UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| SHIRLEY SHERROD,<br><br>Plaintiff,<br><br>v.<br><br>ANDREW BREITBART, LARRY O'CONNOR, AND JOHN DOE,<br><br>Defendants. | ) | Case No. 1:11-cv-00477 (RJL) |

**OPPOSITION TO MOTION FOR REMAND BY DEFENDANTS ANDREW BREITBART AND LARRY O'CONNOR**

I. Preliminary Statement

Plaintiff Shirley Sherrod asks the Court to ignore the plain and unambiguous language of the removal statute (28 U.S.C. § 1441(a)) that *requires* the Court to *disregard* the alleged citizenship of a fictitiously named defendant, such as the John Doe defendant named here, when determining the diversity of citizenship of the parties. Section 1441(a) could not be more clear or more dispositive. It states that "[f]or purposes of removal under this chapter, *the citizenship of defendants sued under fictitious names shall be disregarded*." (Emphasis added.) Because Sherrod alleges that she is a Georgia citizen and Defendants Andrew Breitbart and Larry O'Connor are California citizens, there is diversity of citizenship. The motion for remand should be denied.

Despite the plain wording of Section 1441(a), Sherrod argues that because Breitbart and O'Connor allegedly know where Doe resides, the statute's express terms somehow do not apply. But this is not the law. Appellate courts throughout the country have ruled time and again that the plain language of the statute governs, and a party sued under a *fictitious name* cannot be

considered for determining diversity of citizenship, regardless of what the other defendants may (or may not) know about his or her domicile. Sherrod has not pointed to *any* authority that would allow the Court to disregard the plain meaning of the statute. In fact, Sherrod's motion principally relies on cases that draw support from a 1994 Louisiana district court decision that has been expressly discredited for basing its ruling on pre-1988 authority – *i.e.*, *before* Section 1441(a) was amended to add the language precluding reference to the citizenship of fictitiously named defendants. Other cases cited by Sherrod which did not involve motions for remand and Section 1441(a) are equally inapplicable.

The 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. Finally, there is no legitimate basis for any jurisdictional discovery, limited or otherwise. Section 1441(a) makes clear that the citizenship of John Doe is irrelevant.

Because the citizenship of a fictitiously named "John Doe" defendant must be disregarded for purposes of removal jurisdiction, the motion for remand must be denied.

II. Argument

A. Section 1441(a) clearly and unambiguously requires the Court to disregard the John Doe defendant's citizenship for purposes of removal.

Title 28, Section 1441 of the United States Code governs the removal of actions from state courts and the Superior Court of the District of Columbia to federal courts. The statute expressly states that the citizenship of fictitiously named defendants (i.e., "John Doe" defendants[1]) must not be considered:

[1] The identification of a defendant as "John Doe" at the time the complaint is filed means that he is a "defendant[] sued under [a] fictitious name[]" under Section 1441(a) for purposes of removal. *Thompson v. Golden Corral Corp.*, 2008 WL 4093716 (D.N.M. Apr. 1, 2008).

> For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a). Congress added this sentence to the statute in 1988. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(a), 102 Stat. 4642 (1988).

As recognized by Courts of Appeals across the country, the removal statute's plain meaning mandates disregarding the citizenship of John Doe defendants for purposes of determining diversity jurisdiction. *See*, *e.g.*, *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1235 (10th Cir. 2006) ("[C]onsistent with the text of 28 U.S.C. § 1441(a) … the citizenship of 'John Doe' defendants should be disregarded …."); *Howell v. Tribune Entm't Co.*, 106 F.3d 215, 218 (7th Cir. 1997) ("[N]aming a John Doe defendant will not defeat the named defendant's right to remove a diversity case …"); *Alexander v. Electronic Data Sys. Corp.*, 13 F.3d 940, 948 (6th Cir. 1994) ("It is clear that 'Jane Doe' is a fictitious name" that "Section 1441(a) compels … be disregarded for purposes of diversity jurisdiction."); *see also Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 426 n.10 (1st Cir. 2007) ("The presence of John Does does not destroy diversity jurisdiction in cases removed to federal court.").

Sherrod does not even attempt to argue that Section 1441(a) is ambiguous.[2] Instead, Sherrod simply asks the Court to ignore the express terms of the statute. But when interpreting a statute, courts must apply its plain language. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain … the sole function of the courts is to enforce it according to its terms."). Indeed, in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), the Supreme Court instructed:

[2] Nor could she. The language of Section 1441(a) is clear and unambiguous, and thus it is "dispositive of the issue." *Howell v. Circuit City*, 330 F. Supp. 2d 1314, 1317 (M.D. Ala. 2004) (disregarding citizenship of John Doe and denying motion to remand).

