IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jane Doe, Plaintiff, vs. Travis Paul Grant, et al., Defendants.	No. CV-20-02045-PHX-SPL **ORDER**

Before the Court is Plaintiff's timely filed Motion to Remand ("Motion"). (Doc. 9) The Motion is fully briefed and ready for review. (Docs. 9, 13, 14) For the following reasons, the Motion will be conditionally granted.

I. BACKGROUND

Plaintiff Jane Doe is an individual who resides in Arizona. (Doc. 1-1 at 2) The Maricopa County Sheriff's Office arrested Plaintiff on October 20, 2018. (Doc. 1-1 at 3) Allegedly, her mugshot was immediately placed on multiple mugshot websites owned and run by Defendants, who are domiciled in Florida. (Docs. 1 at 3, 1-1 at 1) On August 27, 2019, new Arizona law that created civil penalties for operators of these mugshot websites went into effect. A.R.S. §§ 44-7901–02. On September 24, 2020, Plaintiff initiated this action seeking civil penalties under A.R.S. §§ 44-7901–02, as well as damages for misappropriation of likeness and portrayal in a false light, and injunctive relief against Defendants in Maricopa County Superior Court. (Doc. 1-1 at 3–5) Defendants removed this case to federal court on October 23, 2020 based on federal diversity jurisdiction. (Doc.

1) Plaintiff now moves for remand to Maricopa County Superior Court on the basis that the amount in controversy is too low to confer diversity jurisdiction. (Doc. 9)

II. LEGAL STANDARD

Federal courts may exercise removal jurisdiction over a case only if subject-matter jurisdiction exists. 28 U.S.C. § 1441(a); *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004). The removing party bears the burden of establishing subject-matter jurisdiction as a basis for removal by a preponderance of the evidence. *Id.* at 1117, *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988). To satisfy this burden under 28 U.S.C. § 1441, the removing party must demonstrate that either diversity or federal question jurisdiction existed at the time of removal. *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009). There is a "strong presumption against removal jurisdiction," which "must be rejected if there is any doubt as to the right of removal in the first instance." *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1107 (9th Cir. 2010). Diversity jurisdiction exists when the amount in controversy exceeds $75,000 and the case is between citizens of different states. *See* 28 U.S.C. § 1332(a). A court may look outside the face of the complaint to determine the amount in controversy when it is not stated with specificity in the complaint. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117–18 (9th Cir. 2004). Defendants may allege a higher amount in controversy in those situations. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87–89 (2014).

III. DISCUSSION

The parties do not dispute that complete diversity exists. The issue here is whether the amount in controversy under 28 U.S.C. § 1332(a) has been pled. In a situation where it is "unclear or ambiguous from the face of a state-court complaint whether the requisite amount in controversy is pled . . . [t]he removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional amount. Under this burden, the defendant must provide evidence establishing that it is 'more likely than not' that the amount in controversy exceeds that

amount." *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (internal citations omitted). This rule means that courts may consider not only the amount in controversy stated in the complaint, but also allegations made in the notice of removal as well as "summary-judgment-type evidence." *Lewis v. Eli Lilly & Co.*, No. CV-19-05740-PHX-JJT, 2020 WL 5210815, at *2 (D. Ariz. Sept. 1, 2020) (citing *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 416 (9th Cir. 2018)).

Here, the amount in controversy is ambiguous because Plaintiff pled a range of damages in her complaint. (Doc. 1-1 at 5) Plaintiff argues that this case must be remanded to Maricopa County Superior Court because the amount in controversy is below the amount required under 28 U.S.C. § 1332(a). Plaintiff avers that she does not and will not seek more than $74,000 in damages. (Doc. 9 at 1–2) Plaintiff asked for "[c]ompensatory or statutory damages in an amount no less than $50,000 and no more than $74,000." (Doc. 1-1 at 5) She further argued that Defendants showed no "summary-judgment-type evidence" that her damages would exceed the amount she pled. (Doc. 9 at 5) Plaintiff also offered to submit an affidavit swearing she would seek no more than $74,000 in damages. (Doc. 9 at 3)

