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Of Attorneys for Mr. Valles

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MATTHEW VALLES,

Plaintiff,

v.

WELLS FARGO BANK N.A. and **KIMBERLY THRUSH**,

Defendants.

Case No. 3:18-cv-00575-MO

MR. VALLES'S MOTION TO REMAND

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CERTIFICATION

In compliance with LR 7–1, I certify that the parties made a good faith effort through telephone conference and by email to resolve the dispute and have been unable to do so. Fuller decl. ¶ 1; Ex. 7. Even after being provided an advanced copy of this motion, Wells Fargo continues to insist that diversity jurisdiction exists. *Id.*

MOTION

Under 28 U.S.C. § 1447, this action should be remanded for lack of subject matter jurisdiction **(1)** because the parties are not diverse, and **(2)** because Mr. Valles alleges a plausible claim against Ms. Thrush.

This motion is supported by the legal memorandum below, the declaration of Michael Fuller and attached exhibits.

INTRODUCTION

The improper removal of this action stood only to prolong litigation, and Wells Fargo's ongoing refusal to stipulate to remand now burdens Court and counsel with unnecessary motion practice.

Wells Fargo's legal gamesmanship should be made at its own expense. After a determination that no reasonable basis for diversity jurisdiction exists, Mr. Valles respectfully requests reimbursement of the reasonable fees he incurred to prosecute this motion.

PROCEDURAL BACKGROUND

On February 28, 2018, Mr. Valles filed an action in Multnomah County Circuit Court against Wells Fargo and Ms. Thrush for employment discrimination. Fuller decl. ¶ 2; Ex. 1. Plaintiff Mr. Valles and defendant Ms. Thrush are both citizens of Oregon. *Id.* at ¶ 5; Ex. 5, ¶ 6. Mr. Valles's complaint includes two claims: that Wells Fargo engaged in whistleblower retaliation in violation of ORS 659A.199, and that Ms. Thrush aided and abetted in that retaliation in violation of ORS 659A.030(1)(g). *Id.* at ¶ 2.

The summons and complaint were served on Wells Fargo and Kimberly Thrush, care of Wells Fargo, at Wells Fargo's main office location, as registered with the FDIC, that Wells Fargo has repeatedly accepted service of process at in prior actions in this District. *Id.* at ¶ 3; Ex. 2. Follow-up mailing of the summons and complaint to Ms. Thrush, care of Wells Fargo, and Wells Fargo was also accomplished. *Id.* at ¶ 4; Ex. 3. On March 2, 2018, the proof of service for Wells Fargo was returned to Multnomah County Circuit Court. *Id.* at ¶ 6; Ex. 4.[1]

[1] When filing an action against a corporation and its individual employee, plaintiff's counsel often sends notice of the action to the employee care of the corporation, as occurred in this case. Fuller decl. ¶ 3. When Wells Fargo claimed for the first time in its removal notice that Ms. Thrush had not been served, Mr. Valles engaged a process server to personally serve her within the time permitted by the rules. *Id.*

Plaintiff's counsel expected Wells Fargo to appear in the Multnomah County Circuit Court action around April 2, 2018. *Id.* at ¶ 6. At that time, plaintiff's counsel would have confirmed whether counsel for Wells Fargo would also file an appearance on behalf of Ms. Thrush. *Id.* Instead, counsel for Wells Fargo filed a notice of removal. *Id.*; Ex. 5.

Counsel for Wells Fargo has at no time indicated that Ms. Thrush did not receive notice of the Multnomah County Circuit Court action against her. *Id.* at ¶ 7. Counsel for Wells Fargo has at no time indicated that it does not represent Ms. Thrush for purposes of Mr. Valles's claim against her. *Id.* at ¶ 8.

On April 12, 2018, Ms. Thrush was personally served with the summons and complaint in the Multnomah County Circuit Court case. *Id.* at ¶ 9.

LEGAL MEMORANDUM

As a removing defendant, Wells Fargo bears "the burden of establishing that removal is proper." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992) ("The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." (internal quotation marks and citation omitted)). In deciding this motion, "any doubt regarding the existence of subject matter jurisdiction" must be resolved in favor of remand. *Id.* at 566 ("Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.").

