UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN HRITZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. C-1-00-835
	)	(Judge Weber)
JOHN AND/OR JANE DOE(S), *et al.*	)	
	)	
Defendants.	)	

SURREPLY OF DEFENDANT JANE DOE IN OPPOSITION TO MOTION TO REMAND

In her opposition to plaintiff's motion for remand, defendant Jane Doe argued that a petition for pre-litigation discovery is a civil proceeding that is removable so long as the action that it is intended to facilitate would be within the court's original jurisdiction. We drew on several disparate lines of authority to establish that the jurisdictional basis for a case that is brought either to enable or to block a separate law suit is determined by examining the nature of the case to which the first action is related. Thus, if the related case would be a diversity case, then both the amount in controversy, and the propriety of joining each party, is determined by the amount in controversy and the proper parties in that other case.[1]

Although Doe's opposition anticipated most of the arguments in Hritz' reply brief, plaintiff advanced several arguments for the first time. First, he argued that the case was never properly removed because the docket in the state court case does not contain a copy of the removal notice, and hence defendant must have failed to send the notice of removal to the state court pursuant to 28 U.S.C. § 1446(d). Second, plaintiff argued that, because the propriety of removal must be assessed

[1]As in the opposition to remand, we identify defendant as Jane Doe without intending to specify her gender.

at the time of removal, no information not contained in the complaint or in the removal notice can be considered in determining the propriety of removal. Third, plaintiff argued that a petition for pre-litigation discovery can never be within the court's diversity jurisdiction because it is not a "civil action" and never has any amount in controversy; and that, in any event, because the petition seeks information from a third party, it must be deemed a lawsuit against that third party and the third party must consent to removal. As we explain below, none of these arguments is correct.

1. Plaintiff argues first that defendant failed to send a copy of her notice of removal to the state court from which it was removed, as required by 29 U.S.C. § 1446(d), and that as a result the removal itself is invalid. Apart from the irony that this attack on removal is based on an action (or omission) that cannot by its nature be shown in the complaint or the notice of removal, the contention is incorrect. Immediately after the notice of removal was filed, undersigned counsel Mr. Levy mailed the notice to plaintiff's counsel under cover of the attached letter, which explained that the notice had been filed and confirming that the state court was now precluded from taking any further action. Copies of that letter, along with the notice (although not the underlying documents), were mailed both to the state court in Ohio from which it had been removed, and to the state court in Virginia from which a subpoena to America Online had been obtained, so that they would be on notice of the removal, and would know not to take any further steps to enforce the subpoena Even if the Ohio court did not, for whatever reason, note the receipt of this mailing on its docket, notice of the removal, actual or constructive, is all that is required to meet the requirements of section 1446(d). *E.g.*, *Medrano v. Texas*, 580 F.2d 803, 804 (5th Cir. 1978); *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 547 (5th Cir. 1985), citing *United States ex rel. Echevarria v. Silberglitt*, 441 F.2d

225, 227 (2d Cir. 1971).[2]

2. Plaintiff's second new argument is that, because the propriety of removal must be judged at the time the removal is first effected, a court may consider only those facts that are expressly stated either in the complaint or in the notice of removal. In this regard, it is true in the Sixth Circuit, as elsewhere, that the propriety of removal depends on the facts in existence at the time of removal. But the law in the Sixth Circuit, as in most other courts, is that a court may consider facts not set forth in the notice of removal so long as those facts pertain to the existence of removal jurisdiction at the time of removal. *E.g.*, *Sierminksi v. Transouth Finan.* Corp., 216 F.3d 945, 949 (11th Cir. 2000); *Tech Hills II v. Phoenix Home Life Mut. Ins. Co.,* 5 F.3d 963, 969 (6th Cir. 1993); *Gafford v. General Electric Co.*, 997 F.2d 150, 164 (6th Cir. 1993).

