

Thus, even if Florida law applies, the Arizona court still has jurisdiction over the claims, and the routine approach in such cases is to grant the plaintiff leave to amend to reassert claims under the non-forum state's laws. *See, e.g., Cicero v. Liberty Mut. Ins. Co.*, No. 15-CV-076, 2016 WL 6571235, at *2 (M.D. Fla. Jan. 7, 2016) ("This Court also held that Pennsylvania law, not Florida law, applies to Plaintiffs' claims under Florida's choice-of-law rules. Accordingly, this Court granted Plaintiffs leave to amend their complaint to cite to Pennsylvania law.").

Because Defendants do not even allege, let alone demonstrate, that amendment of the complaint to add claims under Florida law would be futile, Plaintiffs' motion to remand must be granted. *See e.g.*, *Vasquez v. Bank of Am., N.A.*, No. SA CV 15-0006-DOC JC, 2015 WL 794545, at *3 (C.D. Cal. Feb. 23, 2015) ("Remand must be granted unless the defendant shows that the plaintiff would not be afforded leave to amend his complaint to cure [the] purported deficiency.") (quotation omitted); *See also e.g.*,

Salustri v. Dell, Inc., No. EDCV0902262SJODTBX, 2010 WL 11596554, at *7 (C.D. Cal. Apr. 27, 2010) (Holding that because Texas law, not California law, applied to the Plaintiffs claims, the claims asserted under California law were dismissed without prejudice and with leave to amend to assert claims under Texas law).

Stated somewhat differently, it is not enough for Defendants to merely assert in conclusory fashion that Florida law applies and then secure removal on that basis. Defendants must demonstrate both 1) that Florida law applies, and 2) that the Florida Plaintiffs have no possibility of recovery under Florida law and the impossibility of recovery "is obvious according to the settled rules of the state." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009) (internal quotation marks omitted). Defendants make no attempt to (and, at any rate, cannot) do so.

Transparently, Defendants' Notice of Removal is nothing more than an egregious and objectively unreasonable attempt to derail state court proceedings in this case and cause unnecessary delay. It is procedurally defective on its face and offers no good-faith basis for federal subject matter jurisdiction. This case should not only be remanded, but Plaintiffs should also be awarded costs and attorneys' fees pursuant to 28 U.S.C. § 1447(c) for having to bring this Motion.

II. The State Court Case was Improperly Removed and Must Be Remanded.

A. Defendants Do Not Come Close To Overcoming the "Strong Presumption" Against Removal.

There is a "strong presumption" against removal jurisdiction, and courts "strictly construe the removal statute against removal jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). In fact, "[f]ederal jurisdiction ***must be*** rejected if there is ***any doubt*** as to the right of removal in the first instance." *Id.* (emphasis added). *See also Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) ("[D]efendant always has the burden of establishing that removal is proper"); *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (citation omitted);

Hofler v. Aetna US Healthcare, 296 F.3d 764, 767 (9th Cir. 2002) (the removal statute is "strictly construed against removal jurisdiction"); *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005) ("removal statute should be construed narrowly in favor of remand to protect the jurisdiction of state courts").

"When removal is premised on fraudulent joinder, [as it is here,] the burden on the party seeking removal ***is even greater***." *Bullock v. Zimmer, Inc.*, No. CV 10-334-PHX-SRB, 2010 WL 11515474, at *2 (D. Ariz. June 8, 2010) (emphasis added) (citing *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 436 F. Supp. 2d 1070, 1072 (D. Ariz. 2006)). "A removing party asserting fraudulent joinder must "demonstrate that there is no possibility that [the non-removing party] would be able to establish a cause of action against them in state court." *Id*. (*quoting Dodson v. Spiliada Mar. Corp.*, 951 F.2d 40, 42 (9th Cir. 1992) (citation omitted). "Consistent with the strict standard against removal, a court evaluating a fraudulent joinder claim resolves all ambiguities about state law in favor of the non-removing party." *Id*. "The court also views factual allegations in the light most favorable to the non-removing party." *Id*. (citing *Bertrand v. Aventis Pasteur Labs., Inc.*, 226 F. Supp. 2d 1206, 1212 (D. Ariz. 2002)).

"'If there is a possibility that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.'" *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 548 (9th Cir. 2018). This means that a "***district court must consider ... whether a deficiency in the complaint can possibly be cured by granting the plaintiff leave to amend***." *Id*. at 550 (emphasis added).

