

1 Andrew Ivchenko (#021145)
2 **ANDREW IVCHENKO, PLLC**
3 4960 South Gilbert Road, #1-226
4 Chandler, AZ 85249
5 Phone: (480) 250-4514
6 Aivchenkopllc@gmail.com
7 *Attorney for Plaintiffs*

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9
10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF ARIZONA**

12
13 Doe I, et al.,

14 No. 2:20-CV-1142-SMB

15 Plaintiffs

16 vs.
17
18 **PLAINTIFFS' RESPONSE TO**
19 **DEFENDANTS' MOTION FOR**
20 **JURISDICTIONAL**
21 **DISCOVERY**

22
23 Grant, et al.,

24 Defendants.

25 (Assigned To Hon. Susan M. Brnovich)

26
27 Plaintiffs Doe I, *et al.*, (“Plaintiffs”) respectfully submit this response to Defendants
28 Kyle David Grant, *et al.*, (“Defendants”) Motion for Jurisdictional Discovery [Doc. 17] (the
“Motion for Discovery”). Defendants seek jurisdictional discovery on facts that, even if
established, do not support Defendants’ fraudulent joinder or misjoinder claims. Accordingly,
for this and other reasons described more fully below, the Court should deny the Motion for
Discovery.

29
30 **I. Introduction**

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32 Defendants are quintessential mugshot website operators that exploit arrest information
33 and misappropriate images in booking photos to solicit third party advertising for their
34 mugshots websites for their pecuniary gain. [Doc. 1-2 at ¶¶ 1-2, 7]. On May 1, 2020, Plaintiffs
35 filed a complaint (“Complaint”) in the Maricopa County Superior Court against Defendants.
36 [Doc. 1-2]. The Complaint asserts causes of action for: (1) violation of the Arizona Mugshot
37 Act (A.R.S. 44-7901/7902) (“Arizona Mugshot Act”), (2) invasion of privacy based on

1 appropriation, (3) intentional infliction of emotional distress, (4) unlawful appropriation/right
 2 of publicity, and (5) punitive damages. [Doc. 1-2, ¶¶ 60-93].

3 Although this case raises no federal question and, as Defendants concede, complete
 4 diversity is lacking, Defendants filed a Notice of Removal shortly after Superior Court Judge
 5 Janice Crawford denied their Notice of Change of Judge [Docs. 1-5]. Defendants' sole basis
 6 for removal is their unsupported contention that the Florida Plaintiffs' citizenship does not
 7 defeat diversity under the fraudulent joinder and misjoinder doctrines. [Doc. 14]. Defendants'
 8 Notice of Removal could not have been more frivolous [*see* Docs. 12 ("Motion to Remand")
 9 and 20 ("Response to Motion to Remand")], and for this reason, Plaintiffs filed the Motion to
 10 Remand [Doc. 12].

12 Despite the pending Motion to Remand, Defendants, knowing their fraudulent joinder
 13 and misjoinder claims completely lack merit, once again attempt to confuse the issues, deflect
 14 attention away from their baseless removal efforts, and sidetrack these proceedings by filing
 15 three additional motions, asking this Court to (i) sever the Florida Plaintiffs' claims [Doc. 16],
 16 (ii) take judicial notice of court records that have nothing to do with Defendants' fraudulent
 17 joinder and misjoinder claims [Doc. 15], and order jurisdictional discovery on a facts that,
 18 even if established, do not establish Defendants' baseless fraudulent joinder and misjoinder
 19 claims [Doc. 17]. For the reasons set forth below, and in Plaintiffs' Response to Defendants'
 20 Request for Judicial Notice and Response to Defendants' Motion to Sever, Plaintiffs
 21 respectfully request that the Court put an end to Defendants' vexatious conduct, deny the
 22 Motion for Discovery, and remand this case to Arizona State Court.