1. No subject matter jurisdiction exists under 28 U.S.C. § 1332 because the parties are not completely diverse.

Under 28 U.S.C. § 1332, this Court may have jurisdiction over Mr. Valles's claims against Wells Fargo and Ms. Thrush if the amount in controversy is over $75,000 and the controversy is between citizens of different states. There is no dispute that the amount in controversy is over $75,000 – there is also no dispute that Ms. Thrush and Mr. Valles are citizens of Oregon. Fuller decl. ¶ 5; Ex. 5, ¶ 6.

"Section 1332 requires complete diversity of citizenship; each of the plaintiffs must be a citizen of a different state than each of the defendants." *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). In this case, because both Mr. Valles and Ms. Thrush are

citizens of Oregon, complete diversity is destroyed and the Court lacks subject matter jurisdiction under 28 U.S.C. § 1332.

1.1. An "unserved" defendant may not be ignored for purposes of determining diversity in the context of this case.

"The case law is clear that a defendant who is a citizen of plaintiff's state destroys complete diversity, regardless of whether that defendant was properly served prior to removal." *Jennings-Frye v. NYK Logistics Americas Inc.*, 2011 WL 642653, at *3 (C.D. Cal. Feb. 11, 2011).

Despite this clarity, Wells Fargo continues to argue that 28 U.S.C. § 1441(b) prevents this Court from considering Ms. Thrush's citizenship in determining whether diversity of the parties exists because she had not been completely served[2] before Wells Fargo filed its notice of removal. Ex. 5, ¶ 6.

[2] As noted above, Ms. Thrush was served via Wells Fargo's main office registered with the FDIC, and a follow-up mailing of the summons and complaint to Ms. Thrush, care of Wells Fargo, was accomplished. Under ORCP 7 D(2)(c) office service, followed by mailing to a "place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action," is effective service. Further, if there is some defect in the service under ORCP 7, then the Court "must determine whether service is otherwise adequate, because it meets the 'reasonable notice' standard set forth in ORCP 7 D(1)." *Murphy v. Price*, 131 Or. App. 693, 696 (1994), *rev. denied,* 321 Or. 137 (1995). Regardless, this Court need not reach the issue of whether the previous service on Ms. Thrush was adequate based on the case law cited in this motion, and because Ms. Thrush was served personally on April 12, 2018. Fuller decl. ¶ 9; Ex. 6.

In so arguing, Wells Fargo essentially asks this Court to overturn a mountain of precedent and establish a new rule of law: if one defendant is not served within an arbitrary time period identified by another defendant, then the diversity analysis of the entire case is governed only by the citizenship of defendants served at the time of removal. Wells Fargo's warped interpretation of diversity jurisdiction as stated in its removal notice cannot be the law.[3] As discussed further, it is not.

1.2. Wells Fargo's argument ignores long-standing Ninth Circuit precedent and mischaracterizes the law.

In urging this Court to create a new rule, Wells Fargo cites to the Ninth Circuit's decision in *Cripps v. Life Insurance Co.*, in support of its argument. 980 F.2d 1261, 1266 (9th Cir. 1992). Wells Fargo fails to explain that *Cripps* applies by its own terms only to interpleader actions. *Id.* at 1265.

[3] Wells Fargo learned about this lawsuit from the *New York Times* and other news outlets, the same day it was filed. *See* Wells Fargo Accused of Harming Fraud Victims by Closing Accounts. If the Court were to adopt Wells Fargo's argument in this case, large out-of-state employer-defendants could begin removing all state court lawsuits by quickly filing a notice of removal before their individual forum state employee-defendants could be served. Particularly, as here, where the employee-defendant is still employed by the employer-defendant, Wells Fargo's argument, if adopted, would result in an absurd process. Allowing such a result would encourage legal gamesmanship and is, in any event, directly at odds with the law.

