

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

Case No. 03-Civ-80515-Hurley/Lynch

KATY JOHNSON,

Plaintiff,

vs.

TUCKER MAX,

Defendant.

DEFENDANT'S MOTION FOR EXPEDITED DISCOVERY  
OF DISPUTED JURISDICTIONAL FACTS AND FOR MODIFICATION  
OF ORDER SETTING EXPEDITED BRIEFING SCHEDULE  
AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Pursuant to S.D. Fla. L.R. 7.1, Defendant Tucker Max hereby moves for entry of an Order granting leave to conduct expedited discovery of disputed jurisdictional facts and modifying the Order Setting Expedited Briefing Schedule issued by the Court on June 19, 2003. In support hereof, Defendant states:

Factual Background

On June 6, 2003, Defendant removed this action to this Court on the basis of both diversity and federal question jurisdiction. On June 13, 2003, Defendant responded to the Complaint by filing a Motion to Dismiss. Thereafter, on June 17, 2003, Defendant filed an Emergency Motion to Dissolve *Ex Parte* Temporary Injunction (the "Motion to Dissolve"), requesting the Court to dissolve a temporary injunction that was obtained by Plaintiff on an *ex parte* basis in the state court prior to removal.

On June 19, 2003, the Court *sua sponte* issued its Order Setting Expedited Briefing (the “Briefing Order”) requiring Defendant to file a supplemental brief containing “summary-judgment-type” evidence on the issue of subject matter jurisdiction by Monday, June 30, and requiring Plaintiff to file any brief in response by July 10. Later in the day on June 19, Plaintiff served its Motion for Remand upon Defendant. Apparently, however, the Motion for Remand was not filed with the Court until after the Court had already issued the Briefing Order.

Finally, on June 23, Defendant filed its Notice of Mootness regarding the Motion to Dissolve, indicating that under Supreme Court precedent the *ex parte* temporary injunction expired by operation of law on June 20.

### Argument

#### I. Discovery of Disputed Jurisdictional Facts Is Warranted

While discovery matters are generally left to the discretion of the District Court, that is not the case, in this Circuit, when it comes to discovery of disputed jurisdictional facts. *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 729 (11th Cir. 1982) (“We have held that such jurisdictional discovery is not entirely discretionary, and this appears to be the better view.”) (citing cases). In *Eaton*, the Court of Appeals reversed the trial judge’s refusal to grant the plaintiff leave to conduct discovery of disputed facts regarding the issue of subject matter jurisdiction. *Id.* at 731 (stating that district court must provide “an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction”). *See also, Chalwest (Holdings) Limited v. Ellis*, 924 F.2d 1011, 1014 (11th Cir. 1991) (stating that an evidentiary hearing may be required to resolve disputed jurisdictional facts). Accordingly, where there are critical facts in dispute on the issue of subject matter jurisdiction, courts in this Circuit should permit limited discovery on the issue.

The fact that *Eaton* involved the right of a plaintiff, rather than a defendant, to take discovery of disputed jurisdictional facts is of no moment. First of all, as a general principle and issue of fundamental fairness, the discovery rules are not supposed to favor one party over the other. Second, just like the plaintiff in *Eaton*, Defendant here has the burden of establishing the Court's subject matter jurisdiction by a preponderance of the evidence, and therefore the need for jurisdictional discovery is the same. *See also, Majd-Pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901, 903 (11th Cir. 19874) ("plaintiff bears the burden of proving the court's jurisdiction [and] should be given the opportunity to discover facts that would support his allegations of jurisdiction") (reversing for refusal to allow jurisdictional discovery).

Indeed, one recent federal court specifically noted that the distinction between plaintiff and defendant on this issue is "immaterial." *See Nettles v. Hyman*, 2000 WL 1182808, \*2 n.4 (S.D.N.Y. 2000) ("this distinction is immaterial because the need for discovery is the same"). Citing *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.23d 291, 298 (2d Cir. 2000), a removal case, the *Nettles* court stated:

[T]he fundamental principle remains applicable [despite *Mehlenbacher* being a removal case], that courts should be wary of entering judgment before the parties have been provided with some opportunity to review whatever evidence may exist of the amount in controversy.