23 **II. The Court Should Deny Defendants' Motion for Discovery**

25 **A. The State Court Should Decide Whether Jurisdictional Discovery is
 26 Necessary.**

27 The fact that Defendants need discovery in order to determine whether the Court has
 28 jurisdiction is the very reason why the Court should deny the Motion. As pointed out in the

1 Motion for Remand, federal courts are reluctant to decide issues of fraudulent joinder because
 2 “[t]he fraudulent joinder argument makes the subject matter jurisdiction analysis ‘rather
 3 complicated,’ especially if the inquiry involves ‘the more unusual question of ‘fraudulent
 4 joinder’ of a plaintiff.” *In re: Bard IVC*, 2016 WL 6393596, at *3 (D. Ariz. Oct. 28, 2016)
 5 (citation omitted). The Ninth Circuit is especially reluctant to decide issues of fraudulent
 6 joinder “where a defendant raises a defense that requires a searching inquiry into the merits of
 7 the plaintiff’s case, even if that defense, if successful, would prove fatal.” *Grancare, LLC v.*
 8 *Thrower by & through Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (citation omitted).
 9

10 Here, assuming Defendants are correct (they are not) and jurisdictional discovery is
 11 needed to determine whether there is any possibility the Florida Plaintiffs can state a viable
 12 claim in this case (either under Arizona or Florida law), then that alone warrants denying the
 13 Motion for Discovery because, under those circumstances, the jurisdictional inquiry will
 14 require a complex and arduous inquiry into the merits of the case. Accordingly, the state court,
 15 not the federal court, should decide the merits of Defendants’ fraudulent joinder analysis,
 16 including whether any additional discovery is needed to establish such claim. For this reason,
 17 the Court should deny the Motion for Discovery and remand this case to Arizona State Court.
 18 [See Motion to Remand at 6-7].
 19

B. Defendants Misstate The Proper Legal Standard

20 Plaintiffs do not dispute that Defendants may present facts outside the four corners of
 21 the complaint to support its fraudulent joinder claims. [Motion for Discovery at 4]. In fact,
 22 Plaintiffs agree that Defendants must present clear and convincing evidence in order to
 23 overcome their “heavy burden” against fraudulent joinder and removal jurisdiction. [Motion
 24 for Remand at 7-8]; *Grancare*, 889 F.3d at 548. With that said, “the question of fraudulent
 25 joinder must be determined on the record *at the time* of the removal petition.” *Verduzco v.*
 26 *Ford Motor Co.*, No. 1:13-CV-01437-LJO-BA, 2013 WL 6053833, at *3 (E.D. Cal. Nov. 15,
 27 2013) (citing *Hanson v. Bravo Env'tl. NW, Inc.*, No. 3:13-CV-00704-SI, 2013 WL 4859319, at

1 *3 (D. Or. Sept. 11, 2013) (emphasis added). Accordingly, even if additional discovery might
 2 establish Defendants' fraudulent joinder claims (it will not), the Court should still deny the
 3 Motion for Discovery because these facts did not exist on the record at the time Defendants
 4 filed the Notice of Removal.

5 None of the cases cited by Defendants change this conclusion. In *Bus. Buyer Directory,*
 6 *LLC. v. Nw. Capital Appreciation, Inc.*, No. CV-08-1606-PHX-DGC, 2008 WL 5082264, at
 7 *2 (D. Ariz. Nov. 26, 2008), the Court never addressed whether Courts could look at facts
 8 obtained after removal in analyzing fraudulent joinder. In fact, that case did not even involve
 9 any issues pertaining to subject matter jurisdiction. *Id.* Instead, the Court analyzed whether it
 10 could permit jurisdictional discovery to determine whether it has personal jurisdictional over
 11 the parties. *Id.* Defendants do not contest personal jurisdiction and have waived any challenge
 12 to personal jurisdiction. Thus, *Bus. Buyer Directory, LLC* is inapposite.

