**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 *et al*.,<br><br>Defendants. | Civ. A. No. 11-00477 (RJL)<br><br>**ORAL ARGUMENT REQUESTED** |

**PLAINTIFF SHIRLEY SHERROD'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND**

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## INTRODUCTION

The sole issue for the Court is whether Defendants Breitbart and O'Connor, having repeatedly and publicly stated that their co-defendant John Doe can be found in Georgia (destroying complete diversity), may ignore those admissions, and their own knowledge regarding John Doe's identity and whereabouts, in order to invoke the diversity jurisdiction of the federal courts. The answer to that question is "no." Defendants Breitbart and O'Connor should not be permitted to manipulate the Court's subject matter jurisdiction — and unilaterally determine the forum for this case — by selectively disclosing facts regarding their co-defendant's identity and whereabouts. Accordingly, the case should be remanded.

This case involves straightforward state-law claims among non-diverse parties. As explained in detail in the Complaint, Defendants defamed Mrs. Sherrod (a citizen of Georgia), cast her in a false light, and intentionally inflicted emotional distress when they published, to a worldwide internet audience, false statements asserting, among other things, that Mrs. Sherrod "discriminates against people due to their race" in performing her official federal duties. *See generally* Complaint (Ex. A). Defendants drew false support for this claim from a video recording of a speech Mrs. Sherrod gave, which Defendants deceptively edited to create the false appearance that Mrs. Sherrod was admitting present-day racism against individuals who came to her for her assistance as a USDA official.

Notably for this motion, Defendant Breitbart has freely admitted on more than one occasion that Defendant O'Connor and he obtained the video recording from "***an individual in Georgia***" — Defendant John Doe — who, according to Defendant Breitbart, was directly involved in the deceptive editing of the video clip and encouraged its publication. The Complaint thus states valid claims against each of the three Defendants — Breitbart, O'Connor, and Doe — based in large part on Defendant Breitbart's widely publicized admissions regarding

the origin and the editing of the video. First, in a televised interview, Defendant Breitbart admitted that he received the video of Mrs. Sherrod's speech from "***an individual in Georgia***" in "early April" of 2010. *See* http://www.foxnews.com/story/0,2933,597324,00.html. Later, in a separate radio interview, Defendant Breitbart again stated that the video of Mrs. Sherrod's speech came from "***a guy down in Georgia***." *See* http://www.youtube.com/watch?v=hYqr8yPMIA0. Accordingly, far from mere speculation, Mrs. Sherrod's good-faith basis for alleging that Defendant Doe is a citizen of Georgia comes directly from Defendant Breitbart's own recorded admissions.

But in their removal papers, Defendants Breitbart and O'Connor now attempt to conceal these highly relevant prior public statements reflecting Defendant Doe's citizenship, and his involvement in the underlying torts, so that they may gain entrance to federal court despite the true lack of diversity. Nowhere in their Notice of Removal does either Defendant Breitbart or Defendant O'Connor deny that John Doe is a citizen of Georgia. Instead, Defendants mechanically cite a portion of the removal statute providing that defendants sued under fictitious names shall be disregarded for purposes of removal. Various courts, however, have remanded cases involving John Doe defendants where, as here, the defendants ***know*** the identity of the "Doe" defendant, the "Doe" defendant is a real person whose presence in the case defeats complete diversity, and the complaint alleges legitimate legal claims against him. Remand is particularly appropriate here, where the claims alleged in the Complaint against Defendant Doe (and vital information reflecting Doe's citizenship) come directly from Defendant Breitbart's own public statements regarding Doe's role in defaming Mrs. Sherrod.

Alternatively, given the Defendants' prior public statements and clear knowledge of the facts regarding John Doe's identity and citizenship, the Court should order limited jurisdictional

discovery for the sole purpose of identifying the citizenship of John Doe and determining with certainty whether subject matter jurisdiction exists. Such discovery should occur before this Court is forced to expend its resources on motions practice and discovery that may only be duplicated or interrupted by an eventual remand.

## ARGUMENT

### I. Because Defendants Have Repeatedly Admitted John Doe's Citizenship And Role In The Defamation Of Plaintiff, They Are Not Permitted To Conceal This Information For Purposes of Removal.

In 1988, Congress amended the general removal statute, 28 U.S.C. § 1441(a), to address a limited problem not at issue here. Specifically, before the amendment, defendants who wanted to remove a case had to establish complete diversity between each defendant and each plaintiff even though the defendants often knew nothing of the identity of their "fictitious" co-defendants. As a result, the addition of one or more "fictitious defendants" to a case filed in state court would effect a virtual freeze on any potential removal proceedings brought by the named defendants. *See generally* David D. Siegel, Official Commentary on 1988 and 1990 Revisions of Section 1441.

