UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

CAROL BETH DAVIS, Plaintiff, v. GOOGLE INC., and AMAZON.COM, INC., d/b/a ZAPPOS.COM, INC. Defendants.	§ § § § § § § § § § § § §	Civil Action No. _____

DEFENDANT GOOGLE INC.'S NOTICE OF REMOVAL

Defendant Google Inc. ("Google") hereby removes this action to this Court from the Bowie County, State of Texas, pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446, and, to the extent required, reserves any and all rights, objections, and defenses, and respectfully shows this Honorable Court as follows:

I. FACTUAL BACKGROUND

1. Google is the named Defendant in Civil Case No. 12C0247-102, filed in the Judicial District Court of Bowie County, Texas (the "State Court Action").

2. Plaintiff's Petition for Declaratory Judgment (the "Petition") in the State Court Action was filed on or about February 13, 2012. Google was served with the Petition on February 23, 2012, when it accepted service via email from Plaintiff's counsel.

3. Plaintiff filed her First Amended Petition for Declaratory Judgment on March 13, 2012 (the "Amended Petition").

4. This Notice is being filed with this Court within thirty (30) days after Google received a copy of Plaintiff's initial pleading setting forth the claims for relief upon which

Plaintiff's action is based.

5. In accordance with 28 U.S.C. §1446(a), attached hereto are true and complete copies of all process, pleadings, and orders served upon Google in the State Court Action. These documents include the Petition (Ex. 1), Amended Petition (Ex. 2), Plaintiff's Requests For (1) Admissions And (2) Interrogatories Propounded To Defendant Google, Inc. (Ex. 3). Also attached in support of this Notice, are true and correct copies of the Second Amended Complaint (without exhibits) and an Order Denying Plaintiff's Motion for Preliminary Injunction on file in Keith Dunbar, Individually, and as Representative on Behalf of Similarly Situated Persons v. Google Inc., No. 5:10-CV-00194 (E.D. Tex.) (Exs. 4 and 5, respectively), email correspondence between Plaintiff's counsel and Defendant's counsel (Ex. 6), the Complaint for Declaratory Judgment in Sheppard v. Google, No. CV2012-11-2, in the Circuit Court of Little River County, Arkansas (Ex. 7) and a certified copy of the State Court Action docket sheet (Ex. 8).

6. Venue is proper in this Court pursuant to 28 U.S.C. §1441 because the Eastern District of Texas is the federal judicial district encompassing the District Court of Bowie County, Texas, where this suit was originally filed.

II. FEDERAL QUESTION JURISDICTION

7. This Court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. Pursuant to 28 U.S.C. §1441(b), "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

8. Defendant is entitled to remove this action pursuant to 28 U.S.C. §1441 because it arises under federal law, giving this Court original jurisdiction pursuant to 28 U.S.C. §1331.

9. District courts have original jurisdiction when Congress "so completely preempts

a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Elam v. Kansas City S. Ry. Co., 635 F.3d 796, 803 (5th Cir. 2011). Federal question jurisdiction may also exist when state law claims turn on substantial questions of federal law. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005). In making the jurisdictional assessment, "[c]ourts look past words in the complaint to the substance of the claim alleged, in order to determine whether the claim actually arises under federal law." Woodrow v. Inland Paperboard & Packaging, Inc., 2005 WL 6482749, *2 (E.D. Tex. Jul 21, 2005) (Hines, J.) (emphasis in original).

A. Plaintiff's Amended Petition is artfully pleaded in an attempt to avoid ECPA.

10. Although Plaintiff's Amended Petition purports to plead state law claims, plaintiffs "do not enjoy absolute self-determination" in whether districts courts have original jurisdiction. Id. The Fifth Circuit requires district courts to "disregard artful language in complaints, when such language is designed to restrict potential implementation of federal jurisdiction." Id.

11. Plaintiff artfully pleads under the Texas Declaratory Judgment Act a request "to determine: the rights and status of the parties with regard to Plaintiff's claim of proprietary ownership in certain data of her electronic mail (hereinafter "email") prior to the receipt of the email by the recipients who are Gmail[1] account holders of the Defendant, Google, Inc." (Am. Petition at ¶2.a.).[2] Plaintiff also requests supplementary relief under Texas State law relating to conversion, theft, forgery and breach of computer security, and further asks that Google "be required to provide and disclose to the Court and Plaintiff all uses it makes of Plaintiff's data for

[1] Gmail is Google's free email service enjoyed by millions throughout the world.