14 *Matter of Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996) also
 15 does not apply because the Court never addressed whether a defendant could seek
 16 jurisdictional discovery after filing a notice of removal to establish its fraudulent joinder
 17 claims. Instead, the Court found that one of the defendants had been fraudulently joined, but
 18 only after it granted the defendant's motion for summary judgment. *Id.* at 1491-92. In granting
 19 the motion for summary judgment, the Court may have looked at an affidavit and videotape
 20 attached to the motion, but it is unclear from the opinion whether this evidence was already
 21 part of the record at the time of removal, and even if it was not part of the record, the plaintiffs
 22 never disputed the Court's use of the evidence, and therefore, the Court never addressed
 23 whether it would be proper for it to rely on the evidence in deciding the defendant's fraudulent
 24 joinder claim. *Id.*

26 *Spence v. Flynt*, 647 F. Supp. 1266, 1272 (D. Wyo. 1986) similarly does not apply
 27 because, again, the Court never addressed whether it could order jurisdictional discovery or
 28 rely on facts obtained after removal to federal court, and even if it did, such ruling (by the

1 Tenth Circuit district court) would be contrary to Ninth Circuit case law. *See Verduzco v. Ford*
 2 *Motor Co.*, 2013 WL 6053833 at *3 (citing *Hanson*, 2013 WL 4859319 at *3).

3 *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992) and *Morris v. Princess*
 4 *Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001) similarly fail because, again, the courts
 5 never addressed whether a defendant could seek jurisdictional discovery after filing a notice of
 6 removal to establish its fraudulent joinder claims. Rather, in both cases, the courts held that the
 7 plaintiffs' allegations, even if true, could not possibly state a claim upon which relief could be
 8 granted. In making this decision, neither court looked at evidence obtained after the notice of
 9 removal or otherwise ordered jurisdictional discovery to determine whether Plaintiffs could
 10 potentially state a viable claim.¹ Thus, neither case applies here.²

11

12 **C. Additional Discovery Will Not Save Defendants' Fraudulent Joinder Claim**

13 Even if Defendants could rely on evidence gathered after they filed the Notice of
 14 Removal (they cannot), the Court should still deny their Motion for Discovery. Defendants
 15 contend they need discovery to determine whether the Florida Plaintiffs were arrested outside
 16 of Arizona because if they were, then, according to Defendants, this conclusively establishes
 17 they were fraudulently joined. [Motion for Discovery at 1, 5-6].

18

19

20 ¹ The *Morris v. Princess Cruises, Inc.* Court might have found that “[t]he obviously non-
 21 actionable nature of [Plaintiff's claim] is highlighted by [Plaintiff's] own affidavit,” 236 F.3d
 22 at 1068, but again, like *Matter of Med. Lab. Mgmt. Consultants*, it is unclear whether this
 23 evidence was already part of the record at the time of removal, and even if it was not part of
 24 the record, the plaintiffs never disputed the Court's use of the evidence, and therefore, the
 25 Court never addressed whether it would be proper for it to rely on the evidence in deciding the
 26 defendant's fraudulent joinder claim. *Id.* Moreover, at most, the Court's statement regarding its
 27 use of the affidavit was *dicta*. The Court had already decided, based on the allegations made
 28 by Plaintiff, that she could not possibly state a viable claim. Accordingly, *Morris* is inapposite.

² *Ehrman v. Cox Commc'ns, Inc.*, 932 F.3d 1223, 1228 (9th Cir. 2019), cert. denied, 140 S. Ct. 2566, 206 L. Ed. 2d 497 (2020) and *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) are also easily disposed of because, once again, neither case involved any allegations of fraudulent joinder, and therefore, the Court never addressed whether defendants can rely on facts discovered after removal to establish fraudulent joinder.

1 Before addressing the substance of Defendants' argument, Plaintiffs note that
2 Defendants represented to this Court, in their Notice of Removal, that Plaintiffs "essentially
3 admitted their claims have no connection to Arizona" and that "[b]ased on that admission
4 Defendants determined this case was removable . . ." [Doc. 1 at 4-5]. If that is true, and
5 Plaintiffs admitted in their Response to Defendants' Motion to Dismiss [Doc. 1-8] that the
6 Florida Plaintiffs were arrested outside of Arizona, then Defendants would not need any
7 additional discovery to determine that issue, and for this reason, the Court should deny the
8 Motion for Discovery. However, if Defendants' representation to this Court is not true, then
9 Defendants concede that they had absolutely no basis to file the Notice of Removal, and
10 therefore, the Court should not only deny the Motion for Discovery and remand this case to
11 state court, but it should also award Plaintiffs' attorneys' fees for having to defend against
12 Defendants' baseless removal. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)
13 (Courts may award attorney's fees under § 1447(c) "where the removing party lacked an
14 objectively reasonable basis for seeking removal").

