David S. Gingras, #021097
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044
Tel.: (480) 264-1400
Fax: (480) 248-3196
David@GingrasLaw.com

Attorneys for Defendants
Travis Paul Grant, Mariel Lizette Grant and
Kyle David Grant

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

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO REMAND

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Defendants Travis Paul Grant, *et al*., ("Defendants") respectfully submit this response to Plaintiffs' Motion to Remand. As explained herein, this Court has subject matter jurisdiction over this case. For that reason, Plaintiffs' motion must be denied.

I. INTRODUCTION

This case presents a textbook example of fraudulent joinder. Understanding why this is so requires understanding the convoluted history of this dispute. This review is proper because "it is well settled that upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal." *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (E.D.Cal. 1979) (quoting *Smoot v. Chicago, Rock Island & Pacific Railroad Co*., 378 F.2d 879, 881–82 (10th Cir. 1967)); *see also Matter of Med. Lab. Mgmt. Con.*, 931 F. Supp. 1487, 1491 (D.Ariz. 1996) ("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.'") (quoting *Lewis*, *supra*).

A. Case 1—Renee Ivchenko

The current dispute began in April 2018 with the arrest of Plaintiff's counsel wife, Renee Ivchenko, in Scottsdale. At that time, Mrs. Ivchenko was arrested and charged drunkenly assaulting a Scottsdale police officer during a domestic dispute. Following her arrest, Mrs. Ivchenko was booked into jail by the Maricopa County Sheriff's Office (MCSO), and in keeping with its normal practice, MCSO published Mrs. Ivchenko's mugshot and details of her charges on its website at: https://www.mcso.org/Mugshot/.

Mrs. Ivchenko was subsequently charged with felony aggravated assault on a police officer in *State v. Renee Ivchenko*, Maricopa County Superior Court Case No CR2018–119949. Rather than face trial and conviction, Mrs. Ivchenko entered into a felony pretrial diversion program. As part of this program, Mrs. Ivchenko admitted guilt but was allowed to attend an alcohol treatment program. After successfully completing the program, the criminal case against Mrs. Ivchenko was dismissed in September 2018.

More than a year after her arrest, on May 9, 2019, Mrs. Ivchenko (then represented by her husband, Andrew) filed suit against Defendants in the Maricopa County Superior Court, *Renee Ivchenko v. Kyle David Grant*, *et al*., Case No. CV2019–090493 ("Case 1"). In short, Mrs. Ivchenko alleged Defendants defamed her by republishing her mugshot and arrest records which were originally published online by MCSO. Mrs. Ivchenko alleged that by republishing her mugshot, Defendants implied she was guilty of committing a crime. For this transgression, Mrs. Ivchenko's Complaint sought more than $1 million in damages.

On its face, Mrs. Ivchenko's Complaint in Case 1 was clearly removable; Mrs. Ivchenko is a citizen of Arizona and all Defendants are citizens of Florida. As a result, Mrs. Ivchenko's Complaint was removed to this Court on May 29, 2019 and assigned Case No. 19-CV-3756-JJT.

Following removal, undersigned counsel explained to Mr. Ivchenko that the entire action was groundless for numerous reasons. Among other things, Mrs. Ivchenko's defamation claim was clearly untimely pursuant to A.R.S. § 12–541 because it was based

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

on records published by Defendants in April 2018, more than one year before the action was commenced. After considering things, Mr. Ivchenko agreed to voluntarily dismiss the entire case two days later on May 31, 2019.

B. Case 2—Renee & Andrew Ivchenko (+ 20 Anonymous Plaintiffs)

After Case 1 was dismissed, this dispute should have ended. Instead, nearly seven months later, on December 19, 2019, Mr. and Mrs. Ivchenko (this time as plaintiffs) filed a new action in Maricopa County Superior Court Case No. CV2019–015355 styled *Renee Ivchenko and Andrew Ivchenko v. Kyle David Grant, et al.* ("Case 2").