*Id.*

Another reason *Eaton* is applicable here is that if Defendant is denied discovery on the disputed jurisdictional facts, Defendant could (assuming *arguendo* there is no federal question jurisdiction) be denied his statutory right to a federal forum and left to proceed in state court. That is the same fate that the *Eaton* plaintiff faced, because a dismissal of a plaintiff's complaint for lack of jurisdiction is without prejudice, and the plaintiff there would also have been with no recourse but to proceed in state court.

Moreover, the Eleventh Circuit has specifically held in the removal context that a removing defendant has the right to substantiate allegations regarding the amount in controversy with “summary-judgment-type” evidence when the plaintiff’s complaint is inconclusive regarding the amount in controversy. *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001). The Eleventh Circuit in *Williams* went on to state that where the jurisdictional amount is not facially apparent from the complaint – which it is not in this case – the district court “may require evidence relevant to the amount in controversy.” *Id.* The Court then found the record before it to be “inconclusive” on the amount in controversy, stating:

The district court made no factual findings on the amount in controversy, and neither [plaintiff] nor [defendant] submitted any evidence relevant to the issue.

*Id.* at 1320. As a result, the Eleventh Circuit then remanded the case to the district court “for factual findings on the amount in controversy if the amount in controversy cannot be clearly determined by a review of the record.” *Id.* at 1321.

In view of *Williams*, it is manifest that Defendant should be given some reasonable opportunity to obtain evidence relevant to the amount in controversy directly from Plaintiff. Without such discovery, this Court will be deprived of the evidence upon which to make the factual findings regarding the amount in controversy that are required by the Eleventh Circuit.

In fact, Plaintiff’s actions here present an even more compelling case for discovery of disputed jurisdictional facts. This is because Plaintiff’s Motion for Remand is unabashedly evasive about telling Defendant or the Court how much Plaintiff is seeking in damages, and about the value of the injunctive relief requested in this case. In fact, Plaintiff makes no affirmative statements regarding the amount in controversy in the Motion for Remand. Considering that the Court’s Briefing Order states that Plaintiff’s representations regarding the amount in controversy are entitled to some deference (*see* Briefing Order at 2), Plaintiff’s failure

to make any such representations – not just in the Complaint, but also in the Motion for Remand – is therefore quite telling. By way of example and illustration, Plaintiff could have supported the Motion for Remand with facts showing that Plaintiff’s damages could not exceed \$75,000 because her income is *de minimus* or because her earning capacity was not affected by Defendant’s actions. Instead, however, Plaintiff has concealed facts relevant to the amount in controversy. Such an approach is not only unfair to Defendant, but also deprives the Court of any meaningful ability to make an informed decision – and the required findings of fact – regarding its subject matter jurisdiction.

As one of our sister courts aptly held in a highly analogous case:

The Plaintiff should not be allowed to rob [defendant] of its right to removal by demanding such damages as may be “fairly ascertained by the jury.” Permitting such practice allows the Plaintiff to “have his cake and eat it too.” In other words, the Plaintiff effectively prevents federal jurisdiction by failing to demand a specific monetary figure, while making it possible for the jury to return a verdict well in excess of [the jurisdictional minimum]. Such an approach is simply unfair and will not be permitted by this Court.

*Steele v. Underwriters Adjusting Co., Inc.*, 649 F. Supp. 1414, 1416 (M.D. Ala. 1986) (emphasis added). Accordingly, the *Steele* court ordered the parties to conduct expedited discovery on the amount in controversy issue, reasoning:

A period of discovery which has as its sole purpose the determination of the amount in controversy would clarify the jurisdictional question in this case. This will give the Defendant an opportunity to submit requests for admissions, etc., in an effort to require Plaintiff to be specific regarding the value of Plaintiff’s case. It will also give the Plaintiff an opportunity to submit an affidavit admitting that his case is worth less than [the jurisdictional minimum], if that was, in fact, what Plaintiff was attempting to do in his motion for remand.

