UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY SHERROD, Plaintiff, v. ANDREW BREITBART *et al*., Defendants.	Civ. A. No. 11-00477 (RJL) **ORAL ARGUMENT REQUESTED**

PLAINTIFF SHIRLEY SHERROD'S REPLY
IN SUPPORT OF HER MOTION TO REMAND

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INTRODUCTION

Two days after Defendants told the Court that Mrs. Sherrod "is not entitled" to remain in D.C. Superior Court solely because ***she*** does not know Defendant John Doe's identity, *see* Defs.' Remand Opp. at 4 [Dkt. 18], Mr. Breitbart again took to the airwaves to declare that ***he*** knows exactly who and where John Doe is—and that he is an "an individual in Georgia" who participated directly in Defendants' defamation of Mrs. Sherrod.[1] This admission followed at least two similar statements by Mr. Breitbart identified in Plaintiff's motion to remand: one during a televised interview, in which Mr. Breitbart admitted that he received the video of Mrs. Sherrod's speech from "an individual in Georgia" in "early April" of 2010;[2] and another during a radio interview, in which Mr. Breitbart stated that the video of Mrs. Sherrod's speech came from "a guy down in Georgia."[3]

These repeated public statements by Defendants underscore that Plaintiff's motion to remand does not ask the Court "to ignore the plain and unambiguous language of the removal statute." *See* Defs.' Remand Opp. at 1. Rather, it asks the Court ***not*** to ignore Mr. Breitbart's and Mr. O'Connor's knowledge, statements, and conduct regarding their co-defendant's identity and whereabouts—just as numerous other courts have refused to do when faced with a party's inequitable efforts to manipulate federal jurisdiction. Defendants should not be permitted to mock Mrs. Sherrod and this Court by boasting to anyone and everyone ***outside*** this courthouse that John Doe is from Georgia, while assuring everyone ***within*** this courthouse that there is complete diversity and thus subject matter jurisdiction.

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1 *See* http://www.billpressmedia.com/nsmpc/bps042011-shuster-breitbart-FREE.mp3.

2 *See* http://www.foxnews.com/story/0,2933,597324,00.html.

3 *See* http://www.youtube.com/watch?v=hYqr8yPMIA0; *see also* Pl.'s Remand Mem. at 2-3 [Dkt. 15-1].

At bottom, Defendants' litigation tactic could not be clearer. They hope this Court will ignore their public statements and countenance their concealment of John Doe's identity and whereabouts long enough to allow them to use removal to this Court as a temporary "pit stop" on their way to transferring the case to their home forum of California. But the removal statutes were designed precisely to ***prevent*** such jurisdictional and forum-selection gamesmanship, not to further it. For these reasons, and for the reasons identified in Plaintiff's opening brief, this case should be remanded to D.C. Superior Court.

ARGUMENT

I. This Case Should Be Remanded.

Although Defendants contend that "Sherrod has not pointed to any authority that would allow the Court to disregard the plain meaning of" 28 U.S.C. § 1441(a), *see* Defs.' Remand Opp. at 2 (emphasis omitted), Plaintiff's motion, in fact, cites more than a half dozen cases supporting remand, *see* Pl.'s Remand Mem. at 5-7. Defendants claim the cases cited in Plaintiff's motion are distinguishable because Congress overruled them by statute in 1988 and because they ignored the plain meaning of § 1441(a). *See* Defs.' Remand Opp. at 3-5. But Plaintiff's cases ***post-date*** the 1988 amendment—and reach the same conclusion rejecting jurisdictional gamesmanship by defendants who, like Defendants here, ***know*** the identity and whereabouts of their John Doe co-defendants. Nor do these cases cited by Plaintiff ignore the plain meaning of § 1441(a). Rather, they explicitly consider the "fictitiously named defendant" provision but conclude it should not apply where, as here, it would result in unfairness to the plaintiff in light of the defendant's knowledge or conduct. *See, e.g.*, *Brown v. TranSouth Fin. Corp.*, 897 F. Supp. 1398, 1401-02 (M.D. Ala. 1995) ("It would be unfair to force the plaintiffs from their state court forum into federal court by allowing [defendant] to plead ignorance about the [Doe defendant's] identity and citizenship ….").

