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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

John Doe I, et al.,

Plaintiffs

vs.

Travis Paul Grant, et al.,

Defendants.

Case No. 20-CV-1142-SMB

MOTION FOR JURISDICTIONAL DISCOVERY

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Defendants Travis Paul Grant, *et al*. ("Defendants") respectfully move this Court for an order permitting jurisdictional discovery relating to the claims of three Plaintiffs—identified as John Does 8, 9 and 10 (the "Florida Plaintiffs"). To be clear about this request—Defendants only seek discovery relating to a single fact: *where* were the Florida Plaintiffs arrested? In their home state of Florida, or in Arizona?

As explained in Defendants' concurrently-filed Response to Plaintiffs' Motion to Remand, the location of the Florida Plaintiffs' arrests is a critically important fact that affects this Court's jurisdiction. In short, if the Florida Plaintiffs were arrested in Arizona, then it is possible they were *not* fraudulently joined in this matter. On the other hand, if the Florida-resident Plaintiffs were arrested in Florida, this conclusively establishes fraudulent joinder.

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I. INTRODUCTION

The underlying facts of this matter are discussed in other concurrently-filed pleadings, so they will not be repeated in full here. As noted in those other pleadings, this case involves twenty anonymous Plaintiffs who claim they were arrested (the Complaint never explains when or where each Plaintiff was arrested). Following these arrests, Plaintiffs claim Defendants published their mugshots and related criminal records in violation of Arizona's newly-enacted "mugshot law", A.R.S. § 44–7902.[1]

After this case was removed on June 9, 2020, Plaintiffs moved to remand. In their motion, Plaintiffs claim this Court lacks diversity jurisdiction because three of the twenty Plaintiffs are citizens of Florida (Defendants are citizens of Florida). If true, absent some other argument, this means diversity is lacking.

Defendants assert the Florida-resident Plaintiffs were fraudulently joined because they were not arrested in Arizona, nor do they allege any facts sufficient to show that Arizona law applies to them. Instead, Defendants allege the Florida-resident Plaintiffs were arrested in their home state—Florida. Thus, because they were fraudulently joined, their presence does not defeat diversity jurisdiction.

In their Motion to Remand, Plaintiffs do not dispute this factual allegation. They do not claim they were arrested in Arizona, nor do they allege their mugshots were obtained from Arizona-based law enforcement agencies. Instead, Plaintiffs argue this does not matter because even if they were not arrested in Arizona, and even if Arizona law does not apply to them, the Florida-resident Plaintiffs were not fraudulently joined because they might be able to amend the Complaint to assert claims under *Florida* law.

As explained in Defendants' Response to Plaintiffs' Motion to Remand, Plaintiffs' argument is based on a misstatement of the law. Fraudulent joinder asks whether the non-diverse party has stated a valid claim *in this court and in this case*. The rules of fraudulent joinder do not require the defense to go further by also proving the non-diverse plaintiff has no claims in some other court under the law of *some other state.*

[1] A.R.S. § 44–7902 became effective on August 27, 2019.

Nevertheless, in an abundance of caution and in order to ensure this Court has all the facts necessary to reach the correct decision, if the Florida-resident Plaintiffs try to deny that they were arrested in Florida in their Reply brief, then Defendants must be granted leave to conduct jurisdictional discovery into that issue. In addition, if the Court agrees with Plaintiffs' argument and holds that fraudulent joinder requires Defendants to show that the non-diverse Plaintiffs have no tenable claims under the laws of any other state (like Florida) or if Plaintiffs seek leave to amend to assert claims under Florida law, Defendants must be granted leave to perform jurisdictional discovery into that issue to determine whether, in fact, Plaintiffs could state viable claims under Florida law.[2]

Again, to be clear—Defendants' primary argument is that jurisdictional discovery is not necessary in light of the current posture of this case and the legal standards for fraudulent joinder. Instead, Defendants' position is that because the Florida-resident Plaintiffs do not deny the factual allegations set forth in the Notice of Removal (e.g., that the Florida-resident Plaintiffs are sham/fraudulently joined parties because they were not arrested in Arizona), that jurisdictional fact should be deemed undisputed for the purposes of determining whether this Court has jurisdiction. *See Ehrman v. Cox Communications, Inc.*, 932 F.3d 1223, 1228 (9th Cir. 2019) ("[A]t the pleading stage, allegations of jurisdictional fact need not be proven unless challenged.") (quoting *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 614 (9th Cir. 2016)).

Furthermore, as a matter of law, Defendants do not agree that the rules of fraudulent joinder require them to show the Florida-resident Plaintiffs have no claims under *Florida* law. However, if the Court agrees with Plaintiffs on either or both of those points, then Defendants must be allowed to perform discovery into those issues prior to a ruling on Plaintiffs' Motion to Remand.