[2] Plaintiff initially pleaded for declaratory relief as to "the rights and status of the parties with regard to Plaintiff's claim of proprietary ownership in all data of her electronic mail (hereinafter "email") prior to the receipt of the email by the recipients who are Gmail account holders of the Defendant, Google Inc." (Petition at ¶2.a.) (emphasis added).

purposes of Gmail, and, after March 1, 2012, any other uses by Google for any other services offered by Google." (Id. at ¶36.a.-e.).

12. However, a review of Plaintiff's Amended Petition reveals that Plaintiff's alleged claims and allegations fall within the Electronic Communications Privacy Act ("ECPA"). The Wiretap Act and the Stored Communications Act ("SCA") are both part of ECPA, and play complementary roles in Congress's regulatory scheme. 18 U.S.C. §2511 et seq.; 18 U.S.C. §2701 et seq. Under ECPA, an email may either be intercepted and actionable under the Wiretap Act or acquired while in electronic storage and actionable under SCA, but not both. Steve Jackson Games, Inc. v. U.S. Secret Service, 36 F.3d 457, 462-63 (5th Cir. 1994).

13. The Wiretap Act imposes liability on a person who (1) intentionally (2) intercepted (or used knowing or having reason to know the information was obtained through interception)[3] (3) the contents of (4) an electronic communication (5) using a device and (6) that no statutory exceptions apply. 18 U.S.C. §2511(1)(a), (d). Additionally, there is no violation of the Wiretap Act when the interception occurs with the consent of just one of the parties to the communication. 18 U.S.C. §2511(2)(d). In other words, the Wiretap Act's key elements are "interception" or "use" of the contents of an email and an important exception is the "consent" of one party to the communication.

14. SCA imposes liability on a person who (1) intentionally (2) accesses (3) without authorization or by exceeding an authorization (4) a facility through which an electronic communication service is provided and (5) thereby obtains, alters, or prevents authorized access to (6) an electronic communication (7) while it is in electronic storage. 18 U.S.C. §2701(a).

[3] Specifically, ECPA provides liability for any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" and "intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. §2511(1)(a), (d).

Thus, "access" and "without authorization" represent key elements of an SCA claim.

15. As indicated above, a number of Plaintiff's counsel are all too familiar with this statute, as they have spent more than a year prosecuting a putative class action solely under ECPA on behalf of a putative class of non-Gmail users against Google relating to the exact same conduct alleged here. Keith Dunbar, Individually, and as Representative on Behalf of Similarly Situated Persons v. Google Inc., Cause No. 5:10-CV-00194 (E.D. Tex.) ("Dunbar v. Google").[4] On March 16, 2012, Judge Folsom denied certification.

16. In addition, on February 1, 2012, Plaintiff's lead counsel filed a nearly identical suit to the present case in Arkansas on behalf of another plaintiff, styled Sheppard v. Google, No. CV2012-11-2, in the Circuit Court of Little River County, Arkansas. (Ex. 7). One week after Google removed the Sheppard case to the Western District of Arkansas on the grounds of federal question (asserting complete preemption under ECPA) and diversity, Plaintiff amended her petition in this action to attempt to artfully disclaim an ECPA claim. (Am. Petition at ¶8). Rather than correct the deficiency, Plaintiff's amended pleading only emphasizes her counsel's awareness of the clear application of ECPA.

17. As demonstrated below, Plaintiff's Amended Petition pleads and indeed recognizes the necessity of ECPA findings, either under SCA or the Wiretap Act, to any relief she might request:

a. Plaintiff claims that there is an interception of Plaintiff's email while the email is in transit to the Gmail user by alleging: "Prior to receiving Plaintiff's emails, Gmail users are

[4] For example, in Dunbar v. Google, the Second Amended Complaint alleges "Google scans the content of all electronic communications received by Gmail account holders . . . Google intercepts all electronic communications sent to Gmail account holders . . . Google uses the information and content obtained from the scanning of incoming electronic communications to sell and place in certain account holders' browser windows advertisements that are related to the content and meaning of intercepted electronic communications." (Ex. 4, at ¶7). It further alleges: "No party to the electronic communications sent by Plaintiff and the Class Members as made the basis of this suit consented to Google's interception or use of the contents of the electronic communications." (Ex. 4, at ¶226). It also sought "[a]ppropriate declaratory relief." (Ex. 4, at ¶227.b.).