This case, by contrast, poses no such problem for Defendants Breitbart and O'Connor. First, unlike the prototypical historical case where a plaintiff may have alleged baseless claims against "Does 1-100" solely to keep the case in state court, this Complaint's allegations are focused, specific, and rely directly on Defendant Breitbart's own public admissions:

- Doe is a citizen of Georgia who was directly involved in the defamation of Mrs. Sherrod; (Feb. 11, 2011 Compl. ¶¶ 2, 12 [Dkt. 1-2])
- Doe contacted Breitbart and solicited him to publish the misleading clip, not the other way around; (*id*. at ¶ 57)
- Doe sent Breitbart the tape as early as April 2010, intending that Breitbart would use the tape to suggest that Mrs. Sherrod's speech revealed racism; (*id*.)

- Breitbart could not open the initial file containing the video and, months later, contacted Doe again, directing him to "cut the pertinent information" from the full speech, *see* http://www.youtube.com/watch?v=hYqr8yPMIA0; (*id.* at ¶¶ 58, 63)

- Doe did edit the tape, sent it back to Breitbart for publication, and additionally posted his own version of the edited clip on YouTube as early as July 15, 2010, thus playing a central and pivotal role in creating the defamatory blog post. (*id.* at ¶ 58).

In other words, John Doe is not some hypothetical, extraneous defendant whose relationship to the case is unknown and speculative; he is the individual who, according to ***Defendant Breitbart's*** public statements, actually edited the tape to falsely suggest that Mrs. Sherrod was exercising her federal job duties in a racist manner.

Second, unlike the pre-1988 cases where defendants may have been at a loss to guess their unknown "fictitious" co-defendants, in this case Defendants Breitbart and O'Connor are the ***only*** parties with knowledge of who John Doe is and where he lives. Thus, it is uniquely within the Defendants' power to ensure that this case is rightly before a court with subject matter jurisdiction. Were this case to remain in federal court, Defendants Breitbart and O'Connor would benefit from their own concealment by manipulating federal subject matter jurisdiction and proceeding in their chosen forum.

Numerous district courts across the country have agreed that remand is appropriate in situations such as this — where the unnamed defendant is a real person, who is alleged with specificity in the complaint, and is known to the other defendants. In *Khorozian v. Hudson United Bancorp*, Civ. No. 06-2798 (WHW), 2007 WL 38697 (D.N.J. Jan. 4, 2007), for example, the court recognized the important distinction between unnamed defendants and truly fictitious defendants. There, the plaintiff brought suit against "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), XYZ Corps (1-100)." *Id.* at *1. The plaintiff claimed that some

of these unidentified defendants were residents of New Jersey, and therefore destroyed complete diversity. *Id*. at *2. The court, however, concluded that the citizenship of "John Does (1-100)" and "XYZ Corps (1-100)" should not be considered under § 1441(a) because they had been sued under fictitious names, explaining that the plaintiff merely "put[] them in the caption, without including any corresponding allegations in the complaint. This is not enough to destroy diversity." *Id*. at *3. The court, however, distinguished the other unnamed defendants because they were "***not*** clearly fictitious under section 1441." *Id*. (emphasis added). The court explained that it "has not found, nor does [named defendant] offer, any precedent for disregarding these defendants' citizenship in a motion for remand," and added, "[e]ven if the Court determines that these defendants are equivalent to John Doe defendants, the complaint contains allegations that identify them to some extent." *Id*. Accordingly, the court remanded the case.

Similarly, the court in *Tompkins v. Lowe's Homes Center, Inc*., 847 F. Supp. 462 (E.D. La. 1994), took the complaint's specific allegations into account in deciding to remand. The court found that while the citizenship of defendants sued under fictitious names should generally be disregarded, the court should consider the citizenship of a fictitious defendant when "plaintiffs' allegations give a definite clue about the identity of [the] fictitious defendant by specifically referring to an individual who acted as a company's agent." *Id*. at 464.