Although some decisions took a more restrictive view, as cited in plaintiff's reply brief, Congress itself demanded a more relaxed approach when it passed the Judicial Improvements and Access to Justice Act in 1988. Section 1009 of that Act amended 28 U.S.C. § 1446(b) by changing the requirement of a verified petition for removal that contained a "short and plain statement of the facts supporting removal," to the current language under which a defendant files a notice of removal

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[2] In addition to sending a copy of the original notice of removal, defendant mailed to the Butler County court the opposition to plaintiff's motion to remand. This filing was returned to the defendant's counsel, apparently on the ground that the case with the caption of the removed case was not pending in the state court; we assume that the reason why the original notice of removal is not on file is the same. *But see In re Toler*, 999 F.2d 140, 142 (6th Cir. 1993) (under Rule 5(e), Federal Rules of Civil Procedure, document should not be rejected for filing simply because not presented in form required by local rules). Undersigned counsel contacted the state court clerk and was told that the papers would not be filed and noted on the docket unless they were submitted with information identifying the state court docket number. The notice of removal was then mailed back to the Butler County clerk under cover of a letter (copy attached) that contained the state court docket number. Defendant's opposition to the motion to remand now appears on the state court docket (copy attached).

that "contains a short and plain statement of the grounds for removal." The similarity between this language and the notice pleading language of section 8(a) of the Federal Rules of Civil Procedure was not accidental – as the House Committee on the Judiciary explained:

> The present requirement that the petition of removal state the facts supporting removal has led some courts to require detailed pleading. Most courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement established by civil rule 8(a).
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> House Report No. 100-889, at 71-72, *reprinted in* 1988 Code Cong. & Admin News 5982, 6032.

Here, the notice of removal plainly states the grounds for removal – that the citizenship of the parties is diverse and that the amount in controversy exceeds $75,000. That is all that the removal statutes require.

3. Plaintiff argues that a pre-complaint petition for discovery can never be removed, no matter what would be at stake in the lawsuit that the discovery is intended to enable, because a petition for discovery is not a "civil action" within the meaning of 28 U.S.C. § 1441. Mem. at 3, *citing Hinote v. Morgan*, 179 F.R.D. 335 (S.D. Ala. 1998), and *Mayfield-George v. Texas Rehab. Comm.*, 2000 U.S. Dist LEXIS 16338 (N.D. Tex. 2000). (Plaintiff cites two other cases that denied removal of pre-litigation petitions, Mem. at 4, but neither adopted the no-civil-action analysis). As we now explain, however, the analysis in these cases is deeply flawed, for several reasons.

First, although 28 U.S.C. § 1441(b) authorizes the removal of "civil actions," 28 U.S.C. § 1446(b), which sets forth the procedures to be followed to effect a removal, speaks of the removal of a "civil action or proceeding." *Christian, Klein & Cogburn v. NASD*, 970 F. Supp. 276, 278 (S.D.N.Y. 1997). It would seem apparent that these two provisions should be read in pari materia,

and thus the argument that a pre-litigation petition is a state court proceeding rather than a state court action does not provide a reason to bar removal of the former category of actions.

Second, the Supreme Court has long spoken of the removal of civil "actions" and similar "proceedings" as if they were equivalent terms. Thus, for example, in several cases the Supreme Court has discussed the removability of eminent domain proceedings, holding that once they pass from the state administrative process into a proceeding before a state judicial tribunal, they become proceedings "in the nature of a civil action" and thus are removable. *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 26 (1959); *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578-579 (1954).