without authority to grant any person rights to, license to, use of, or any control over Plaintiff's property interest in the Plaintiff's data" (Am. Petition at ¶ 22) (emphasis added); and "Plaintiff seeks from this Court a declaration that … all data in Plaintiff's email header fields, prior to the receipt of that email by a Gmail user, is the sole personal property of Plaintiff" (Id. at ¶ 32) (emphasis added). Plaintiff alleges an interception under the Wiretap Act, see 18 U.S.C. §2511(1)(a);[5]

b. Plaintiff also claims that Google uses or accesses Plaintiff's email by alleging: "Google uses Plaintiff's data in these header fields in connection with various activities" (Am. Petition at ¶15) (emphasis added), "Google has exercised control and will continue to exercise control over Plaintiff's data" (Id. at ¶18) and "Plaintiff seeks from this Court a declaration that Google has no ownership interest in or property rights in Plaintiff's data" (Id. at ¶33).[6] Plaintiff thus pleads use or access under ECPA, see 18 U.S.C. §2511(1)(d), §2701(a).

c. Plaintiff claims she has not consented to any interception or authorized any access to her emails, by alleging: "Plaintiff has not authorized Google to in any way exercise control of Plaintiff's data for any purpose" (Am. Petition at ¶21).[7] Plaintiff clearly seeks to avoid the statutory exception of consent to interception, see 18 U.S.C. §2511(2)(d), or to affirmatively allege access without authorization, see 18 U.S.C. §2701(a); and

[5] In her original Petition, Plaintiff also alleged: "Prior to the Gmail users ever receiving Plaintiff's email, Google takes data from Plaintiff's email" (Petition at ¶11), "Prior to the Gmail user ever receiving Plaintiff's email, Google uses Plaintiff's data" (Id. at ¶12), "Google's exercise of control of Plaintiff's data occurs prior to the Gmail user's receipt" (Id. at ¶17), "Google has exercised control . . . by taking data from Plaintiff's email prior to those emails being received by Gmail users" (Id. at ¶18) and "Plaintiff seeks from this Court a declaration that (a) all data in Plaintiff's email, prior to the receipt and review of that email by a Gmail user, is the sole personal property of Plaintiff" (Id. at ¶32).

[6] In her original Petition, Plaintiff also alleged: "Google takes data from Plaintiff's email" (Petition at ¶11), "Google uses Plaintiff's data" (Id. at ¶12) (emphasis added), "Google generates income from advertisers as a result of taking Plaintiff's data from Plaintiff's email and using Plaintiff's data to deliver advertisements to the Gmail user when the Gmail user opens the email" (Id. at ¶13), "Google's exercise of control of Plaintiff's data" (Id. at ¶17), "Google has exercised control and will continue to exercise control over Plaintiff's data by taking data from Plaintiff's email" (Id. at ¶18), and "Plaintiff seeks from this Court a declaration that Google has no ownership interest in or property rights in Plaintiff's data" (Id. at ¶33).

[7] Plaintiff's allegation in the original Petition was identical. (Petition at ¶21).

d. Plaintiff claims that the other party to the email communication, a Gmail user, could not consent to any interception or authorize any access, by alleging "Prior to receiving Plaintiff's emails, Gmail users are without authority to grant any person rights to, license to, use of, or any control over Plaintiff's property interest in the Plaintiff's data and value of that data contained therein" (Am. Petition at ¶22), and "Plaintiff seeks from this Court a declaration that prior to receiving Plaintiff's emails, Gmail users are without authority to grant any person rights to, license to, use of, or any control over Plaintiff's property interest in Plaintiff's data" (Id. at ¶34).[8] Here, again, Plaintiff seeks to avoid a finding of consent or authorization under ECPA, see 18 U.S.C. §2511(2)(d), §2701(a), and seeks declaratory relief under ECPA, see 18 U.S.C. §2520(b)(1), §2707(b)(1).