*Id.* at 1418.

Defendant respectfully submits that this Court should follow the Eleventh Circuit’s decision in *Williams* and the highly analogous case of *Steele* and require the submission of

evidence following expedited, limited discovery that Defendant requests herein so as to be able to make factual findings on the amount in controversy with at least a reasonably complete record. *See also, Auvil v. CBS*, 140 F.R.D. 450, 451-52 (E.D. Wash. 1991) (ordering discovery in removal case on the amount in controversy even where plaintiff stipulated to less than the jurisdictional minimum); *Garbin v. Gulf South Pipeline Co. LP*, 2001 WL 1386067, \*2 (E.D. La. 2001) (ordering jurisdictional discovery on amount in controversy as a predicate to consideration of motion for remand).

So that the Court is clear, Defendant firmly expects and anticipates that limited discovery will categorically demonstrate that more than \$75,000 is at stake in this case. For example, Defendant proposes to take discovery of Plaintiff in order to ascertain her income level and the value of the “career opportunities” that she claims she lost, and is losing, due to Defendant’s alleged conduct. Additionally, and also by way of example and not limitation, Defendant proposes to take discovery of Plaintiff regarding the “battery” alleged in the Complaint, in order to ascertain the nature of Plaintiff’s alleged injuries; of Plaintiff’s alleged embarrassment and reputation damage; of the truth or falsity of Defendant’s essay about Plaintiff (since if it is false her damages would be greater); and of whether Plaintiff is claiming punitive damages. Clearly, each of these categories of information is highly relevant to the amount in controversy, and the discovery obtained will undoubtedly establish beyond a preponderance of the evidence that the jurisdictional minimum is met here.

In conclusion, inherent in the right to submit “summary-judgment-type” evidence in support of removal is the right to conduct some discovery on the issue, especially where, as here, the critical facts are in dispute and, in fact, are being concealed by Plaintiff. Similarly, inherent in the Court’s obligation to make factual findings on the issue of the amount in controversy is the

obligation to afford the parties some reasonable opportunity to gather and present to the Court all relevant evidence necessary for the determination. To be certain, Defendant is not arguing that discovery is a matter of right in every removal case, since the “summary-judgment-type” evidence standard recognized by the Eleventh Circuit in *Williams* is itself limited to cases where (like this one) the plaintiff’s complaint is facially inconclusive regarding the amount in controversy. Here, in light of Plaintiff’s lack of disclosure (or even assertion) of the relevant facts, the requested discovery would not only be useful, but necessary to the Court.

For these reasons, Defendant requests leave of Court to conduct expedited discovery on the limited issue of the amount in controversy. Defendant specifically requests leave to serve written discovery requests upon Plaintiff no later than one (1) week from the date of an order on this motion, and that Plaintiff be required to respond two (2) weeks later. Defendant then would have the ability to conduct depositions of Plaintiff and her business manager(s) during the two (2) week period following the written responses (or earlier if practicable), assuming the availability of the witnesses and Plaintiff’s counsel. No later than 10 days after the deposition(s), Defendant would then respond with its memorandum in opposition to the Motion for Remand, and attach the “summary-judgment-type” evidence obtained from the discovery. Plaintiff can then file a reply memorandum under the normal time frame, if she desires.

## II. Modification of Briefing Order

In light of the filing of the Motion for Remand (which occurred after issuance of the Briefing Order), Defendant respectfully requests that the Briefing Order be modified in the interests of judicial economy. If no modification is made, then a duplicative set of briefs that the parties need not write, and the Court need not read, will nonetheless be filed. This is because

Defendant will now be filing a separate response to the Motion for Remand, and Plaintiff most likely a reply memorandum in support of the remand motion.

Moreover, the exigent circumstances that appear to have prompted the Briefing Order, namely Defendant's Emergency Motion to Dissolve and the Court's resulting need to confirm its jurisdiction on an expedited basis before dealing with the injunction on the merits, no longer exist. The exigent circumstances no longer exist because the Motion to Dissolve is now moot.