As she did in Case 1, Mrs. Ivchenko alleged in Case 2 that Defendants defamed her by publishing her mugshot and criminal arrest records in April 2018. In addition, Mr. Ivchenko asserted his own defamation claims based on the fact that an unknown person published statements on Twitter accusing Mr. and Mrs. Ivchenko of committing "fraud" on the U.S. Copyright Office. This allegation was based on the fact that following her arrest, Mrs. Ivchenko submitted an application to the Copyright Office in which she claimed that she owned the copyright in her mugshot taken by MCSO. After the Copyright Office unwittingly approved Mrs. Ivchenko's registration, Mr. Ivchenko sent several different DMCA takedown demands to Twitter in which he alleged that third parties were "infringing" Mrs. Ivchenko's copyright by sharing her mugshot.

As before, after Defendants were served with the Complaint in Case 2, undersigned counsel contacted Mr. and Mrs. Ivchenko's new counsel to explain the case was groundless. Unlike before, Mr. and Mrs. Ivchenko refused to dismiss the action. Notably, the Complaint in Case 2 was *not* clearly removable because unlike Case 1 (wherein Mrs. Ivchenko sought damages of $1,000,000), the Complaint in Case 2 did not list any specific amount of damages. As will become evident, the omission of damages from the Complaint in Case 2 was a tactical effort by Mr. Ivchenko to avoid federal jurisdiction.

After Mr. and Mrs. Ivchenko refused to dismiss Case 2, on February 21, 2020, Defendants appeared in the state action and filed a Motion for Summary Judgment. In response to that motion, six days later on February 27, 2020, Mr. and Mrs. Ivchenko filed

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

an Amended Complaint which completely changed the action in several ways. First, Mr. Ivchenko withdrew all his claims and disappeared from the caption. Second, Mrs. Ivchenko withdrew her defamation claim, but otherwise continued to allege that Defendants were liable for publishing her mugshot and criminal records obtained from MCSO. Third and most importantly, the Amended Complaint added twenty new anonymous Plaintiffs, each asserting claims under Arizona's new "Mugshot Act", A.R.S. § 44–7902. Notably, none of the new Plaintiffs claimed to reside in Florida; their alleged states of citizenship included only Arizona, Texas, California, and New York.

After the Amended Complaint was filed, in their initial Rule 26 Disclosure Statement, Plaintiffs disclosed (for the first time) that they were seeking millions of dollars in damages. As noted above, both the original and amended Complaints in Case 2 were silent as to the specific amount of damages requested. Based on this disclosure, Case 2 was removed to this Court on April 3, 2020 and assigned Case No. 20-CV-674.

Following removal of Case 2, the parties were ordered to meet and confer to prepare a Joint Case Management Plan. In the initial draft of that plan, Plaintiffs expressed their belief that Case 2 was improperly removed and that they intended to immediately challenge federal jurisdiction.

Excepts from Draft Joint Case Management Plan
Exhibit A to Declaration of Counsel

addresses topics identified in the April 7, 2020 Order.

[1] The Order required the parties to file this Joint Case Management Plan by May 4, 2020. However, for the reasons outlined in Plaintiffs' Motion to Stay Proceedings and Remand to State Court (Doc. __), which Plaintiffs incorporate herein by reference, Plaintiffs believe removal to Federal Court was improper and that this Court lacks jurisdiction. With that said, Plaintiffs submit this Joint Case Management Plan wholly out of an abundance of caution.

- 1 -

4837-3714-6043 v1 [89794-1]

Despite initially announcing their intention to seek immediate remand in the draft of the Case Management Plan, Plaintiffs did not do so. Instead, Plaintiffs subsequently withdrew all references to remand from the final version of the plan which was filed with the Court. *See* ECF Doc. 12, filed May 4, 2020 in 20-CV-674-MTL.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Instead of moving to remand Case 2, Plaintiffs hatched an alternate scheme. First, on May 1, 2020, Mr. Ivchenko (no longer represented by his counsel in Case 2) filed a new *third* action in Maricopa County Superior Court Case No. CV2020-093006 styled *John Doe I, et al. v. Travis Paul Grant, et al.* ("Case 3"; this matter). A few weeks later, on May 19, 2020, Plaintiffs moved to voluntarily dismiss Case 2. On June 26, 2020, the District Judge (Hon. Michael T. Liburdi) issued an order (ECF Doc. 26 in 20-CV-674-MTL) dismissing Mrs. Ivchenko's claims in Case 2 with prejudice. The remaining claims of the twenty anonymous Plaintiffs were dismissed without prejudice.