B. Complete Diversity is Lacking

"Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and Congress." *Hampton v. Insys Therapeutics, Inc.*, 319 F. Supp. 3d 1204, 1209 (D. Nev. 2018) (*citing* U.S. Const. art. III, § 2, cl. 1). "If at any time before final judgment it appears that the district court

lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c); *see also Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003). Of the two types of subject matter jurisdiction, Defendants assert only diversity jurisdiction. However, diversity jurisdiction exists only where there is "complete diversity" among the parties; each of the plaintiffs must be a citizen of a different state than each defendant. *Caterpillar Inc. v. Le*wis, 519 U.S. 61, 68 (1996).

On its face, Defendants' Notice of Removal is improper as Defendants concede complete diversity is absent. [Doc. 1 at 6]. This defeats diversity jurisdiction under 28 U.S.C. section 1332. Because this case lacks complete diversity, barring any recognized exception followed by the Ninth Circuit, Defendants have not satisfied their heavy burden to show that removal was proper. *Abrego Abrego v. Dow Chem. Co*., 443 F.3d 676, 684 (9th Cir. 2006) ("it is to be presumed that a cause lies outside the limited jurisdiction of the federal courts and the burden of establishing the contrary rests upon the party asserting jurisdiction") (internal citations omitted). Accordingly, the Court must remand this case back to state court.

C. The Court Should Remand to the State Court To Determine Whether the Florida Plaintiffs Properly Joined the Action.

Because Defendants' fraudulent joinder argument requires a searching analysis into the merits of the Florida Plaintiffs' claims, and any potential claims they may assert under Florida law in an amended complaint, that inquiry should be conducted in the state court prior to removal. As Judge Campbell explained in *In re: Bard IVC* (one of the rare cases addressing the alleged fraudulent joinder of a non-diverse plaintiff) the complex fraudulent joinder analysis precludes removal until the issue is decided in state court:

> Defendants' fraudulent joinder argument raises complicated issues[.] The fraudulent joinder argument makes the subject matter jurisdiction analysis "rather complicated," especially if the inquiry involves "the more unusual question of 'fraudulent joinder' of a plaintiff." *Foslip Pharm., Inc. v. Metabolife Int'l, Inc.*, 92 F.Supp.2d 891, 899 (N.D. Iowa 2000).

2016 WL 6393596, at *3 (D. Ariz. Oct. 28, 2016). Given the complex merits analysis necessary to evaluate fraudulent joinder, the Ninth Circuit has stated:

> We have declined to uphold fraudulent joinder rulings where a defendant raises a defense that requires a searching inquiry into the merits of the plaintiff's case, even if that defense, if successful, would prove fatal.

Grancare, 889 F.3d at 548). "A decision about fraudulent joinder ***is*** a decision about merits; it is a decision about the merits of the case against the non-diverse defendants." *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 304 (D. Mass. 2004) (emphasis in original). Accordingly, this Court should remand this case to the state court to first determine the merits of Defendants' fraudulent joinder contention.

D. The Florida Plaintiffs Were Not Fraudulently Joined.

Defendants contend (but make no attempt to demonstrate) that removal was proper because the Florida Plaintiffs were "fraudulently joined." [Doc. 1 at 6]. In doing so, Defendants ignore the Ninth Circuit cases, and district court cases within the Circuit, addressing the issue. But as the Ninth Circuit has explained (with regard to a claim of fraudulent joinder of a non-diverse defendant):

> There are two ways to establish fraudulent joinder: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009) (*quoting Smallwood v. Illinois Cent. RR. Co.*, 385 F.3d 568, 573 (5th Cir. 2004)). Fraudulent joinder is established the second way if a defendant shows that an "individual[] joined in the action cannot be liable on any theory." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). But "if there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court." *Hunter*, 582 F.3d at 1046 (*quoting Tillman v. R.J. Reynolds Tobacco*, 340 F.3d 1277, 1279 (11th Cir. 2003) (*per curiam*)) (emphasis added). A defendant invoking federal court diversity jurisdiction on the basis of fraudulent joinder bears a 'heavy burden' since there is a 'general presumption against [finding] fraudulent joinder.' *Id.*

Grancare, 889 F.3d at 548.