If there were any doubt that *Cripps* does not apply in a case such as this, the *Cripps* opinion included a footnote essentially reaffirming the law that "**a defendant [cannot] ignore an unserved, nondiverse co-defendant in seeking to *remove* a case to federal court based on diversity**." *Id*. at 1266 n.4 (italics in original) (citing *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969)).

Indeed, this principle is black letter law in this Circuit. *See, e.g., Preaseau v. Prudential Ins. Co.*, 591 F.2d 74, 78 (9th Cir. 1979) ("[T]his court has specifically rejected the contention that § 1441(b) implies that service is the key factor in determining diversity."); *X-Littlepage v. Berkel & Co. Contractors*, 2016 U.S. Dist. LEXIS 51782, at *5 (N.D. Cal. Apr. 15, 2016) ("Our circuit has long held that a nonresident defendant cannot remove a 'nonseparable' action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the codefendant." (internal quotation marks and citation omitted)); *Rhodes v. Barnett*, 692 F. App'x 834, 835-36 (9th Cir. 2017) (unpublished) (once again clarifying that unserved defendants must be considered in determining whether there is complete diversity and awarding plaintiff's fees on remand because the defendant had no reasonable basis for asserting diversity jurisdiction when the plaintiff and unserved co-defendant were both California citizens).

In attempting to obfuscate this clear rule, Wells Fargo also cites to *Pullman v. Jenkins Co.*, 305 U.S. 534, 537 (1939), for the proposition that "removability is to be determined 'at the time of the petition for removal.'" Ex. 5, ¶ 6. Wells Fargo fails to point out, however, that thirty years after *Pullman*, the Ninth Circuit flatly rejected Wells Fargo's interpretation of *Pullman* in *Vitek*, 412 F.2d at 1176.

In *Vitek*, the Ninth Circuit pointed out, "[o]ccasional holdings that unserved codefendants can be ignored in deciding removal petitions stem from the **erroneous** assumption that *Pullman* turned on a distinction between unserved nonresident defendants and unserved resident defendants, rather than upon want of diversity, and the further **misassumption** that 28 USC § 1441(b), by implication, expanded removal jurisdiction to permit removal, despite want of diversity, if a resident defendant whose presence would defeat diversity had not been served." *Id.* at 1176 n.1 (emphases added).

Vitek therefore makes clear that it is error for any statement from *Pullman* to be construed as support for the proposition that an unserved co-defendant in this case can be ignored for deciding diversity jurisdiction upon removal. *Id.*

1.3. Wells Fargo's reliance on *Spencer*, *Republic*, and *Roth* is similarly misplaced.

In addition to *Cripps* and *Pullman*, Wells Fargo erroneously relies on *Spencer v. U.S. District Court for the Northern District of California*, 393 F.3d 867, 870-71 (9th Cir. 2004). Wells Fargo cites *Spencer* for the proposition that "the limitation on removal pursuant to diversity jurisdiction where a forum defendant is involved does not exist where such defendant has not been 'joined *and served*' at the time of removal." (Emphasis supplied by Wells Fargo); Ex. 5, ¶ 6.

Wells Fargo's characterization of *Spencer* is barely comprehensible, as Wells Fargo strains to apply what is a wholly inapplicable case. *Spencer* dealt with "whether the joinder of a local, but completely diverse defendant, after an action has been removed to federal court, requires remand." *Id.* at 870. Although the analysis is sparse, *Spencer* stands for the non-controversial proposition that the removal statute – 28 U.S.C. § 1441(b), which forbids removal in the case when a non-diverse forum defendant is present in the action – applies only at the time of removal. *Id.* at 871.

The court in *Spencer* did not overrule (or even analyze) *Vitek*, *Preaseau*, or any other case in this Circuit holding that a defendant cannot ignore an unserved co-defendant in seeking to remove a case to federal court based on diversity. In any event, the question in *Spencer* is

not the question the Court is presented with in this case. Ms. Thrush was a non-diverse forum defendant present in Mr. Valles's state court lawsuit at the time of removal – therefore *Spencer* is inapplicable.