C. Case 3—This Matter

As noted above, this matter (Case 3) was filed by Mr. Ivchenko in state court on May 1, 2020. Initially, the case did not appear to be removable because although the Complaint was largely identical to the Complaint filed in Case 2, it had one obvious difference—the Complaint in Case 3 included three new non-diverse Plaintiffs—John Does 8, 9 and 10—who claimed to be citizens of Florida. Due to the lack of apparent diversity, Defendants did not initially remove Case 3. Instead, on May 12, 2020, Defendants appeared in state court and filed a Rule 12(b)(6) Motion to Dismiss.

In that motion, Defendants requested, in the alternative, more information about the claims of the non-Arizona resident Plaintiffs, including the Florida-resident Plaintiffs, John Does 8, 9 and 10. Specifically, Defendants' motion noted that none of the non-Arizona resident Plaintiffs alleged that they were arrested in Arizona, nor did they allege any other facts showing why Arizona law applied to them. This clearly raised concerns that the non-Arizona resident Plaintiffs might have been fraudulently joined in a further attempt to avoid federal jurisdiction.

Any doubts on that point were resolved on June 1, 2020 when Plaintiffs filed their response to Defendants' motion. In their response, Plaintiffs essentially admitted the non-Arizona resident Plaintiffs were not arrested in Arizona, and that the only reason these parties were joined in the case was because *Defendants* were subject to personal jurisdiction in Arizona. Based on that admission, Case 3 was removed on June 9, 2020.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

II. SUMMARY OF ARGUMENT

The facts here present a textbook example of fraudulent joinder. After Mr. Ivchenko objected to the removal of Case 2, he realized there were no factual or legal grounds to seek remand of that case. As a result, he found a different solution—he simply filed a new, substantially identical action in state court which included three new non-diverse sham Plaintiffs, then moved to voluntarily dismiss the prior federal action.

This scheme easily meets the test for fraudulent joinder for two different reasons. First, under the well-settled rules of fraudulent joinder, the Florida-resident Plaintiffs are clearly sham parties who have no tenable claims against Defendants under Arizona law. These Plaintiffs live in Florida, they were arrested in Florida, their mugshots were taken in Florida by Florida law enforcement agencies and released to the public in Florida. Defendants (who all reside in Florida) republished these mugshots and arrest records on their Florida-based website in a manner permitted by Florida law.

Under these facts, there is no basis for these Florida-resident Plaintiffs to bring claims against Defendants *in Arizona* under Arizona substantive law. This is so because under the well-settled rules of this state, Arizona law does not apply to alleged tortious conduct committed in Florida by Florida-resident defendants against Florida plaintiffs.

In their Motion to Remand, Plaintiffs do not even attempt to refute this argument. Instead, they offer an entirely new theory—even if the Florida resident Plaintiffs have no claims under *Arizona* law, they might be able to amend the Complaint to assert claims under *Florida* law. If that occurred, Plaintiffs argue fraudulent joinder cannot be found because, in their view, the rule requires strict proof that the non-diverse party has no colorable claims under the law of *ANY other jurisdiction*, not just this state.

Defendants' response to this is two-fold. First, Plaintiffs misstate the legal test for fraudulent joinder. The relevant question is *not* whether Plaintiffs might have a hypothetical claim *in some other state* under the laws of *some other jurisdiction*. Rather, the question is much more specific: do the non-diverse Plaintiffs have any potential chance of prevailing in Arizona state court under the theories as currently alleged;

"Fraudulent joinder inquiry focuses on the validity of the legal theory being asserted against the non-diverse defendant." *Didyoung v. Allstate Ins. Co*., 2012 WL 1983779, *3 (D.Ariz. 2012) (finding fraudulent joinder and denying remand).

As explained below, the non-diverse Plaintiffs cannot prevail under Arizona substantive law for the simplest of reasons: because Arizona substantive law does not apply to a person who lives in Florida, is arrested in Florida, and whose mugshot is republished by a Florida-resident defendant operating a Florida-based website. Arizona substantive law cannot and does not create, nor does it govern, alleged torts committed *in Florida* by a Florida-resident defendant against a Florida-resident plaintiff.