Although Defendants' explanation as to why the doctrine of fraudulent joinder applies here is cursory, conclusory, and vague, Defendants' position appears to be that the Florida Plaintiffs were fraudulently joined because they "cannot establish any legitimate claim for relief under Arizona substantive law." [Doc. 1 at 7]. Defendants contend that any dispute between the Florida Plaintiffs and Defendants "would be controlled by Florida law, not Arizona law." [Doc. 1-4 at 16]. But even if Defendants are correct, that does not mean, as Defendants frivolously assert without citation to any legal authority, that these "Plaintiff[s] would have no right to bring an action in Arizona[.]" *Id*.

First, it is hornbook law that "an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens." *Burnham v. Superior Court of California, Cty. of Marin*, 495 U.S. 604, 638 (1990) (Brennan, J. concurring)). As such, even if a Florida plaintiff does not have a viable cause of action under Arizona law (based on a choice of law analysis), that does not mean, as Defendants contend, that the Florida Plaintiffs cannot bring a claim and obtain relief in the Arizona courts. Instead, the likely result of any motion to dismiss the Florida Plaintiffs' claims based on a choice of law analysis would be to permit those plaintiffs to amend the complaint and assert claims under Florida law. *See e.g.*, *Salustri v. Dell, Inc.*, No. EDCV0902262SJODTBX, 2010 WL 11596554, at *7 (C.D. Cal. Apr. 27, 2010).[3]

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[3] To be clear, in the trial court below, Defendants did not move to dismiss the Florida Plaintiffs' claims on the basis that the Florida Plaintiffs could not assert a claim under Arizona law. Instead, Defendants simply requested a more definite statement with regard to the Florida Plaintiffs' claims. Had Defendants so moved for dismissal, Plaintiffs would have requested leave to amend the complaint to assert claims under Florida law, and Plaintiffs' request would have very likely been freely granted: "Motions to dismiss for failure to state a claim are not favored . . . and the non-moving party should be given an opportunity to amend its complaint if such an amendment will cure its defects." *Sun*

E. The Florida Plaintiffs May Bring a Claim in Arizona State Court Because the Arizona Court Has Both Personal Jurisdiction over the Defendants and Subject Matter Jurisdiction Over the Claims.

Defendants' arguments that any claim the Florida Plaintiffs may have has minimal contacts to Arizona is irrelevant as to whether these Plaintiffs are fraudulently joined and/or may obtain relief in the Arizona Court. Indeed, Defendants' contention in this regard sounds like a personal jurisdiction argument. However, Defendants have not challenged personal jurisdiction in the Arizona court and have waived any such challenge. *See e.g., Schnabel v. Lui*, 302 F.3d 1023, 1033 (9th Cir. 2002) (A party "waive[s] any defense of lack of personal jurisdiction … by failing to raise the defense in its first motion under Rule 12(b)"). By lodging a personal jurisdiction argument under the guise of a choice-of-law analysis, Defendants appear to be trying to trick the Court into "conflat[ing] the principles of subject matter and personal jurisdiction to reach an incorrect result." *C & I Eng'g, LLC v. Performance Imp. of Virginia*, No. 1 CA-CV 11-0111, 2012 WL 1358471, at *4 (Ariz. Ct. App. Apr. 17, 2012), *as corrected* (Apr. 25, 2012). Defendants' attempted sleight of hand is unavailing.

There are two bases for the Arizona court's exercise of jurisdiction—personal and subject matter—both of which are satisfied here. As explained by the Arizona Court of Appeals:

> Although personal jurisdiction turns on a party's submission to jurisdiction or minimum contacts, *see Williams v. Lakeview Co.*, 199 Ariz. 1, 3, ¶ 6, 13 P.3d 280, 282 (2000), subject matter jurisdiction addresses 'a court's statutory or constitutional power to hear and determine a particular type of case.' *State v. Moldanado*, 223 Ariz. 309, 311, ¶ 14, 223 P.3d 653, 655 (2010) (citations omitted); *see also Sil–Flo Corp. v. Bowen*, 98 Ariz. 77, 81-82, 402 P.2d 22, 25 (1965) ("Jurisdiction of the subject matter . . .

World Corp. v. Pennysaver, Inc., 130 Ariz. 585, 589, 637 P.2d 1088, 1092 (Ct. App. 1981); *see also e.g., Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) ("a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts...") (citations omitted).

> includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question." (citation omitted)). Whether the court possesses subject matter jurisdiction turns on the nature of the allegations set forth in the complaint. *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 507, 744 P.2d 29, 34 (App.1987).