Republic West Insurance Co. v. International Insurance Co., 765 F. Supp. 628 (N.D. Cal. 1991), is equally unavailing to Wells Fargo's argument. In *Republic*, the analysis was based on the assumption that it was "undisputed that complete diversity of citizenship exists as no defendant in the action has the same citizenship as the plaintiff." *Id.* at 629. A more helpful analysis is offered by *Pinter v. Arthury J. Gallagher Service Co.*, 2016 WL 614348, at *4 (C.D. Cal. Feb. 16, 2016).[4] *Pinter* highlights that the analysis in *Republic* does not apply to "whether the citizenship of unserved defendants could be ignored for purposes of establishing diversity jurisdiction." *Id.* at *4 n.5.

Wells Fargo's reliance on *Roth v. Davis*, 231 F.2d 681, 683 (9th Cir. 1956), is even further off the mark. *Roth* dealt with fictitious "John

[4] *Republic* also relied on the language in 28 U.S.C. § 1441(b)(2) that "[a] civil action otherwise removable solely on the basis of [complete diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Pinter* explains that the purpose of 28 U.S.C. § 1441(b)(2) is to prevent removal even when there is complete diversity when a defendant is from the forum state; the statute does not "render the citizenship of non-served defendants irrelevant for purposes of establishing diversity jurisdiction and the right to remove." 2016 WL 614348, at *4.

Doe" defendants, who had never materialized, had no citizenship, and who had even been dismissed by the district court prior to the appeal. *Id. Roth* provides Wells Fargo no support.

In sum, Wells Fargo's assertion that this Court should disregard Ms. Thrush's citizenship because she had not yet been formally served is contradicted by clear precedent and has no basis in the law.

2. Ms. Thrush was not fraudulently joined in this lawsuit – to the contrary, the complaint contains specific allegations of the instrumental role Ms. Thrush played in the illegal retaliation against Mr. Valles.

Wells Fargo also argues that Ms. Thrush's citizenship should be disregarded for diversity purposes because she has been fraudulently joined. Ex. 5, ¶¶ 9-11. Wells Fargo argues that Mr. Valles's complaint fails to state a claim against Ms. Thrush for aiding and abetting discrimination. Wells Fargo also argues that Mr. Valles only alleges damages against Wells Fargo.

Courts in the Ninth Circuit recognize the "strong presumption against removal jurisdiction" and the "general presumption against fraudulent joinder." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1046 (9th Cir. 2009). Wells Fargo must establish its claim that Ms. Thrush was fraudulently joined with "clear and convincing evidence." *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). As set forth below, Wells Fargo is factually and legally incorrect about

Mr. Valles's claims, and Wells Fargo simply cannot meet its high burden to demonstrate Ms. Thrush was "fraudulently joined."

2.1. Mr. Valles has stated a claim against Ms. Thrush.

"If there is a non-fanciful possibility that plaintiff can state a claim under [Oregon] law against the non-diverse defendants the court must remand." *Macey v. Allstate Prop. & Cas. Ins. Co.*, 220 F. Supp. 2d 1116, 1117 (N.D. Cal. 2002). If the law is unsettled or unclear, this Court should resolve any doubts in favor of the party seeking remand. *King ex rel. King v. Aventis Pasteur, Inc.*, 210 F. Supp. 2d 1201, 1209 (D. Or. 2002).

Joinder of Ms. Thrush in this lawsuit is not fraudulent so long as Mr. Valles is entitled to relief against her on any theory. *Sessions v. Chrysler Corp.*, 517 F.2d 759, 760-61 (9th Cir. 1975). In this case, Mr. Valles's complaint stated a claim against Ms. Thrush under ORS 659A.030(1)(g).

2.2. The complaint contains sufficient allegations that Ms. Thrush aided and abetted retaliation.

The plain text of ORS 659A.030(1)(g) prohibits any person, whether an employer or an employee, from aiding or abetting any unlawful employment practice. In the context of wrongful termination, a complaint alleges sufficient facts for liability against an employee under ORS 659A.030(1)(g), whether or not the complaint actually

alleges that the employee was involved in the termination decision. *Demont v. Starbucks Corp.*, 2010 WL 5173304 (D. Or. Dec. 15, 2010) (determining that two supervisors were properly joined as defendants in an employment action even though it was "not clear who was involved in the termination decision").