This leads to the second problem with Plaintiffs' argument—even assuming the Florida-resident Plaintiffs *could* assert claims under Florida law (which is NOT a question this Court must resolve), that would still be insufficient to defeat federal jurisdiction here in Arizona. This is so because under the related concept of *misjoinder*, even when a non-diverse party has a colorable claim, that party cannot defeat federal jurisdiction by joining their unrelated claims with the claims of other fully diverse parties. This type of intentional misjoinder is simply another species of fraudulent joinder.

Put another way—let's assume the Florida plaintiffs do have valid claims under Florida law. Even so, it is clear those claims do not arise from the same transaction/occurrence as the other Plaintiffs nor would they involve identical questions of law or fact as the remaining, fully-diverse parties in this case. Because of this, the Florida resident Plaintiffs fail to meet the requirements for permissive joinder under Rule 20(a)(1). As a result, even assuming the Florida resident Plaintiffs have claims under Florida law, those claims are not properly joined here and do not destroy diversity.

Even assuming *arguendo* the Florida Plaintiffs have valid claims under Florida law, the appropriate result is not to remand this entire case back to Arizona state court. Instead, the proper remedy is to sever and dismiss the claims of the Florida Plaintiffs under Rule 21, and remand only that part of the case. To that end, Defendants have concurrently filed a Motion to Sever along with this response.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

III. ARGUMENT

a. Plaintiffs' Motion Misstates The Proper Legal Standards

In their Motion to Remand, Plaintiffs begin with all the familiar legal arguments—federal jurisdiction is narrow, there is a presumption against fraudulent joinder, and doubts must be resolved in favor of remand, etc. Defendants do not dispute those general legal points as applied in a non-First Amendment context.

However, this case involves weighty First Amendment issues because it arises from speech on issues of public interest and concern (e.g., criminal proceedings). *See Rodriguez v. Fox News Network, L.L.C.*, 238 Ariz. 36, 39, 356 P.3d 322, 325 (Ariz. App. 2015) (explaining, "crimes themselves [are] 'events of legitimate concern to the public.' Speech on matters of public concern 'occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'") (emphasis added)

Because this case implicates the First Amendment, the rules this Court must apply are not nearly as unfavorable as Plaintiffs suggest. On the contrary, courts in this district (and elsewhere) have warned that extra caution and careful scrutiny must be applied when fraudulent joinder allegations are raised in First Amendment cases.

For example, in *Matter of Medical Laboratory Management Consultants*, 931 F.Supp. 1487 (D.Ariz. 1996), Judge Silver warned the potential fraudulent joinder of claims in a First Amendment case required extra caution:

> First Amendment considerations have special relevance when examined in light of the purposes of diversity and removal jurisdiction. Such jurisdiction is based on the dual goals of avoiding local prejudice and guaranteeing the vindication of federal rights. First Amendment cases involve the application of federal constitutional principles designed to resolve the inherent tension between free speech and privacy rights. In addition, defamation cases often concern media criticism of local citizens, necessitating a forum free of local prejudice. Therefore, the underlying goals of diversity and removal jurisdiction strongly support the retention of jurisdiction in cases involving the First Amendment.

Matter of Med. Lab. Mgm't, 931 F.Supp. at 1493 (finding fraudulent joinder and denying plaintiff's motion to remand) (emphasis added) (internal citations omitted).

These same concerns have been shared by other courts which have expressly rejected a presumption in favor of remand in cases implicating the First Amendment; "Adherence to a ritualistic 'all doubts resolved in favor of remand' rule where a serious claim of fraudulent joinder is raised in an action implicating First Amendment values would undermine the special responsibility of the federal courts in such cases." *Lewis v. Time Inc.*, 83 F.R.D. 455, 462 (C.D.Cal. 1979) (emphasis added), aff'd, 710 F.2d 549 (9th Cir. 1983).

Importantly, the district court in *Matter of Med. Lab. Mgm't Consul.* also noted that contrary to Plaintiffs' position here, because of the Ninth Circuit's unique "voluntary-involuntary" rule (which bars removal *after* dismissal of a nondiverse party) claims of fraudulent joinder cannot be resolved in state court prior to removal. This is so because, "If after remand the state court determines that the allegedly fraudulent claims against [the sham party] are in fact without merit, the case could not again be removed, resulting in an irrevocable loss of federal jurisdiction." 931 F. Supp. at 1491.