C & I Eng'g, LLC, 2012 WL 1358471 at *4. Unlike federal district courts, the Arizona superior courts are courts of general jurisdiction. *See e.g., Falcone Bros. & Assocs., Inc. v. City of Tucson*, 240 Ariz. 482, 487, 381 P.3d 276, 281 (Ct. App. 2016) ("The superior court's jurisdiction … is one of general jurisdiction[.]") (citation and quotation omitted). Because the Florida Plaintiffs seek money damages and/or injunctive relief, the Arizona Court has jurisdiction over the claims as long as it has personal jurisdiction over the Defendants:

> Where the plaintiff seeks a money judgment or equitable relief, the action is one against the person, or in personam, and the court has jurisdiction if it has jurisdiction over the defendant. *Santa Cruz Ranch v. Superior Court*, 76 Ariz. 19, 26, 258 P.2d 413, 417-18 (1953); *Price v. Sunmaster*, 27 Ariz.App. 771, 775, 558 P .2d 966, 970 (1976).

Rothweiler v. Clute, No. 1 CA-CV 11-0174, 2012 WL 463770, at *2 (Ariz. Ct. App. Feb. 14, 2012).

Thus, as long as the Arizona court has personal jurisdiction over the Defendants (as it does here) it has subject matter jurisdiction over the Florida Plaintiffs' claims. As the Arizona Court of Appeals stated in a similar situation:

> The superior court has subject matter jurisdiction provided it has personal jurisdiction over Clute. Clute has not disputed that the court has personal jurisdiction over her. The superior court therefore has subject matter jurisdiction over the breach of contract action absent any other restriction.

Rothweiler v. Clute, 2012 WL 463770 at *3.

Again, Defendants do not challenge the Arizona court's personal jurisdiction over them. The only question then is whether the Arizona courts have subject matter jurisdiction over the claims in this case. Whether those claims are construed under

Arizona law or Florida law the answer is the same, the Arizona court has subject matter jurisdiction over the claims in this case.

Here, the Florida Plaintiffs allege tort claims and claims for violation of statute, claims "which unquestionably fall[] within the superior court's general jurisdiction." *Gatecliff*, 154 Ariz. at 507, 744 P.2d at 34; Ariz. Const. art. 6, § 14 (providing general jurisdiction of superior court consists of "[c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court"). As the Arizona Court of Appeals has stated:

> [S]ubject matter jurisdiction refers to a court's statutory or constitutional power to hear and determine a particular type of case. The trial court had jurisdiction over this civil action in which Ader sought damages for various claims, including breach of fiduciary duty and fraudulent concealment.

Ader v. Estate of Felger, 240 Ariz. 32, 44, 375 P.3d 97, 109 (Ct. App. 2016) (citation s and quotations omitted). What this established law means is that the Florida Plaintiffs are proper parties and may assert claims for relief in the Arizona court against Defendants. Whether those claims are governed by Arizona or Florida law is irrelevant. A complaint is not dismissed simply because choice-of-law rules require application of the law of a state other than the forum state. Thus, even if Defendants are correct that Florida law applies, the Arizona court still has jurisdiction over any Florida claim, and the routine approach in such cases is to grant the plaintiff leave to amend to reassert claims under the non-forum state's laws. *See*, *e.g.*, *Cicero* at *2 ("This Court also held that Pennsylvania law, not Florida law, applies to Plaintiffs' claims under Florida's choice-of-law rules. Accordingly, this Court granted Plaintiffs leave to amend their complaint to cite to Pennsylvania law."); *See also e.g.*, *Salustri v. Dell, Inc.*, No. EDCV0902262SJODTBX, 2010 WL 11596554, at *7 (C.D. Cal. Apr. 27, 2010) (Holding that because Texas law, not California law, applied to the Plaintiffs claims, the claims asserted under California law were dismissed without prejudice and with leave to amend to assert claims under Texas law).

Indeed, the very idea that the Florida Plaintiffs cannot properly join this action and assert claims under Florida law and obtain relief in the Arizona court is not only not the law, but violates the principles of efficiency enshrined in the Federal and Arizona joinder rules. "Joinder is not the same as jurisdiction. Joinder of multiple Plaintiffs may be appropriate when their claims arise out of 'the same transaction, occurrence, or series of transactions or occurrences.'" *In re: Bard IVC* at *4 (quoting Fed. R. Civ. P. 20(a)); *see also* Ariz. R. Civ. P. 20, which is identical to its federal counterpart. "The Rules of Civil Procedure…encourage the joinder of all appropriate parties in a single suit to avoid multiplicity of litigation." *Arizona Title Ins. & Tr. Co. v. Kelly*, 11 Ariz. App. 254, 255, 463 P.2d 838, 839 (1970).