Defendants assert that because the authorized statutory damages could and should be higher than $75,000, federal jurisdiction exists. (Doc. 13 at 5) Defendants argue that based on the damages scheme set forth in A.R.S. § 44–7902(D), if they are found liable, Plaintiff is entitled to damages of up to $500 per each day of the violation, which means her damages would be at a minimum, $200,000.[1] (Doc. 13 at 5–6) Defendants also point

[1] The relevant statute states:

> A person that violates subsection b of this section is liable for damages for each separate violation in an amount of at least:
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> 1. $100 per day during the first thirty days of the violation.
>
> 2. $200 per day during the subsequent thirty days of the violation.
>
> 3. $500 per day for each day thereafter.

A.R.S. § 44–7902(D) (emphasis added). The statute went into effect on August 27, 2019,

out that they put in their Notice of Removal a chart that set forth the monetary damages Plaintiff could win if Defendants are found to have violated the statute, and thus met their burden. (Doc. 13 at 5)

However, Plaintiff has also stated repeatedly that she will not ask for more than $74,000. (Docs. 9 at 3, 14 at 3) Plaintiffs are allowed to stipulate to less damages to avoid removal; this is well-settled. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) ("If [a plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294, (1938)). Other courts have acknowledged concerns about gamesmanship, which occurs when plaintiffs amend their complaint to seek more than the jurisdictional minimum after the one-year deadline for removal has passed. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 n. 3 (9th Cir. 2007). A stipulation would avoid that issue. However, there is also some debate as to when stipulation is proper. The Fifth Circuit does not allow plaintiffs to stipulate to lesser damages once removal has already occurred; the stipulation must be filed with the complaint. *See De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995), *Gebbia v. Wal–Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000). On the other hand, district courts within the 9th Circuit have implied that federal courts have the authority to remand a case back to state court based on a post-removal stipulation. *Patel v. Nike Retail Servs., Inc.*, 58 F. Supp. 3d 1032, 1038–39 (N.D. Cal. 2014) ("A legally binding commitment by Plaintiff not to recover that amount is the best possible evidence on [the amount in controversy question]."); *see also Sherman v. Nationwide Mut. Ins. Co.*, No. 12–cv–152–M–DLC–JCL, 2013 WL 550265 (D. Mont. Jan. 15, 2013) report and recommendation adopted, No. 12–cv–152–M–DLC–JCL, 2013 WL 550659, at *2 (D. Mont. Feb. 12, 2013); *Cicero v. Target Corp.*, No. 2:13–CV–619 JCM (GWF), 2013 WL 3270559, at *2 (D. Nev. June 26, 2013).

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and the mugshot remains on the website(s) today. At the time of removal, statutory damages were at $190,000, and today they are upwards of $200,000.

Based on the decisions from the Court's sister districts, there is persuasive authority to grant Plaintiff's motion to remand, as long as Plaintiff stipulates to the lesser amount in damages to avoid the possibility of gamesmanship.

Therefore,

IT IS ORDERED that Plaintiff's Motion to Remand (Doc. 9) is **conditionally granted**.

IT IS FURTHER ORDERED that Plaintiff file a signed affidavit with the stipulation to lesser damages by **December 4, 2020**.

IT IS FURTHER ORDERED that upon the filing of the signed affidavit the Clerk of Court is instructed to remand the case to Maricopa County Superior Court and terminate this case.

IT IS FURTHER ORDRED that if Plaintiff fails to file a signed affidavit by the above date, the deadlines set in the Court's November 10, 2020 Order (Doc. 11) stand and Plaintiff has **thirty (30) days** from the date of this order to respond to Defendants' Motion to Dismiss (Doc. 5), Notice of Constitutional Challenge to Statute (Doc. 6), and Motion to Strike the Complaint (Doc. 8).

Dated this 1st day of December, 2020.

Honorable Steven P. Logan
United States District Judge