Because the voluntary-involuntary rule precludes removal after a fraudulently joined party is severed or dismissed in state court, the issue of fraudulent joinder can *never* be resolved in state court; the case must be removed first and the issue heard by the federal court. As such, this Court must reject Plaintiffs' invitation to "remand this case to the state court to first determine the merits of Defendants' fraudulent joinder contention." Mot. at 7:8–10. The result would reward Plaintiffs' clearly improper litigation tactics while leaving Defendants with no recourse, *even if fraudulent joinder is found*.

To avoid such a patently unjust result, district courts should not consider remand until all doubts regarding fraudulent joinder have been resolved:

> [T]here are certain cases in which, due to the peculiarly federal interests involved, or the particularly sensitive issues raised, it would be inappropriate to apply a rule resolving every doubt against retaining jurisdiction. In such a case, the correct resolution is not to remand the case at the first whisper of a doubt, but rather to retain jurisdiction, at least until such time as slight doubt ripens into something of substance.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

> The "any doubt" standard is particularly inappropriate in the present case where First Amendment interests are seriously implicated.
> * * *
> The proper course where a strong claim of fraudulent joinder is made in a case implicating First Amendment rights is for the [federal] court to retain jurisdiction for the present without prejudice to plaintiff's right to move for remand at any point in the litigation when it can be demonstrated that the cause of action which is assertedly without substance is in fact a viable claim.

Lewis, 83 F.R.D. at 461–62; *see also Spence v. Flynt*, 647 F.Supp. 1266, 1272 (D.Wyo. 1986) ("this Court agrees with *Lewis* that first amendment values demand special federal protections. … [T]his Court requires that the defendants prove non-liability as a matter of law or fact with clear and convincing evidence, but if doubts remain, the Court will retain jurisdiction until the doubts are resolved.") (emphasis added).

b. The Florida-Resident Plaintiffs Were Fraudulently Joined Because Arizona Substantive Law Clearly Does Not Apply to Them

As noted above, Plaintiffs suggest fraudulent joinder requires Defendants to show two things: 1.) that the non-diverse Plaintiffs' claims *as currently pleaded* have no chance of success in Arizona state court, and 2.) the non-diverse Plaintiffs could not possibly amend to plead any other hypothetical claims in any other hypothetical jurisdiction. Defendants fully agree with the first part of this argument, but flatly reject the second part as a misstatement of the law. This Court should do the same.

To be clear—the question here is whether the non-diverse Plaintiffs have any chance of success in Arizona state court and as their claims are currently pleaded. *See*, *e.g.*, *Caouette v. Bristol-Myers Squibb Co.*, 2012 WL 3580667, at *2 (N.D. Cal. Aug. 17, 2012) ("[j]oinder will not be deemed fraudulent unless there clearly can be no recovery under state law on the cause alleged or on the facts as they exist when the petition to remand is heard.") (emphasis added) (quoting 15–102 Moore's Fed. Prac.—Civ. § 102.21[5][a]). The issue of whether other *hypothetical* claims exist is not relevant.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

This rule is, in fact, precisely the same standard applied by the Ninth Circuit in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). In that case, the District Court found, and the Ninth Circuit agreed, the plaintiff fraudulently joined non-diverse defendants because the claims against those defendants were untimely under California law and thus were not tenable. *See Ritchey*, 139 F.3d at 1315.

In reaching that conclusion, the Ninth Circuit only evaluated the plaintiff's claims as they were presently pleaded. The court did not go further and require the defendant to also show the plaintiff could not cure the defect by amending, nor did the court ask whether the plaintiff's claims might have been tenable under the law of some other jurisdiction with a longer statute of limitations. Instead, both the District Court and the Ninth Circuit limited their review to the claims as they were actually pleaded; neither court suggested (as Plaintiffs do here), that fraudulent joinder also requires a defendant to conclusively rebut every *other* conceivable cause of action extant in the universe of hypothetical, but unpleaded, claims.

Of course, that is not to say the Court cannot consider arguments regarding possible future amendments to the pleadings, when such arguments are properly raised. However, Plaintiffs have not moved to amend, nor do Plaintiffs cite any authority for the premise that Defendants have an affirmative obligation to rebut purely hypothetical claims which have not yet been raised nor pleaded.