Moreover, the Federal Rules of Civil Procedure provide for the filing of pre-litigation petitions for discovery in appropriate circumstances. Rule 27(a). And yet the original jurisdiction of the federal courts, both for federal question cases and diversity cases, extends only to "civil actions." 28 U.S.C. §§ 1331, 1332. Because the Federal Rules cannot add to or subtract from the jurisdiction of the federal courts, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978), *citing* Rule 82, petitions of this sort must necessarily be considered "civil actions" if the district courts can have power to hear them and issue orders granting discovery in appropriate circumstances. Indeed, in deciding such cases, the courts state that their jurisdiction depends on whether the civil proceeding that the discovery is intended to facilitate would be, when brought, within the district court's jurisdiction. *Dresser Indus. v. United States*, 596 F.2d 1231, 1238 (5th Cir. 1979); *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 52 (5th Cir. 1961); *see also de Wagenknecht v. Stinnes*, 250 F.2d 414, 417 (D.C. Cir. 1957); *Matter of Nabors Loffland Drilling Co.*, 142 F.R.D. 295 (W.D. La. 1992). Similarly, outside the Rule 27 context, when a party seeks pre-litigation

discovery to determine whether it has a valid basis for filing suit, it is entitled to come to the federal court that would have jurisdiction over the action for which the information is sought. *Arizona v. California*, 292 U.S. 341, 347 (1934) (request to take testimony in anticipation of original action between states is properly filed in Supreme Court). Because, in general, the breadth of the district court's jurisdiction is co-extensive with its original jurisdiction, tf such cases are within the district court's original jurisdiction when brought there by the plaintiff, it follows that a defendant may remove them to federal court when the plaintiff has chosen to bring them in state court in the first instance.[3]

Finally, the same policy reasons that support removal of actions for damages or injunctive relief support removal of pre-litigation actions that are brought to facilitate such actions. Hritz is one of the principal officers of a very large corporation which is the single largest company in the county where he filed his petition against an individual employee who lives in a different state. Had Hritz simply filed a libel action against Doe and then sought discovery to identify the defendant, Doe would have been able to remove that case, and obtain the protection of a federal court for the First Amendment arguments upon which the resistance to the subpoena is based, so long as he could show that the amount in controversy exceeded $75,000. And yet, as we have previously indicated, the consequences to Doe of being identified, such as the possibility that she may lose her job in retaliation for her comments, are likely to be far more serious than the consequences of being a defendant in a piece of civil litigation. Hritz should not be able to evade removal, and deprive Doe

[3] At one time, a equitable bill of discovery could be brought in federal court, in aid of an action in law, under the authority of 28 U.S.C. § 644, which allowed suits to perpetuate testimony "if they relate to any matters that may be cognizable in any court of the United States." However, section 644 has been repealed, leaving Chapter 85 of Title 29, 28 U.S.C. §§ 1331 *et seq.*, as the sole jurisdictional basis for Rule 27 petitions.

of her right to a federal forum, by the simple device of calling his action against Doe a pre-litigation petition for discovery. Removability is determined by the substance and not the form or label of the litigation.

4. With respect to the amount in controversy, our opposition pointed to three lines of cases to show that, when a pre-litigation discovery petition is filed in federal court, that court has jurisdiction if it would have jurisdiction over the intended action for which information is sought. (a) We pointed to several cases in which state court pre-litigation petitions were deemed removable because they sought information to support causes of action that would have been within the federal court's jurisdiction. (b) We analogized to several cases in which federal jurisdiction was asserted over cases that were brought either to enable, or to block, a second action, and the courts held that jurisdiction depended on the amount in controversy or another jurisdictional basis for the second action. (c) We drew an analogy to cases in which shareholders sought information from a corporation, and the amount in controversy was held to be the value of the interest that the information was sought to protect.

The reply brief simply ignores the second and third lines of cases. Plaintiff seeks to distinguish the removal cases involving state pre-litigation discovery actions on the ground that they involved federal questions, not diversity jurisdiction, Reply at 4 n.2, but this is a distinction without a difference. If pre-litigation petitions can be removed when they seek information for suits that would be within the district court's jurisdiction under 28 U.S.C. § 1331, there is no reason why such petitions would not be removable when the seek information for suits that would be removable under 28 U.S.C. § 1332, because the removal statutes, 28 U.S.C. §§ 1441 *et seq.*, do not distinguish between these two bases for removal jurisdiction over civil actions (with one exception not pertinent

here, section 1441(b), last sentence). Moreover, the fact that pre-litigation petitions may be presented under Rule 27 if, and only if, they seek testimony for cases that would be within the federal question or diversity jurisdiction, as argued above at 5-6, further demonstrates the removability of such pre-litigation petitions if they are initially filed in state court.