In this regard, the cases cited in Plaintiff's brief are in full accord with countless other Supreme Court, Court of Appeals, and District Court cases recognizing that the removal rules should not be mechanically applied where it would be inequitable to do so. Indeed, more than a century ago, the Supreme Court instructed that "the Federal courts should not sanction" efforts to manipulate federal jurisdiction and thus recognized the now-venerable doctrine of fraudulent joinder as an exception to the complete-diversity requirement in removed cases. *See Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907); *see also Smallwood v. Ill. Cent. R.R. Co.*, 352 F.3d 220, 224 (5th Cir. 2003) ("[T]he doctrine of fraudulent joinder is a judicially-created exception to the complete diversity rule.").

Lower courts, in turn, repeatedly followed the Supreme Court's lead, recognizing judicially created exceptions to other seemingly unambiguous provisions of the removal statutes where rigid application of the statutory rule would allow a party to manipulate the courts' jurisdiction. *See, e.g.*, *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427-29 (5th Cir. 2003) (rejecting "[s]trict application of the one-year limit" of 28 U.S.C. § 1446(b) and holding that the plaintiff's "forum manipulation justifie[d] application of an equitable exception in the form of estoppel"); *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990) (ignoring a non-diverse plaintiff's interest in the case because "federal district courts have both the authority and the responsibility, under 28 U.S.C. §§ 1332 and 1441, to examine the motives underlying" actions taken "principally to defeat removal"); *Johnson v. Heublein Inc.*, 227 F.3d 236, 241-42 (5th Cir. 2000) (applying the "the judicially-created revival exception to the thirty-day requirement of section 1446(b)" because doing so would not "thwart the purposes of the thirty-day limitation"); *Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n*, 668 F.2d 962, 965 (7th Cir. 1982) (explaining that courts have "read into the [removal] statute an exception" allowing removal

after the 30-day deadline where a plaintiff "seek[s] to mislead the defendant about the true nature of [the] suit" by waiting to add allegations that would allow removal only after the deadline had passed); *see also id*. at 966 (rejecting "decision by verbal talismans" in favor of "a sensitivity to the purposes of both the 30-day limitation and its judicially engrafted exception"); *Kite v. Richard Wolf Med. Instruments Corp*., 761 F. Supp. 597, 600 (S.D. Ind. 1989) (declining to apply the one-year time limit on removal because "mechanical" application of the rule "in such a rigid manner" would "open[] the door to potential abuse of the rule"). Although Defendants would have the Court believe that all of these cases applied "faulty reasoning" because they did not mechanically apply statutory language, *see* Defs.' Remand Opp. at 5, the federal courts' long embrace of common-sense, real-world considerations to prevent inequitable manipulation of federal jurisdiction through removal contradicts Defendants' position.

Defendants also contend that the Court should deny remand in light of the unremarkable fact that "Courts of Appeals across the country" have disregarded the citizenship of fictitiously named defendants. *Id*. at 3. That is hardly surprising. Just as there are many cases in which the court did not find fraudulent joinder, there are presumably many cases in which the court applied the "fictitiously named defendant" provision in circumstances that provision was designed to address. Tellingly, however, none of the cases Defendants cite involved a defendant's attempt to manipulate the court's jurisdiction by concealing the Doe defendant's identity while, at the same time, ***publicly*** stating that he knows the Doe defendant destroys complete diversity. *See id*. (citing, e.g., *Howell v. Tribune Entm't Co*., 106 F.3d 215, 217 (7th Cir. 1997) (defendant did not know identity or residence of fictitiously named co-defendant)). And, in fact, several involved a ***plaintiff's*** attempt at jurisdiction manipulation through the joinder of a John Doe, reinforcing the propriety of applying the fictitiously named defendant provision. *See id*. at 5 (citing, e.g.,

Maynard v. Target Corp., No. 08-4796, 2010 WL 2464800, at *2 (E.D. La. June 4, 2010) (explaining that plaintiff's "admitted purpose" in naming the John Doe defendant "was to destroy diversity jurisdiction"). What those courts did in those cases—which present dramatically different jurisdictional considerations—says little about how this Court should apply § 1441(a) in ***this*** case.