As such, the correct focus here is limited to whether or not the Florida residents have any chance of success in Arizona state court under the Arizona substantive legal theories they have currently pleaded. Bearing in mind this Court may go outside the pleadings when answering that question, the answer is unquestionably NO; a resident of Florida cannot possibly recover under Arizona's mugshot act (or any other Arizona common law theory) based on tortious conduct allegedly committed in Florida by a Florida-resident defendant against a Florida-resident plaintiff.

Plaintiffs suggest this simple conclusion is somehow so novel, so ethereal and so complex it is beyond this Court's limited cognitive powers to resolve. That is hogwash.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

It is settled law that each state can adopt rules, laws, and policy choices for conduct occurring within that state's own borders, but no state may pass laws which seek to punish the local conduct of other state's citizens acting entirely within the borders of their home states. *See*, *e.g.*, *BMW of North America v. Gore*, 517 U.S. 559, 571, 116 S.Ct. 1589, 1597 (1996) (observing, "'[n]o State can legislate except with reference to its own jurisdiction … . Each State is independent of all of the others in this particular.") (emphasis added); *Healy v. Beer Inst*., 491 U.S. 324, 336 (1989) ("a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid.")

This rule is not novel. It is clear and obvious under established Arizona law; "When interpreting nonjurisdictional, substantive statutes … we ordinarily assume the substantive reach of a law is contained within the territorial borders of the enacting jurisdiction to avoid conflicts with other jurisdictions." *State v. Willoughby*, 181 Ariz. 530, 542, 892 P.2d 1319, 1331 (Ariz. 1995) (in banc) (emphasis added). The same limitation has been universally recognized by virtually every state and federal court for more than 130 years; "That the legislation of a state can have no extraterritorial force is fundamental, and in the very nature of things incapable of modification, and unproductive of exceptions. The boundaries of the state in which a law originates mark the limit of its operation, and determine with precision and accuracy the extent of its territorial force, and beyond these boundaries it ceases to exist." *Thompkins v. Adams*, 41 Kan. 38, 20 P. 530, 536 (Kan. 1889) (emphasis added); *see also In re St. Paul & K. C. Grain Co*., 89 Minn. 98, 120, 94 N.W. 218, 225 (1903) ("It is an elementary rule that [state] statutory law has no extraterritorial effect. Statutes of a state have no effect *ex proprio vigore* beyond its own limits, and, even if a legislature should intend its laws to apply to persons and property in other states, its enactments in that direction would be wholly inoperative and void. It is beyond the power of a state to impose its laws upon another state … .") (emphasis added); *State ex rel. Juv. Dep't v. Casteel,* 523 P.2d 1039, 1041 (Or. Ct. App. 1974) ("It is axiomatic that the laws of a state have no extraterritorial effect.")

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Given how clear and axiomatic this rule is, it is hardly surprising that Plaintiffs' Motion to Remand makes no attempt to argue that Arizona's mugshot act (or any other aspect of Arizona common law) could be applied extraterritorially to punish Defendants for publishing mugshots of persons arrested in Florida. That glaring omission is no accident; there is simply not a shred of legal authority for the idea that a Florida-resident Plaintiff can demand millions of dollars in damages *under Arizona law* from a Florida-resident Defendant based on conduct which occurred entirely in Florida. Plaintiffs' complete and total silence on this issue confesses their understanding of this error.

Based on these facts, even assuming fraudulent joinder is somewhat rare, and even assuming the level of proof required is exceptionally high, there is no doubt the requisite showing has been made here. After Defendants properly removed the fully-diverse Case 2, in an obvious ploy to defeat federal jurisdiction, Mr. Ivchenko filed a substantially identical new action in which he improperly joined three non-diverse sham Plaintiffs for the sole purpose of trying to deprive Defendants of their right to a federal forum. Rather than rewarding such sharp practice, this Court should strongly condemn it. In doing so, the Court should conclude "Defendants will not be deprived of their right to defend themselves in a federal forum through the sophistic pleadings of the plaintiffs." *Lyons v. American Tobacco Co., Inc.*, 1997 WL 809677, *3 (S.D.Ala. 1997).

c. Even Assuming The Florida Resident Plaintiffs Could Amend To Plead Claims Under Florida Law, Their Misjoinder Does Not Destroy Diversity; The Appropriate Remedy Is Severance Under Rule 21