Likewise, courts have found it to be significant when the named defendant is in a better position than the plaintiff to know the citizenship of John Doe. In *Brown v. Trans-South Financial Corporation*, 897 F. Supp. 1398 (M.D. Ala. 1995), the court was faced with a situation where the named defendant knew or should have known the fictitious defendant's identity. The court explained: "It would be unfair to force the plaintiff[] from [her] state court forum by allowing [the named defendant] to plead ignorance about the defendant-employee's identity and

citizenship when [the named defendant] was in a position to know that information." *Id*. at 1401-02. Accordingly, the court considered the citizenship of the "fictitious defendant" and remanded the case. *Id*. at 1402, 1403; *see also Tompkins*, 847 F. Supp. at 464 (finding remand to be proper when defendant was in the best position to know co-defendant's identity); *Bryant v. Hardees Food Sys., Inc*., No. 3:99CV109-P-A, 1999 WL 33537223 (N.D. Miss. Nov. 4, 1999) (same); *Musial v. PTC Alliance Corp*., No. 5:08CV-45R, 2008 WL 2559300, at *4 (W.D. Ky. June 25, 2008) ("[T]his Court finds that it would be unfair to Plaintiffs to force them from their chosen state court forum into federal court by allowing Defendant PTC to plead ignorance about the identity and citizenship of their employee Defendant 'John Doe.'"); *Marshall v. CSX Transp. Co*., 916 F. Supp. 1150, 1152 (M.D. Ala. 1995) ("[T]he fact that the defendant was in a better position than the plaintiff to ascertain the citizenship of the non-diverse defendant at the commencement of the action in state court is a factor that weighs in favor of considering a fictitious defendant's citizenship for diversity purposes."); *Lacy v. ABC Ins. Co*., No. Civ. A. 95-3122, 1995 WL 688786, at *3 (E.D. La. Nov. 17, 1995) ("[D]efendant was in a better position than plaintiff to ascertain the citizenship of these employees at the commencement of the action, and could have divined the questionable nature of the removal.").

Here, there can be no question that the Complaint alleges specific information about John Doe — including his citizenship, his communications with Defendant Breitbart, and the specific role he played in the defamation — all based on Defendant Breitbart's own public statements. Additionally, there is no doubt that Defendant Breitbart (and presumably Defendant O'Connor as well) knows John Doe's identity and his citizenship. As the cases cited above repeatedly emphasize, it would be unfair to Mrs. Sherrod to allow Defendants to plead ignorance now. That is especially true here, where ***Defendant Breitbart has already publicly and repeatedly stated***

***that John Doe is from Georgia***. Under these circumstances, this case is properly before the D.C. Superior Court and should be remanded.

## II. In The Alternative, Limited Jurisdictional Discovery Is Warranted To Determine Subject Matter Jurisdiction.

The Plaintiff believes that, on the basis of Defendant Breitbart's own statements and the authority cited above, there is a strong basis for remand without the need for discovery. But if the Court is inclined to disagree, in the alternative, the Plaintiff requests the Court to authorize limited, targeted jurisdictional discovery to determine the identity and citizenship of John Doe so that the parties and the Court can ensure that the Court has subject matter jurisdiction before the case proceeds further.

It is well-established that the Court has the power to order discovery to determine its own jurisdiction. *See, e.g.*, *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Ilan-Gat Engineers Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 239 (D.C. Cir. 1981) ("Assuming that the alien citizenship of [defendant] made subject matter jurisdiction doubtful, the court should still have been guided by the principle that courts always have jurisdiction to determine their jurisdiction. The court has power to compel discovery on jurisdictional issues, and can impose sanctions such as costs and fees even in the absence of subject matter jurisdiction.") (internal citations omitted). Indeed, this Court has repeatedly ordered such discovery to confirm or disprove subject matter jurisdiction. *See, e.g.*, *Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1, 1 (D.D.C. 2004); *Doe v. Bin Laden*, 580 F. Supp. 2d 93, 96 (D.D.C. 2008); *see also Avery v. Doe*, No. Civ.A. 96-8247, 1997 WL 88915, at *1 (E.D. Pa. Feb. 21, 1997) (granting discovery to determine citizenship of John Doe) ("A reading of the averments of complaints suggests that the plaintiff genuinely intends to proceed against John

Doe. It seems plain therefore, at least at this stage, that John Doe is not a fictitious or a sham party. 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.") (internal citation omitted).

Here, only limited discovery would be needed to confirm the statements that Defendant Breitbart has already made — specifically, the citizenship and, if necessary at this stage, the identity of John Doe. The Plaintiff anticipates that this limited discovery will confirm what Defendant Breitbart has already admitted: that Mr. Doe is a citizen of Georgia. Allowing discovery for this purpose will save judicial and party resources by ensuring that this case is properly before a court with subject matter jurisdiction. Given the limited scope, such discovery would be especially appropriate in this instance to determine whether federal subject matter jurisdiction does, in fact, exist.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this case be remanded to D.C. Superior Court, where it was filed. In the alternative, Plaintiff requests limited jurisdictional discovery to confirm whether this Court has subject matter jurisdiction over this case.

Dated: April 4, 2011

Respectfully submitted,

/s/ Peter A. Farrell

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