[2] Fraudulent joinder may be found if the non-diverse plaintiff's claim(s) are found to be non-viable for *any* reason, such as where the applicable statute of limitations has expired. *See*, e.g., *Ritchey v. Upjohn Drug Co*., 139 F.3d 1313 (9th Cir. 1998). Accordingly, if the Florida-resident Plaintiffs seek to amend their Complaint to state claims under Florida law, Defendants must be entitled to discovery that would show whether those claims are timely.

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II. DISCUSSION

The related legal doctrines of fraudulent joinder and misjoinder bear on the question of whether this Court has subject matter jurisdiction over this case. In making that determination, the Court is not limited to the four corners of the Complaint.

Instead, "Where fraudulent joinder is an issue, we will go somewhat further. 'The defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent.'" *Ritchey v. Upjohn Drug Co*., 139 F.3d 1313, 1318 (9th Cir. 1998) (emphasis added); *see also Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 549 (9th Cir. 2018) ("the party seeking removal is entitled to present additional facts that demonstrate that a [party] has been fraudulently joined ….") (emphasis added).

Because a district court is permitted to "pierce" the Complaint and consider evidence outside the pleadings when an allegation of fraudulent joinder is raised, if the material facts relating to the question of fraudulent joinder are disputed, jurisdictional discovery must be permitted before remand is decided. *See Buyer Directory, LLC. v. Nw. Capital Appreciation, Inc*., 2008 WL 5082264, at *2 (D.Ariz. 2008) ("denying jurisdictional discovery where further discovery might demonstrate a basis for jurisdiction is an abuse of discretion.")

Accordingly, when considering a question of fraudulent joinder, the court *cannot* remand the case until any and all jurisdictional factual disputes are resolved; in effect, the jurisdictional dispute is subject to the familiar summary judgment standards:

> In determining whether a party has been fraudulently joined, the Court may pierce the pleadings and determine the basis of joinder "by any means available." In addition, a fraudulent joinder claim must be capable of summary determination—if the claims against the nondiverse party are capable of summary judgment, the Court cannot remand the case.

Matter of Medical Laboratory Management Consultants, 931 F.Supp. 1487 (D.Ariz. 1996) (emphasis added) (internal citations omitted) (quoting *Lewis v. Time Inc*., 83 F.R.D. 455 (E.D.Cal.1979), aff'd, 710 F.2d 549 (9th Cir. 1983); *Spence v. Flynt*, 647 F.Supp. 1266, 1271 (D.Wyo. 1986) (explaining, "The standard for removal based on

fraudulent joinder requires that the defendant establish the non-diverse party's non-liability with clear and convincing evidence, though the court need not grant summary judgment for that claim. At the same time, if there is a slight doubt about the defendant's non-liability, the Court may retain the case."); *LeJeune v. Shell Oil Co*., 950 F.2d 267, 271 (5th Cir. 1992) ("a removing party's claim of fraudulent joinder to destroy diversity is viewed as similar to a motion for summary judgment .... A court is to pierce the pleadings to determine whether, under controlling state law, the non-removing party has a valid claim against the non-diverse parties … ."") (emphasis added); *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir.1994) ("[F]raudulent joinder claims can be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony."); *Morris v. Princess Cruises, Inc*., 236 F.3d 1061, 1068 (9th Cir. 2001) (same) (quoting *Cavallini v. State Farm Mutual Auto Ins. Co*., 44 F.3d 256, 263 (5th Cir. 1995)).

Here, the critical jurisdictional fact is simple—*where were the three Florida-resident Plaintiffs arrested*? Florida or Arizona? Again, as noted above, Plaintiffs do not deny Defendants' allegation that John Does 8, 9 and 10 were arrested in Florida, not Arizona. Thus, for purposes of whether or not they have been fraudulently joined, that jurisdictional fact should be taken as undisputed.

At the same time, Plaintiffs claim Defendants have failed to prove fraudulent joinder with evidence; "Defendants' failure to demonstrate fraudulent joinder *by the required clear and convincing evidence* is fatal and requires remand without any further analysis." Mot. at 2:21–3:2 (emphasis added). If this Court agrees with Plaintiffs' argument and finds that *evidence* on this issue is required at this stage, even when the fact has not been directly challenged by Plaintiffs, Defendants have a right to obtain that evidence from Plaintiffs. *See Ehrman*, 932 F.3d at 1228 ("the district court should have permitted jurisdictional discovery had Cox requested it.") (citing *Laub v. U.S. Dep't. of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) ("[D]iscovery should be granted when ... the jurisdictional facts are contested or more facts are needed.")

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On the other hand, if the Court agrees with Defendants and finds that evidence on this issue is *not* required because Plaintiffs have failed to directly challenge this jurisdictional allegation, then discovery is not needed.

III. CONCLUSION

As noted above, Defendants seek jurisdictional discovery into the question of where the Florida-resident Plaintiffs were arrested, but *only* if the Court finds that issue has been properly challenged and disputed by Plaintiffs. If the Court finds that evidence on this issue is required, then the Court should allow Defendants to pursue discovery into that issue.

DATED: July 21, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2020, I transmitted the attached document to the Clerk's Office for ECF filing, and for electronic service on all counsel of record in this matter:

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