Here, Defendants' conduct directly implicates *Wecker*'s admonition that courts should not tolerate inequitable artifices to manipulate federal jurisdiction. *See Wecker*, 204 U.S. at 186 (explaining that federal courts "should be equally vigilant … to permit the state courts, in proper cases, to retain their own jurisdiction"). Mr. Breitbart has repeatedly and voluntarily trumpeted to a nationwide broadcast audience that John Doe resides in Georgia—brazenly doing so again just days after filing Defendants' brief opposing remand. Defendants cannot legitimately expect this Court simply to ignore those statements. Nor should they expect this Court to allow them to turn the "fictitiously named defendant" provision on its head, transforming it from a limit on fraudulent joinder into a pretense whose mechanical application results in what *Wecker* and its progeny might well have dubbed fraudulent removal.

Ultimately, this Court's jurisdiction to hear this case is governed ***not*** by a procedural phrase in § 1441(a), but by the overarching mandate of § 1332: complete diversity is required. *See, e.g.*, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). Because "[f]ederal courts are courts of limited jurisdiction," the Court must "presume[]" that Mrs. Sherrod's claims "lie[] outside this limited jurisdiction, and the burden of establishing the contrary rests upon" Defendants—"the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Section 1441(a) should be applied with the overarching principle of

"limited jurisdiction" in mind.[4] By their own public admissions, Defendants have forfeited the right to rely on the fictitiously named defendant provision of § 1441(a) and, by virtue of those same admissions, the Court lacks subject matter jurisdiction over this case.

II. In The Alternative, The Court Should Allow Jurisdictional Discovery.

Defendants also contend that discovery "is not allowed" in support of a motion to remand related to the fictitiously named defendant provision. *See* Defs.' Remand Opp. at 7. That is not correct. *See* Pl.'s Remand Mem. at 8 (citing *Avery v. Doe*, No. 96-8247, 1997 WL 88915, at *1 (E.D. Pa. Feb. 21, 1997) ("The proper course of action at this early stage … is to allow a reasonable but brief period of time for plaintiff to ascertain the true citizenship of John Doe.")). Section 1441(a) does not limit discovery, and the fact that three cases from the Southern District of Mississippi declined to grant a plaintiff's request in light of the ***plaintiff's*** attempt at jurisdiction manipulation through the joinder of multiple generic John Doe defendants hardly supports Defendants' assertion that jurisdictional discovery is forbidden. *See* Defs.' Remand Opp. at 7 (citing, e.g., *Lizana v. Guidant Corp.*, No. 1:03cv254GRO, 2004 WL 3316405, at *1, *3 (S.D. Miss. Jan. 21, 2004) (plaintiff named "John Does 1-100" as defendants and fraudulently joined another defendant "in an effort to defeat diversity jurisdiction")).

Moreover, Defendants' assertion misses the point. The Court can determine on the current record that the fictitiously named defendant provision does not apply. But if the Court is

[4] Equally unavailing is Defendants' argument that "[t]he Court should disregard Doe's citizenship for the additional reason that the Complaint is devoid of facts necessary to establish personal jurisdiction over Doe in the District of Columbia." *See* Defs.' Remand Opp. at 2. Personal jurisdiction is an individual right that may not be asserted by another party in these circumstances. *See SmithKline Beecham Corp. v. Geneva Pharms., Inc.*, 287 F. Supp. 2d 576, 580 n.7 (E.D. Pa. 2002) (explaining that a defendant "lacks standing to contest personal jurisdiction" on a co-defendant's behalf); *Jenkins v. Smead Mfg. Co.*, No. 09-0261, 2009 WL 3628100, at *3 (S.D. Cal. Oct. 28, 2009) ("Plaintiff correctly points out that Defendants lack standing to raise lack of personal jurisdiction or venue on behalf of the Proposed Defendants."); *see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest."). Moreover, there is ample time to determine personal jurisdiction over John Doe once Defendants reveal his identity to the Court.

inclined to conclude that it must be applied, discovery is appropriate in light of the removal statute's jurisdictional command that "[i]f 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). Defendants' sole response to cases recognizing the federal courts' obligation to confirm their own jurisdiction is that they did not allow discovery "in these circumstances." *See* Defs.' Remand Opp. at 7. Again, that response says more about the uniquely audacious nature of Defendants' position than it does the Court's well-established power to order jurisdictional discovery. Indeed, the Court surely has the authority to ask Defendants a simple and straightforward question: Who is John Doe and where does he live? The Court should at least demand an answer to that question so that it can confirm that it will have subject matter jurisdiction going forward, and before it devotes significant time to the other issues in this case.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be granted.

Dated: May 19, 2011

Respectfully submitted,

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