16 Moreover, even if it were true that the Florida Plaintiffs were not arrested in Arizona
17 and Arizona law does not apply to them, this fact, standing alone, cannot establish Defendants'
18 fraudulent joinder claim. As further detailed in the Motion for Remand and Reply in Support
19 of Remand, it is hornbook law that "an out-of-state plaintiff may use state courts in all
20 circumstances in which those courts would be available to state citizens." *Burnham v. Superior*
21 *Court of California, Cty. of Marin*, 495 U.S. 604, 638 (1990) (Brennan, J. concurring)). As
22 such, even if the Florida Plaintiffs do not have viable claims under Arizona law (based on a
23 choice of law analysis), that does not mean that the Florida Plaintiffs cannot bring a claim and
24 obtain relief in the Arizona courts. Instead, the likely result of any motion to dismiss the
25 Florida Plaintiffs' claims based on a choice of law analysis would be to permit those plaintiffs
26 to amend the complaint and assert claims under Florida law. *See e.g., Salustri v. Dell, Inc.*, No.
27 EDCV0902262SJODTBX, 2010 WL 11596554, at *7 (C.D. Cal. Apr. 27, 2010) (Holding that

1 because Texas law, not California law, applied to the Plaintiffs claims, the claims asserted
 2 under California law were dismissed without prejudice and with leave to amend to assert
 3 claims under Texas law).

4 In their Response to Plaintiffs' Motion for Remand [Doc 14] ("Response to Motion for
 5 Remand"), Defendants do not dispute Plaintiffs' contention [*See Reply in Support of Motion*
 6 for Remand at 4, n. 5]. Instead, Defendants contend that Plaintiffs cannot defeat their
 7 fraudulent joinder claims by amending the complaint to add claims under Florida law because,
 8 according to Defendants, the Court may only consider the Florida Plaintiffs' claims as they are
 9 *currently* pled. [Response to Motion for Remand at 10-13]. As pointed out in Plaintiffs' Reply
 10 in Support of Motion for Remand at 4-6, Defendants are wrong and their argument is legally
 11 frivolous. *See Grancare*, 889 F.3d at 550 (9th Cir. 2018) (As part of the fraudulent joinder
 12 analysis, a "district court **must consider** ... whether a deficiency in the complaint can possibly
 13 be cured by granting the plaintiff leave to amend.") (emphasis added). Accordingly, even if the
 14 Florida Plaintiffs were arrested outside of Arizona and Arizona law does not apply to them,
 15 Defendants' fraudulent joinder claim still fails because, as Defendants concede, the Florida
 16 Plaintiffs could amend the complaint and assert claims under Florida law. [Reply in Support of
 17 Motion for Remand at 4, n. 5]. Therefore, because the matter upon which Defendants seek
 18 discovery (*i.e.* where the Florida Plaintiffs were arrested and whether they can assert claims
 19 under Arizona law) cannot establish Defendants' fraudulent joinder claim, the Court should
 20 deny the Motion for Discovery.³

23 ³ To be clear, Defendants only contend that jurisdictional discovery is necessary to establish
 24 their fraudulent joinder claim. Defendants never contend that jurisdictional discovery is also
 25 necessary to establish their fraudulent misjoinder claim. Even if they did, the Court should still
 26 deny Defendants' jurisdictional discovery requests because, like Defendants' fraudulent
 27 joinder claim, regardless of whether the Florida Plaintiffs were not arrested in Arizona or
 28 Florida, or whether they can only assert claims under Arizona or Florida law, Defendants'
 fraudulent misjoinder claim still fails because not only would all of the Plaintiffs' claims still
 arise out of the same transaction or occurrence, or series of transactions or occurrences, and
 involve common questions of law and fact, but Defendants never established with clear and

D. Defendants' Alternative Request for Discovery Fails

In a final desperate attempt to delay remand, Defendants contend that “if the Court agrees with Plaintiffs’ argument and holds that fraudulent joinder requires Defendants to show that non-diverse Plaintiffs have no tenable claims under the law 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.” [Motion for Discovery at 3]. Defendants are wrong for several reasons.