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. … [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. *When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.*

(emphasis added); *see also Public Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 811 (D.C. Cir. 2008) (affirming judgment of district court after "concluding that the plain language of the TREAD Act means what it says"); *Evergreen Equity Trust v. Fannie Mae (In re Fannie Mae Sec.)*, 503 F. Supp. 2d 25, 32 (D.D.C. 2007) (Leon, J.) ("plain meaning" of SLUSA required finding that dismissed state law claims were preempted).

Sherrod attempts to deflect the Court's attention from the plain language of the statute by citing statements made by Breitbart regarding John Doe. Breitbart and O'Connor's knowledge regarding John Doe, however, is immaterial to the jurisdictional inquiry. *See*, *e.g.*, *Circuit City*, 330 F. Supp. at 1317 (declining to remand notwithstanding the named defendants' knowledge of the citizenship of the fictitiously named defendants); *Derungs v. Wal-Mart Stores, Inc.*, 162 F. Supp. 2d 861, 863 n.4 (S.D. Ohio 2001) (finding removal proper even where the John Doe defendants were "extremely likely" to be non-diverse). As one court has noted, the statute does not "speak about 'fictitious individuals.' Instead, Congress stated that defendants '*sued under fictitious names* shall be disregarded.'" *Thompson*, 2008 WL 4093716, at *6 (emphasis added). Having sued one of the three defendants as a John Doe, Sherrod is not entitled to invoke that defendant's citizenship in an effort to defeat diversity of citizenship.

B. The cases on which Sherrod tries to rely have been overruled by statute.

Sherrod claims that "numerous district courts" have remanded in similar situations. The cases she cites, however, rely on precedent decided prior to the 1988 amendment of Section 1441 which added the sentence that the citizenship of fictitiously-named defendants shall be

disregarded. For example, she relies on *Tompkins v. Lowe's Home Ctr., Inc.*, 847 F. Supp. 462, 464 (E.D. La. 1994), but as one recent case has noted, *Tompkins* relies on pre-1988 authority and is thus "inapplicable." *Maynard v. Target Corp.*, 2010 WL 2464800, at *3 (E.D. La. June 4, 2010). As the court in *Maynard* stated:

> *Thompkins* [sic] relies upon a district court decision from 1982. The removal statute was amended in 1988, to add the provision instructing courts to disregard the citizenship of defendants sued under fictitious names for removal purposes. Therefore, *Thompkins* [sic] is inapplicable, and [the Doe defendant's] citizenship should be disregarded for removal purposes.

*Id.* at *3.

Similarly, Sherrod's attempted reliance on *Brown*, *Marshall*, *Lacy*, *Bryant*, and *Musial*,[3] is also misplaced because those cases rely upon on the faulty reasoning in *Tompkins*.[4] Sherrod also cites *Khorozian*, 2007 WL 38697, at *3, which is distinguishable on its face because it only permitted remand due to the citizenship of *unnamed* defendants and not due to the citizenship of

[3] *Brown v. Transouth Fin. Corp.*, 897 F. Supp. 1398, 1401 (M.D. Ala. 1995); *Marshall v. CSX Transp. Co., Inc.*, 916 F. Supp. 1150, 1152 (M.D. Ala. 1995); *Lacy v. ABC Ins. Co.*, 1995 WL 688786, at *2 (E.D. La. Nov. 17, 1995); *Bryant v. Hardees Food Sys, Inc.*, 1999 WL 33537223, at *1 (N.D. Miss. Nov. 4, 1999); *Musial v. PTC Alliance Corp.*, 2008 WL 2559300, at *3 (W.D. Ky. June 25, 2008).

[4] These cases also are inapposite because they all arise from agency relationships (usually between an employer and an unnamed employee) that do not exist here. *See Lacy*, 1995 WL 688786 at *3 (negligence claim against store and Doe employees responsible for maintaining premises that allegedly caused the plaintiff to slip and fall); *Tompkins*, 847 F. Supp. at 464 (negligence claim against store and Doe employee for allegedly knocking over a steel pipe that hit plaintiff); *Marshall*, 916 F. Supp. at 1153 (negligence claim against company and Doe employee on duty during car-train collision); *Bryant*, 1999 WL 33537223, at *2 (assault claim against restaurant and the Doe employee who allegedly assaulted plaintiff outside restaurant); *Musial*, 2008 WL 2559300, at *4 (wrongful death claim against trailer company and Doe employee whose alleged improper loading of a pipe killed decedent); *Khorozian v. Hudson United Bancorp.*, 2007 WL 38697, at *3 (D.N.J. 2007) (claim against corporation and Doe employees for bank fraud); *Brown*, 897 F. Supp. at 1401 (claim against corporation and Doe employees for misrepresentations).