As noted above, Plaintiffs' motion never attempts to argue the non-diverse Plaintiffs have colorable claims under Arizona law. Instead, Plaintiffs waste a large amount of their brief focusing on the completely irrelevant concept of personal jurisdiction. This argument is unavailing because the salient question is *not* whether Defendants are (or are not) subject to personal jurisdiction in Arizona. Rather, the question is whether a resident of Florida can sue another resident of Florida for acts which occurred in Florida by asserting claims in an Arizona court under Arizona law.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

While never actually addressing that point, Plaintiffs instead try to dodge the issue by arguing: "Whether those claims are governed by Arizona or Florida law is irrelevant." Mot. at 11:15. In short, Plaintiffs suggest if they could plead colorable claims under Florida law, that fact, by itself, precludes a finding of fraudulent joinder.

This argument is wrong as a matter of law. This is so because what Plaintiffs are doing is trying to avoid a finding of fraudulent joinder *by admitting* a violation of the related doctrine of *misjoinder*.

The *sine qua non* of fraudulent joinder is that the non-diverse party has no tenable claims. Thus, the presence of tenable claims by a non-diverse party usually means fraudulent joinder cannot be found.

But what about a slightly different scenario—what if the non-diverse party has tenable claims, but those claims arose in a different state and involves different facts and different law than the other fully diverse parties? Is that enough to destroy diversity jurisdiction and avoid a finding of fraudulent joinder?

The answer is NO, based on the related doctrine of *misjoinder*, which is sometimes referred to by names such as "egregious joinder" or "procedural misjoinder". Whatever term is used, "misjoinder" describes exactly the problem presented here:

> [M]isjoinder occurs when a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party, or a resident defendant, even though the plaintiff has no reasonable procedural basis to join them in one action because the claims bear no relation to each other. In such cases, some courts have concluded that diversity is not defeated where the claim that destroys diversity has "no real connection with the controversy" involving the claims that would qualify for diversity jurisdiction.

In re Prempro Prod. Liab. Litig., 591 F.3d 613, 620 (8th Cir. 2010) (emphasis added) (quoting Ronald A. Parsons, Jr., *Should the Eighth Circuit Recognize Procedural Misjoinder?*, 53 S.D. L.Rev. 52, 57 (2008)).

Again, it is worth noting that fraudulent joinder and *misjoinder* are closely related but distinct concepts. Fraudulent joinder ordinarily requires proof that the non-diverse

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

party has no tenable or colorable claims. In contrast, a *misjoined* party might have meritorious claims of some sort, but those claims have "no real connection" to the *other parties' claims*. In that situation, the non-diverse party is deemed "misjoined", and his/her presence does not destroy diversity. Instead, the remedy for misjoinder is to simply sever/drop the misjoined party under Rule 21, allowing the district court to retain diversity jurisdiction over the remaining case. That is precisely what should occur here, even if the Court finds the Florida-resident Plaintiffs have tenable claims under Florida law. *See Didyoung*, 2012 WL 1983779, *3 ("the Ninth Circuit has instructed District Courts to dismiss fraudulently joined parties ….")

The Ninth Circuit itself has not directly accepted or rejected the doctrine of egregious *misjoinder*; it has only once commented on the rule in an unpublished ruling, *California Dump Truck Owners Ass'n v. Cummins Engine Co., Inc*., 24 Fed. App'x. 727 (9th Cir. 2001) (explaining, "we will assume, without deciding, that this circuit would accept the doctrines of fraudulent and egregious joinder … .")

While the Ninth Circuit itself has left the question open, other district courts have embraced the rule, and rightly so. *See, e.g.*, *In re Bard IVC Filters Pro. Lib. Lit.*, 2016 WL 2956557 (D.Ariz. 2016) (discussing and applying rule, but finding no misjoinder); *Sutton v. Davol, Inc*., 251 F.R.D. 500, 503 (E.D.Cal. 2008) (adopting misjoinder, denying remand and severing claims of non-diverse parties because "A defendant's 'right of removal cannot be defeated by a fraudulent joinder of a [non-diverse party] having no real connection with the controversy.") (emphasis added) (quoting *Wilson v. Republic Iron & Steel Co*., 257 U.S. 92, 97, 42 S.Ct. 35, 66 L.Ed. 144 (1921)); *Reed v. American Medical Sec. Group, Inc*., 324 F.Supp.2d 798, 805 (S.D.Miss. 2004) (finding misjoinder where case involved "a collection of unrelated plaintiffs suing over unconnected events", and finding claims of non-diverse plaintiffs were properly severed under Rule 21, because "The premise which underlies the concept of fraudulent misjoinder is that diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this.") (emphasis added); *see also* Charles Alan Wright & Arthur R.