In this case, Mr. Valles's complaint more than sufficiently alleges when, why, and how Ms. Thrush aided and abetted unlawful retaliation:

- "Ms. Thrush had a history of wrongfully terminating whistleblowers and she understood the legal importance of how to time a termination based on a plausible pretext to avoid detection." Ex. 1, ¶ 26.[5]

- "Mr. Valles immediately noticed that Ms. Thrush was hostile toward him. Ms. Thrush proceeded to try to isolate Mr. Valles from the work of the unit." "Ms. Thrush treated Mr. Valles worse than other employees and would not allow him to get necessary training to work on advanced fraud issues." *Id.* at ¶¶ 15-16.

- Ms. Thrush severely limited the type of work Mr. Valles was able to do. "Ms. Thrush was unusually concerned with Mr. Valles and her ability to control him." "Ms. Thrush would not allow Mr. Valles to work remotely or to use a laptop for work." "Mr. Valles was denied opportunities for overtime and promotions while supervised by Ms. Thrush." *Id.* at ¶ 16.

[5] *See, e.g.*, *Tran v. Wells Fargo Bank N.A.*, Case No. 3:15-cv-00979-BR, Doc. #86, pg. 21 (filed July 6, 2017) ("In the meeting, Thrush asked how to accomplish further disciplining Tran in a way that Tran could not later prove the decision was the result of retaliation.").

- "Each time Mr. Valles returned from leave he observed Ms. Thrush become more hostile toward him." Ms. Thrush consistently refused Mr. Valles's requests for minor schedule changes to accommodate his medical conditions. Ms. Thrush knew that she had to be careful to "not take certain actions against Mr. Valles close in time to his medical leaves." *Id.* at ¶ 17.

- Ms. Thrush fabricated a pretext to baselessly discipline Mr. Valles because he was allegedly cooperating too much with a law enforcement agent. *Id.* at ¶ 18.

- On January 9, 2018, Ms. Thrush fabricated another pretext to wrongfully terminate Mr. Valles's employment at Wells Fargo. *Id.* at ¶ 23.

The ultimate facts alleged in Mr. Valles's complaint more than sufficiently state a plausible claim for aiding and abetting against Ms. Thrush under ORS 659A.030(1)(g) at this early stage in the case. Mr. Valles's complaint alleges that Ms. Thrush colluded with Wells Fargo after he blew the whistle on Wells Fargo's misconduct, for the specific purpose of intentionally creating pretexts to wrongfully terminate him. *Id.* at ¶¶ 18, 23. Mr. Valles's complaint alleges that Ms. Thrush's retaliation was intentional – Ms. Thrush had a "history of wrongfully terminating whistleblowers" and "understood the legal importance of how to time a termination based on a plausible pretext to avoid detection." *Id.* at ¶ 26.

2.3. The cases cited by Wells Fargo are either inapplicable or actually cut against Wells Fargo.

In support of Wells Fargo's contention that Mr. Valles cannot state a claim against Ms. Thrush, it relies on two cases: *Hernandez v. FedEx Freight, Inc.*, 2017 WL 3120283 (D. Or. June 12, 2017), and *State ex rel. Juvenile Department of Multnomah County v. Holloway*, 102 Or. App. 553, 557 (1990).

Holloway is a criminal case that briefly addresses aiding and abetting in a criminal context. The case is wholly inapplicable to aiding and abetting in the civil context of this case and provides no helpful guidance.