Accordingly, the jurisdictional issues can be briefed in the normal, with Defendant simply filing a response to the Motion for Remand (following the jurisdictional discovery of disputed facts discussed above), and then Plaintiff filing a reply memorandum in due course. Defendant respectfully submits this will be much less burdensome and expensive to the parties, and far easier for the Court to digest, than two (2) sets of briefs from both sides.

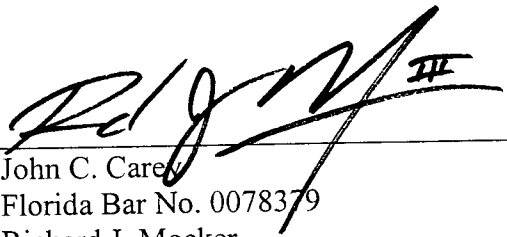
### **Conclusion**

For the foregoing reasons, Defendant respectfully requests entry of the attached proposed Order allowing expedited discovery on the limited issue of the amount in controversy and modifying the briefing schedule on the issue of subject matter jurisdiction.

Dated: June 25, 2003

Respectfully submitted,

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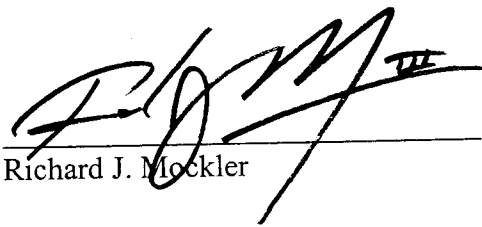
**Counsel for Defendant**

**LOCAL RULE CERTIFICATION**

Pursuant to S.D. Fla. L.R. 7.1, Defendant's counsel conferred with Plaintiff's counsel prior to the filing of this motion in an attempt to resolve by agreement the relief requested herein, but was advised that Plaintiff does not agree.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served by facsimile and United States mail this 25th day of June, 2003, on **Michael I. Santucci, Esq.**, Law Offices of Michael I. Santucci, P.A., Counsel for Plaintiff, 500 West Cypress Creek Road, Suite 500, Fort Lauderdale, Florida 33309.

  
Richard J. Mocker

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

Case No. 03-Civ-80515-Hurley/Lynch

KATY JOHNSON,

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**ORDER**

**THIS CAUSE** is before the Court on the Defendant's Motion for Expedited Discovery of Disputed Jurisdictional Facts and Modification of Order Requiring Expedited Briefing, filed June 25, 2003.

Having considered the motion, the file and being otherwise duly advised in the premises, it is hereby **ORDERED AND ADJUDGED** that the motion is **GRANTED**.

Defendant is granted leave to conduct expedited discovery relating to the issue of subject matter jurisdiction. Defendant shall serve any written discovery requests relating to subject matter jurisdiction within one (1) week of this Order. Plaintiff shall respond to such written requests within two (2) weeks of service. No later than two (2) weeks following service of Plaintiff's responses to the written discovery requests, Defendant shall take any depositions upon oral examination of Plaintiff, or any necessary and relevant non-party witness. Given this expedited schedule, the parties and their counsel are strongly encouraged to attempt to resolve by

agreement any disputes that might arise during discovery. Failure to act in good faith in this regard may result in the imposition of sanctions, including attorneys' fees and costs.

It is further **ORDERED AND ADJUDGED** that the Order Requiring Expedited Briefing dated June 19, 2003 is hereby **MODIFIED**, as follows: Defendant shall file and serve its response to Plaintiff's Motion for Remand within ten (10) days of the conclusion of the discovery period set forth above. Plaintiff may thereafter submit a reply memorandum within the time period provided in Local Rule 7.1. No other briefs on the issue of subject matter jurisdiction shall be filed by the parties unless otherwise ordered by this Court.

**DONE AND ORDERED** in Chambers at West Palm Beach, Florida this \_\_\_\_ day of June, 2003.

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HONORABLE DANIEL T. K. HURLEY  
UNITED STATES DISTRICT JUDGE

Copies furnished:

Michael I. Santucci, Esq.  
John C. Carey, Esq.