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Miller, *Federal Practice and Procedure* § 3723.1—Fraudulent Joinder (2020 supp.) (explaining, "Although some courts have rejected the fraudulent misjoinder doctrine, most courts have adopted it.") (emphasis added) (compiling cases); *see also In re Benjamin Moore & Co*., 309 F.3d 296, 298 (5th Cir. 2002) (adopting rule and agreeing "misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction.")

The leading misjoinder case is *Tapscott v. MS Dealer Service Corp*., 77 F.3d 1353 (11th Cir. 1996), abrogated on other grounds by *Cohen v. Office Depot, Inc*., 204 F.3d 1069 (11th Cir. 2000). Although some courts have suggested *Tapscott* has not been widely accepted, its outcome was not novel or even controversial in any way.

Rather, in *Tapscott* the Court of Appeals simply recognized the joinder of multiple parties/claims is generally not permitted except in cases involving: "(1) a claim for relief asserting joint, several, or alternative liability and arising from the same transaction, occurrence, or series of transactions or occurrences, and (2) a common question of law or fact." *Tapscott*, 77 F.3d at 1360 (citing Fed. R. Civ. P. 20(a)). In order words, when multiple parties assert claims that do not arise from the same transaction or occurrence and the claims do not involve a common question of law or fact, those parties and claims (even if otherwise meritorious) cannot be joined in a single action under Rule 20. When this occurs and unrelated parties improperly join together in violation of Rule 20, the remedy is to sever/drop the non-diverse party under Rule 21.

Applying that simple standard here, while attempting to avoid a finding of fraudulent joinder by invoking their right to assert claims under Florida law, Plaintiffs seem to announce their intent to commit *misjoinder* of the Florida-resident Plaintiffs' claims by asserting claims which do not share common questions of law with any other parties. Their argument admits exactly that; "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." Mot. at 3:10–14 (emphasis added).

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

Stated another way—the Florida-resident Plaintiffs may have tenable claims under Florida law, but that point is irrelevant. What matters is those claims would clearly *not* arise under Arizona law; they would not involve Arizona's mugshot act, and they would not arise from any conduct occurring in Arizona. Given those facts, and additional problems of venue and *forum non conveniens* aside, even if the Florida-resident Plaintiffs could plead tenable claims under Florida law, those claims would not meet the requirements for joinder in Rule 20(a)(1), and those claims could not properly be joined in this matter. Viewed that way, Plaintiffs' goal of avoiding fraudulent joinder by amending to asset claims under Florida law does not help their position here at all; it actually proves why this action was properly removed and why it must remain in this Court.

d. Even If Remand Is Ordered, Fees Must Be Denied

There are no grounds to remand this case. As such, Plaintiffs' request for fees must be denied.

However, even if remand is ordered, there is no basis to award fees because this case involves objectively colorable arguments of fraudulent joinder, and the rule of fraudulent misjoinder remains unresolved by the Ninth Circuit. For either or both reasons, removal was not objectively unreasonable. *See Bullock v. Zimmer, Inc.*, 2010 WL 11515474, *4 (D. Ariz. 2010) ("Courts have denied an award of fees and costs when the defendant had at least a 'colorable basis' for removal. Thus, when removal is premised on an issue of first impression in a jurisdiction, fees are generally not awarded.")

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Remand should be denied.

DATED: July 21, 2020.

GINGRAS LAW OFFICE, PLLC

David S. Gingras, Esq.
Attorney for Defendants

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044

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:

Andrew Ivchenko, Esq.
LAW OFFICES OF ANDREW IVCHENKO
4960 S. Gilbert Road, #1-226
Chandler, AZ 85249
Attorney for Plaintiffs

GINGRAS LAW OFFICE, PLLC
4802 E. RAY ROAD, #23-271
PHOENIX, AZ 85044