5. Finally, plaintiff takes issue with our contention that Yahoo! was a nominal party, on the ground that it is "obvious" that the party from whom he needs discovery to identify Doe is a proper party to a pre-litigation petition for discovery. In support of this argument, plaintiff cites a case involving Florida's pre-litigation discovery procedure, which supposedly refused to allow removal because, under Florida procedure, the holder of the information is properly treated as a defendant. *Sunbeam TV Corp. v. CBS*, 694 F. Supp. 889, 892-893 (S.D. Fla. 1988).

Of course, whatever may be the proper procedure in Florida, plaintiff simply ignores the legislative history of the new Ohio rule allowing petitions for discovery, which were adopted precisely to **avoid** the need to name the holder of the information as a defendant. Opposition at 13-14. Nor did the *Sunbeam* court reject the fraudulent joinder argument on the ground that an information holder is a proper defendant in a pre-litigation discovery petition; to the contrary, the court "concludes that there is a possibility that an action may be maintainable under Florida law as against either of the two irrefutably Florida defendants . . .. Both . . . were more than merely passive witnesses to the transactions at issue . . .. The complaint lists facts alleging that the Plaintiff may have been wronged by several or all of the Defendants . . .." 694 F. Supp. at 893 and n.3.

Here, by contrast, Hritz does not take issue with the contention in our opposition, at 13, that Yahoo! is immune from liability under the safe harbor provision of the Communications Decency Act. As a result, Doe and not Yahoo! is the proper defendant in the action that Hritz claims he is

trying to file, and Yahoo!'s position on the issue of removal is irrelevant.

Moreover, there is ample evidence that even plaintiff does not consider Yahoo! to be a genuine defendant in this case. If Yahoo! were a proper defendant, it would have simply filed its action and given Yahoo! a chance to respond instead of rushing into the state court on an ex parte basis to seek an order allowing it to serve a subpoena in California. After all, although it had a reason for not serving its papers on Doe, it knew very well how to serve Yahoo! Similarly, if Hritz had really believed that Yahoo! was a party to this case, it would have **continued** to serve Yahoo! with papers. But the attached affidavit from Cathy McGoff, the Compliance Manager in Yahoo!'s Legal Department, states that, from the time Yahoo! responded to the subpoena through the November 20 date of the affidavit, Yahoo! had received no papers and not even any communications about the case from plaintiff once it had furnished information in response to the subpoena. Thus, Hritz did not serve on Yahoo! the various papers it filed in Virginia state court or in Virginia federal court, and he did not serve on Yahoo! the very motion for remand in which plaintiff was claiming that Yahoo!'s failure to join in the removal was fatal under the rule of unanimity.

The certificate of service for plaintiff's reply brief shows that the brief was sent to Yahoo! Apparently, plaintiff was stung by Doe's argument that failure to serve Yahoo! previously showed that Hritz did not regard Yahoo! as a genuine party, and served Yahoo! to conform to the pretense that Yahoo! really is a party. The very fact that plaintiff is now trying to cover his tracks shows consciousness that his previous failure to serve Yahoo! cast doubt on the bona fides of his claim that Yahoo! is a party.

But there is a final proof that Hritz does not really believe that, in order to seek discovery from a third-party, he must make that party a respondent in his petition for discovery – once he

learned from Yahoo! that he would need information from AOL in order to identify Doe, he did not return to state court to amend his petition for discovery to name AOL as a respondent. Nor has he been treating AOL as a party to this case, because at no time has he served AOL with any of the papers related to this motion for remand. The reason is that the only genuine defendant in this case is Doe, and hence there was no need to secure any other party's consent to the removal.

CONCLUSION

The motion for remand should be denied.

Respectfully submitted,

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