First, as discussed *supra* at Section II(A), the state court, not the federal court, should decide whether Plaintiffs can possibly state viable claims under Florida law, and whether any additional discovery is needed to establish such claims.

Next, even if the Court were inclined to decide the issue, the Court should still deny Defendants' alternative request for discovery because Defendants do not dispute, in their Response to Defendants' Motion for Remand, that the Florida Plaintiffs could amend the complaint and assert claims under Florida law. [See *supra* at Section II(C); Reply in Support of Remand at 4, n. 5]. The Court cannot now order discovery into an issue that both parties concede is true. Accordingly, Defendants' alternative request for discovery fails.

The Court should also deny Defendants' alternative request for discovery because, again, "the question of fraudulent joinder must be determined on the record *at the time* of the removal petition." *Verduzco v. Ford Motor Co.*, No. 1:13-CV-01437-LJO-BA, 2013 WL 6053833, at *3 (E.D. Cal. Nov. 15, 2013) (citing *Hanson v. Bravo Env'tl. NW, Inc.*, No. 3:13-CV-00704-SI, 2013 WL 4859319, at *3 (D. Or. Sept. 11, 2013) (emphasis added); [See *supra*

convincing evidence that misjoinder in this case is so egregious that it rises to the level of outright fraud. [Reply in Support of Motion for Remand at 9-10; Response to Motion to Sever at 6-10]. Moreover, even if Defendants' could establish the elements of fraudulent misjoinder with additional discovery (they cannot), the doctrine does not apply in the Ninth Circuit, and

1 at Section II(B)]. Thus, even if Defendants discovered additional facts showing the Florida
 2 Plaintiffs cannot state viable claims under Florida law (they will not), these facts did not exist
 3 on the record at the time Defendants filed the Notice of Removal, and therefore, the Court
 4 should still deny Defendants' request for discovery.

5 Finally, Defendants' alternative request for discovery fails because Defendants do not
 6 allege or explain what facts they believe they could discover that will prove the Florida
 7 Plaintiffs cannot possibly assert any viable claims under Florida law. It is plain then that
 8 Defendants' alternative request for discovery is nothing more than a "fishing expedition,"
 9 *Calderon v. U.S. Dist. Court for the N. Dist. of California*, 98 F.3d 1102, 1106 (9th Cir. 1996),
 10 that is "based on little more than a hunch that it might yield jurisdictionally relevant facts."
 11 *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Accordingly, the Court must deny
 12 Defendants' alternative request for discovery. *See e.g., Luna v. FCA US LLC*, No. 19-CV-
 13 08229-LHK, 2020 WL 3605554, at *7 (N.D. Cal. July 2, 2020) (denying Defendants' request
 14 for jurisdictional discovery to establish fraudulent joinder claim because Defendants request
 15 was "based on little more than a hunch that it might yield jurisdictionally relevant facts").

17 **CONCLUSION**

18 For the reasons set forth above and in Plaintiffs' Motion to Remand [Doc. 12],
 19 Plaintiffs respectfully request that Defendants' motion for jurisdictional discovery be denied.

20 **DATED:** August 4, 2020.

21
22 Respectfully submitted,

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24
ANDREW IVCHENKO PLLC

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

27
28 therefore, Defendants' fraudulent misjoinder claim still fails. [Reply in Support of Motion for
 Remand at 6-8].

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing document on August 4, 2020
3 via the Court's ECF system, thereby causing a true copy of said document to be served
4 electronically upon each other party registered through ECF. In addition, copies of the
5 foregoing were emailed to:

6
7 David S. Gingras, #021097
8 Gingras Law Office, PLLC
9 4802 E. Ray Road, #23-271
Phoenix, AZ 85044
10 Attorney for Defendants

11 /s/ Andrew Ivchenko

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