Instructive here is the Arizona Supreme Court's opinion in *Ruby v. United Sugar Companies, S.A.*, 56 Ariz. 535, 109 P.2d 845 (1941) (*overruled on other grounds*). In *Ruby*, the plaintiff's claims had no connection whatsoever to Arizona; the plaintiff was a California company who entered into a contractual agreement with the defendant, a Mexican company, relating to real property situated in Mexico. *Id*. at 537. The *Ruby* Defendant sought a dismissal of the action on that basis for lack of subject matter jurisdiction. *Id*. at 538-40. The Arizona Supreme Court held that the claims could be maintained in Arizona court because the court had personal jurisdiction of the defendant and subject matter jurisdiction over the claim. As the Arizona Supreme Court held:

> [A]n action may be brought … in any court which has jurisdiction of actions of that nature and where proper service can be obtained upon the defendant.

Ruby, 56 Ariz. at 539-540. *See also C & I Eng'g, LLC*, 2012 WL 1358471, which is also instructive. In that case, the defendants there, like the defendants here, argued that the cause of action alleged could not be maintained in the Arizona courts "because Arizona has no contacts with either the parties, the performance of the contract at issue, or the dispute[.]". *Id*. at *4. The Court disagreed and held that the plaintiffs could

maintain their action in the Arizona court, "because the court ha[d] jurisdiction to adjudicate [the] claims." *Id.* The Court explained:

> Additionally, we reject [the defendant's] contention that the superior court lacks subject matter jurisdiction because the lawsuit involves foreign residents concerning a contract performed in a foreign jurisdiction. Minimum-contacts analysis is invoked to determine personal jurisdiction, not subject matter jurisdiction.

C & I Eng'g, LLC, 2012 WL 1358471 at *4 (citations omitted).

Simply put, Defendants' contention that the Florida Plaintiffs cannot assert a claim in Arizona state court against them and obtain relief in the Arizona Court is "flatly wrong." *Gatecliff*, 154 Ariz. at 507, 744 P.2d at 34 ("The plaintiffs here claim damages for breach of contract and insurer bad faith. The Superior Court of Arizona unquestionably has jurisdiction over abstract questions of this kind.").

Thus, even if the Defendants had moved to dismiss the Florida Plaintiffs' claims pursuant to a choice of law analysis, the proper course of action is not dismissal (or a determination that the plaintiffs were fraudulently joined), but to "grant Plaintiff leave to amend [the] Complaint to allege similar violations of [Florida] law." *Hamby v. Ohio Nat. Life Assur. Corp.*, No. CIV. 12-00122 JMS, 2012 WL 2568149, at *5 (D. Haw. June 29, 2012). As such, Defendants removal of this case is objectively baseless.

F. Any Deficiency in the Complaint Can Be Cured By Amendment.

"'[I]f there is a possibility that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.'" *Grancare*, 889 F.3d at 548. As a practical matter, this means that a "***district court must consider ... whether a deficiency in the complaint can possibly be cured by granting the plaintiff leave to amend***." *Id*. at 550 (emphasis added).

It is quite telling that in their conclusory and truncated analysis, Defendants focus on the Arizona Mugshots Act claim and ignore the state common law claims, such as the

Florida Plaintiffs' misappropriation and right of publicity claims. [Doc. 1-2 ¶¶ 58-93]. These claims are viable under both Arizona and Florida law—Defendants make no demonstration to the contrary—such that the Florida Plaintiffs certainly have a possibility of recovery under Florida law.

Indeed, the misappropriation / right of publicity claims under Arizona law are substantially similar to a claim under the Florida misappropriation statutes. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006) (the elements establishing both common law and statutory claims for misappropriation "are substantially identical.").

Pursuant to Florida Statute § 540.08: "No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent ...". Fla. Stat. § 540.08(1). That is precisely what the Plaintiffs allege here; that Defendants are using their booking photos to solicit third party advertising on their mugshots website. [Doc. 1-2 ¶¶ 1-2]. As such, there is a possibility of recovery under Florida law. *See e.g., Bilotta v. Citizens Info. Associates, LLC*, No. 8:13-CV-2811-T-30, 2014 WL 105177, at *1 (M.D. Fla. Jan. 10, 2014) (plaintiff stated a claim under Section 540.08 for misuse of image by mugshot website operators for a commercial purpose on a mugshot website that advertised); *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299, 1311 (M.D. Fla. 2010) (model and photographer entitled to damages for misuse of image on pornographic video).[4]

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[4] This is by no means an exhaustive list of the Florida Plaintiffs' possible causes of action under Florida law the Florida Plaintiffs could assert in the Arizona Superior Court if the Arizona Court were to decide that Florida law applies to their claims.