fictitiously-named defendants. In *Khorozian,* the plaintiff sued a named corporation and its named subsidiary along with unnamed "employees, agents, bank officers, board members, members of the advisory board, and shareholders (all of which will be named at a later time), John Does (1-100), [and] XYZ Corps (1-100)." *Id.* at *2. The defendants removed the case to federal court, and the plaintiff moved to remand on grounds that complete diversity did not exist due to "certain unidentified defendants." *Id.* The court distinguished between fictitiously named John Doe defendants and other unnamed defendants. *Id.* at *3. It refused to remand based on the citizenship of the non-diverse John Doe defendants because of the restriction set forth in Section 1441(a), but granted the motion on the grounds that the non-diverse unnamed defendants were "not fictitious … for purposes of Section 1441." *Id.*

Here, Sherrod seeks remand based on the purported citizenship of a fictitiously named defendant, "John Doe." She has not sued an *unnamed* defendant, such as the employee of a corporate defendant. The plain language of Section 1441(a) thus prevails.

At least one federal court has recently determined that the mandate of Section 1441(a) is so clear that any motion to remand based on a non-diverse John Doe defendant is frivolous absent an argument under Rule 11(b)(2) of the Federal Rules of Civil Procedure that existing law should be extended, modified or reversed. *See Commonwealth Property Advocates v. Citimortgage, Inc.*, 2011 WL 98491, at *2 (D. Utah June 17, 2011). Sherrod has made no such argument here.[5]

[5] In any event, "John Doe's" alleged citizenship should be disregarded because, based on Sherrod's factual allegations in the Complaint, this Court lacks personal jurisdiction over Doe. Sherrod alleges that Doe is from Georgia and fails to identify a single contact that Doe had with the District of Columbia. Where, as here, answering the personal jurisdiction question will preserve subject matter jurisdiction based on diversity, it is preferable to first examine the Court's personal jurisdiction over the defendant. *See Roz Trading Ltd. v. Zeromax Group, Inc.*, 517 F. Supp. 2d 377, 389 (D.D.C. 2007) (Kollar-Kotelly, J.) (finding lack of personal jurisdiction over non-diverse defendant mooted lack of diversity issues raised by other parties).

C. Limited discovery on the citizenship of John Doe should be denied.

Because Section 1441(a) is clear, discovery (limited or otherwise) is not allowed for purposes of determining the citizenship of a John Doe defendant on a motion for remand. *See Lizana v. Guidant Corp.*, 2004 WL 3316405, at *2 (S.D. Miss. Jan. 21, 2004) (citing Section 1441(a) in refusing to allow discovery of identity of John Doe to determine citizenship for remand purposes). Even where a plaintiff claims that the citizenship of the Doe defendant is readily discoverable, courts have denied discovery. For instance, in *Robinson v. Am. Med. Response, Inc.*, 2008 WL 4793736, at *2 (S.D. Miss. Oct. 28, 2008), the court denied a request for discovery relating to John Doe defendants who allegedly were employees of the corporate defendant on the grounds that Section 1441(a) bars consideration of citizenship of fictitiously named defendants. *See also Pipe Freezing Servs., Inc. v. Air Liquide Am*., 2009 WL 2591612, at *4 (S.D. Miss. Aug. 20, 2009) (denying jurisdictional discovery because naming of John Doe defendants is "fatal" to motion for remand premised on non-diversity of parties).

A close reading of the cases cited by Sherrod reveals that *none* allowed limited discovery to determine the citizenship of a *fictitiously named* defendant in these circumstances. In fact, those courts ruled on whether to permit discovery in entirely different situations. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (discovery relating to names and addresses of class action plaintiffs); *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234 (D.C. Cir. 1981) (discovery as to corporate status of named defendant and identity of unnamed, not fictitiously-named, defendant); *Avery v. Doe*, 1997 WL 88915, at *1 (E.D. Pa. Feb. 21, 1997) (discovery relating to employee of named corporation); *Doe v. Bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008) (discovery relating to defendant foreign state's status under Foreign Sovereign Immunities Act); *Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1 (D.D.C. 2004) (same).

Because courts have uniformly rejected requests for discovery when a plaintiff challenges removal under Section 1441 based on the citizenship of a fictitiously named John Doe defendant, this Court should likewise deny Sherrod's demand for "limited" discovery.

VI. Conclusion

For the foregoing reasons, the Motion for Remand should be denied.

Respectfully submitted,

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