Hernandez, at least, addresses aiding and abetting under ORS 659A.030(1)(g). *Hernandez,* 2017 WL 3120283, at *5-9. The *Hernandez* opinion found that some factual allegations were sufficient to state a claim of aiding and abetting under ORS 659A.030(1)(g), and others were not. *Id.* A close review of *Hernandez* demonstrates that a plaintiff need not insert key words like a defendant "intended" to engage in retaliation; the intent may be inferred from the facts. *Id.* at *7-8. Indeed, the *Hernandez* opinion viewed each allegation in the complaint not individually, but in context of all of the facts alleged. *Id.*

In determining that the plaintiff in *Hernandez* stated a claim against one supervisor for aiding and abetting discrimination, the

opinion relied on the **inferences** of discriminatory intent from the facts that:

- The supervisor gave the employee an "impossible task" that would conflict with the employee's pre-approved medical leave;

- The supervisor threatened he would punish the employee for not completing the impossible task; and

- The supervisor defied Human Resources in insisting on a doctor's note from the employee, who invoked a pre-approved FMLA leave. *Id.* at *7.

The plaintiff in *Hernandez* did not include allegations reciting that the supervisor had intent or knowledge of aiding in discrimination or retaliation. *Id.* Despite this, the opinion determined that these general allegations were sufficient to survive a motion to dismiss. *Id.* at *7-8. In this case, Mr. Valles's complaint alleges significantly more facts regarding Ms. Thrush's role in the illegal retaliation and termination than in *Hernandez* as to the specific defendant at issue. Further, *Hernandez* was decided on a FRCP 12(b)(6) standard, unlike the standard in this case where Wells Fargo must establish fraudulent joinder with clear and convincing evidence. *Hamilton Materials, Inc.*, 494 F.3d at 1206.

2.4. Wells Fargo fails to disclose authority relevant to the Court's required analysis in this case.

Conspicuously absent from Wells Fargo's notice of removal are citations to the several cases in this District that specifically address the fraudulent joinder issue in the context of ORS 659A.030(1)(g).

Among those omitted cases is *Ekeya v. Shriners Hospital for Children, Portland*, 258 F. Supp. 3d 1192, 1195 (D. Or. 2017). In *Ekeya*, Judge Simon considered the very question presented in this case: whether a plaintiff had fraudulently joined an employee responsible for employment discrimination such that the employee's citizenship should be disregarded for purposes of diversity jurisdiction. *Id.* After thorough analysis, the court concluded that the defendant-employee had not been fraudulently joined and remanded the action. *Id.* at 1207. The *Ekeya* opinion dealt with a more nuanced question regarding ORS 659A.030(1)(g) than this case, and still concluded that remand was appropriate, along with an award reimbursing the removing plaintiff's fees. *Id.*

Wells Fargo also omits many other cases in this District that have considered whether a plaintiff's claim against an employee-defendant under ORS 659A.030(1)(g) is tantamount to fraudulent joinder. Those cases have uniformly found that the plaintiff stated a sufficient claim under ORS 659A.030(1)(g) such that remand was appropriate. *See*:

- *Kelman v. Evraz, Inc. N.A.*
  2017 WL 241316 (D. Or. Jan. 19, 2017)

    - In *Kelman* the Court noted that the allegations in the complaint would not survive a motion pursuant to FRCP 12(b)(6) but the case still required remand due to the plaintiff's minimal showing of allegations stating a claim pursuant to ORS 659A.030(1)(g). *Id.*

- *White v. Amedisys Holding, LLC*
  2013 WL 489674 (D. Or. Feb. 7, 2013)

    - *White* remanded to state court and recognized, "A corporate entity…can be held liable for committing unlawful employment practices against its employees…based only on the actions of its agents and employees acting on its behalf.... The situation is different if the employee is legally equivalent to the employer, as in a sole proprietorship…. But if the employee is simply acting on behalf of a separate and distinct employing entity, then he or she could well aid, abet, compel or coerce that employer's unlawful employment practices…. This conclusion does open the door to claims against a host of employees who, in their role as supervisors, take adverse employment actions another their subordinates, but such claims are not clearly barred by the language in ORS 659A.030(1)(g) or by any Oregon case law." *Id.* at *5.