III. The Court Should Award Costs And Attorney's Fees To Plaintiffs Pursuant To 28 U.S.C. § 1447(C).

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Courts may award attorney's fees under § 1447(c) "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). "[T]he degree of clarity in the relevant law at the time of removal is a relevant factor in determining whether a defendant's decision to remove was reasonable." *Grancare*, 889 F.3d at 552.

Here, the law could not have been more clear, [*see supra* at Section II], and Defendants' Notice of Removal is worse than lacking an objectively reasonable basis—it could not be more frivolous. Defendants claim that they have a basis for removal because the Florida Plaintiffs have been "fraudulently joined" completely ignores the well-established, dispositive cases cited herein confirming that Defendants had absolutely no basis (let alone an objectively reasonable basis) for seeking removal.

Fees are particularly warranted due to Defendants' transparent ploy to game the system in an effort to drive up Plaintiffs' legal fees and prevent the state court (or any other court) from ever addressing the merits of this case. Not only did Defendants file a totally baseless Notice of Removal, requiring Plaintiffs to file this Motion, but after removing to federal court, Defendants sought to consolidate this case with another federal case, [*see* Doc. 5], even though the plaintiffs in that case had already filed a pending motion to dismiss that Defendants never contested. [*See* Doc. 8 at 2]. Defendants' frivolous efforts required Plaintiffs to defend against consolidation, which, once again, drove up fees and prevented the parties from addressing the merits of this case. Both these and other examples confirm that an award of attorneys' fees is especially warranted here. Not only will it shift the cost of this sideshow to Defendants, but more importantly it will deter others from engaging in such gamesmanship.

IV. The Court Should Stay proceedings until Resolution of the Remand Motion.

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co*., 299 U.S. 248, 254 (1936). *See also Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (the district court "has broad discretion to stay proceedings as an incident to its power to control its own docket"). When considering a motion to stay, district courts may take into account the following factors: "[(1) the possible damage which may result from granting of a stay, [(2)] the hardship or inequity which a party may suffer in being required to go forward, and [(3)] the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

Here, all three factors weigh strongly in favor of granting a stay. First, there are absolutely no possible damages that may result from a stay of proceedings. If anything, Defendants stand to gain from a stay because they will not be required to expend any more resources defending this federal litigation, which, in all likelihood, will be remanded to state court.

The second factor also weighs in favor of granting the stay because, as is the case with Defendants, Plaintiffs, without a stay, would be required to spend significant time and resources prosecuting this federal litigation even though the outcome of the Motion for Remand might dispose of this federal case.

Finally, if the Court does not grant a stay then this might complicate many of the issues in this case. For example, if, after deciding not to grant a stay, the Court rules on the pending Motion to Dismiss, then later decides it does not have subject matter jurisdiction, then complex questions arise whether the ruling on the Motion to Dismiss was valid. *Butte Min. PLC v. Smith*, 876 F. Supp. 1153, 1157 (D. Mont. 1995), aff'd, 76 F.3d 287 (9th Cir. 1996) ("A judgment on the merits cannot be decided before the court

has assumed jurisdiction") (citations omitted). If anything, granting the stay would simplify this entire case because, if the Motion is granted, then there will no longer be any issues or questions of law for this Court to answer. Accordingly, the third factor also weighs in favor of granting the stay.

Conclusion

For the foregoing reasons, based upon the record in the underlying civil action and dispositive Ninth Circuit law, Plaintiffs respectfully request that the Court (1) Remand this action to state court, (2) award Plaintiffs' costs and fees for having to bring this Motion for Remand, and, alternatively, (3) stay all proceedings until such time as the Court has ruled on the Motion to Remand.

DATED: July 9, 2020.

Respectfully submitted,

ANDREW IVCHENKO PLLC

By: */s/ Andrew Ivchenko*
Andrew Ivchenko, Esq.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on July 9, 2020 via the Court's ECF system, thereby causing a true copy of said document to be served electronically upon each other party registered through ECF. In addition, copies of the foregoing were emailed to:

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