- *Daniels v. Netop Tech, Inc.*
  2011 WL 127168, at *2 (D. Or. Jan. 14, 2011)

    - Despite the employer's characterization that the complaint was "entirely devoid of any accusations of wrongdoing" by the employee the plaintiff sought to hold liable under ORS 659A.030(1)(g), *Daniels* remanded the case concluding the plaintiff stated a plausible claim. *Id.*

- *Gaither v. John Q. Hammons Hotels Mgmt., LLC*
  2009 WL 9520797, at *3 (D. Or. Sept. 3, 2009)

    - *Gaither* granted remand and flatly rejected the idea that an actor in the discrimination cannot be liable for aiding and abetting discrimination under ORS 659A.030(1)(g). *Id.*

- *Chambers v. United Rentals, Inc.*
  2010 WL 2730944, at *2 (D. Or. July 7, 2010)

    - *Chambers* remanded to state court and noted, "Whether plaintiff's factual allegations are sufficient is a question properly addressed by the Oregon courts." *Id.*

Finally, Wells Fargo fails to cite *Demont*. *Demont* decided eight years ago that it was not objectively reasonable for the defendant-employer to seek removal in a case based on the claim that an individual employee-defendant could not be held liable for aiding abetting under ORS 659A.030(1)(g). 2010 WL 5173304. The *Demont* opinion reached this conclusion despite the fact that the law on individual liability under ORS 659A.030(1)(g) was not as well-settled as it is today. *Id.*

Judge Brown's analysis in *Demont* centered on the proposition that a claim against individual defendants is not possible – compared to Wells Fargo's argument in this case that the claim is possible but the facts are not sufficient. *Demont* is instructive because it affirms, in the context of claims under ORS 659A.030(1)(g), that the burden for removal is high, and that it is unreasonable for a defendant to seek removal even

when the law is arguably unsettled. *Id.* Based on the ultimate facts alleged in Mr. Valles's complaint, Ms. Thrush is a proper defendant in this case, and thus removal is not appropriate. If "any doubt" exists regarding Ms. Thrush's status as a proper defendant in this action, this Court should resolve the doubt in favor of Mr. Valles and grant his motion to remand. *Gaus*, 980 F.2d at 566.

2.5. The complaint alleges that Ms. Thrush caused Mr. Valles damages.

Finally, Wells Fargo argues, "Plaintiff alleges damages only against Wells Fargo, and that all actions taken by Thrush were within the scope of her employment with Wells Fargo, demonstrating Wells Fargo is the real party in interest." Ex. 5, ¶ 11. As a factual matter, Wells Fargo is incorrect – Mr. Valles has alleged that Ms. Thrush caused him damages. Ex. 1, ¶ 34.

In addition, whether or not Ms. Thrush's actions were within the scope of employment has no bearing on the issue. Wells Fargo's argument essentially rehashes that an employer-defendant can only act through its employees. While this may be true, it is of no consequence in deciding whether there is also individual liability against the defendant's employee who carried out the act of discrimination. *See, e.g., White*, 2013 WL 489674.

3. Mr. Valles is entitled to an order reimbursing the reasonable fees he was forced to incur to prosecute this motion.

Under 28 U.S.C. § 1447(c), "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In assessing whether a court remanding an action should award fees against the removing party, the U.S. Supreme Court observed:

> The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

Martin v. Franklin Capital Corp., 546 U.S. 132, 140 (2005).

Ultimately the Supreme Court held that "the standard for awarding fees should turn on the reasonableness of the removal." *Id.* at 141. If removal is not objectively reasonable, a court should award fees. *Id.*

Applying the "objectively reasonable" standard, judges in this District have found – in cases very similar to this one – that no objectively reasonable basis for seeing removal existed. *Ekeya*, 258 F. Supp. 3d at 1206 (granting plaintiff's request for fees based on

defendant's objectively unreasonable assertions of fraudulent joinder and diversity jurisdiction); *Demont*, 2010 WL 5173304 (same).

CONCLUSION

After a determination that no reasonable basis for diversity jurisdiction exists, Mr. Valles respectfully requests 14 days to file an application for reimbursement of the reasonable fees he incurred to prosecute this motion.

April 18, 2018

RESPECTFULLY FILED,

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PROOF OF SERVICE

I certify that I caused this document and all attachments to be served on all parties by the CM/ECF system.

April 18, 2018

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