18. Plaintiff's attempt to artfully re-characterize her ECPA claim as various state law causes of action must be rejected. A similar attempt to avoid ECPA was rejected in Muskovich v. Crowell, 1995 WL 905403, *1 (S.D. Iowa Mar 21, 1995). There, a plaintiff's alleged state law claims of intentional infliction of emotional distress and breach of duty to protect confidentiality were found to be based on "conduct regulated by ECPA" and therefore preempted by ECPA. Id.[9]

B. ECPA completely preempts Plaintiff's state law claims.

19. While it is presently unclear whether Plaintiff pled an interception and use claim

[8] In her original Petition, Plaintiff similarly alleged: "Prior to receiving and reviewing Plaintiff's emails, Gmail users are without authority to grant any person rights to, license to, use of, or any control over Plaintiff's property interest in the Plaintiff's data and value of that data contained therein" (Petition at ¶22), "Plaintiff seeks from this Court a declaration that prior to receiving and reviewing Plaintiff's emails, Gmail users are without authority to grant any person rights to, license to, use of, or any control over Plaintiff's property interest in Plaintiff's data" (Id. at ¶34).

[9] Plaintiff's attempt to artfully plead herself out of an ECPA claim by alleging she only seeks a determination of "data" that is contained in the "envelope" or "header fields", and not the "body" of an email, must also be rejected. (See Am. Petition ¶¶12-14). Setting aside the oddity that Plaintiff now only cares about the parts of email that she admits "most users in fact rarely see" and may not even be created by Plaintiff (id. at ¶14), the distinction does not alter the fact that the conduct alleged – interception of or unauthorized access to electronic communications – is regulated by ECPA. See 18 U.S.C. §2511 et seq., §2701 et seq. Of course, whether Plaintiff's allegations are sufficient to state a claim for relief under ECPA is another matter. See FED. R. CIV. P. 12(b)(6).

under the Wiretap Act or an unauthorized access claim under SCA, the answer is of no consequence for purposes of removal. Under either provision, ECPA completely preempts Plaintiff's state law claims and presents a federal question for purposes of removal. 18 U.S.C. §2518(10)(c), §2708. To determine whether a federal statute completely preempts a state law cause of action, a court must evaluate whether Congress intended the federal cause of action to be exclusive. Elam, 635 F.3d at 803 (citing Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)). "In determining the nature and reach of federal preemption, Congress's intent is the 'ultimate touchstone.'" Id. Congressional intent can be "expressly through a statute's plain language, or impliedly through a statute's 'structure and purpose.'" Id.[10]

20. Congressional intent is plain from the statutory language of ECPA, which provides this exclusivity of remedies provision:

> The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

18 U.S.C. §2518(10)(c) (emphasis added). Nearly identical language is found in SCA, which likewise provides that the "remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. §2708 (emphasis added).

21. Muskovich is helpful here. There, the defendant removed the case to federal court on the basis that plaintiff's state law causes of action were completely preempted by SCA, 18 U.S.C. §2708. The district court in Muskovich found removal proper, and denied the

[10] Under the Fifth Circuit's prior precedent, to demonstrate complete preemption a defendant had to show that: (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific grant to the federal courts for enforcement of that right; and (3) "there is a clear Congressional intent that claims brought under federal law be removable." Hoskins v. Bekins Van Lines, 343 F.3d 769, 775 (5th Cir. 2003) (emphasis in original). However, in light of Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003), the Fifth Circuit revised and broadened the test to grant preemption when there is Congressional intent that "the federal action be exclusive." Hoskins, 343 F.3d at 775-76 (emphasis added). ECPA meets all prongs of this test. See 18 U.S.C. §§ 2518, 2520; 18 U.S.C. §§ 2708, 2707.

plaintiff's motion to remand due to complete preemption, holding:

> The clear import of section 2708 is that Congress intended for ECPA remedies to be exclusive and to preempt state law claims. . . . Plaintiff contends defendant['s] conduct constitutes intentional infliction of emotional distress under Iowa tort law. But that claim based on Iowa law concerns conduct regulated by ECPA and is therefore preempted.

Muskovich, 1995 WL 905403 at *1-2. So, here too, Plaintiff's Amended Petition requests declaratory relief and alleges either interception and use of email without consent or unauthorized access of email, and thus comes plainly within the contours of ECPA. See supra ¶¶17-18, see also Quon v. Arch Wireless Op. Co., 445 F. Supp. 2d 1116 (C.D. Cal. 2006), aff'd in part, rev'd in part on other grounds, 529 F.3d 892 (9th Cir. 2008), and rev'd and remanded, 130 S. Ct. 2619 (2010) (granting summary judgment on invasion of privacy and state constitutional claims due to express preemption under 18 U.S.C. §2708); Bunnell v. Motion Picture Assoc. of Am., 567 F. Supp. 2d 1148 (C.D. Cal. 2007) (granting summary judgment on invasion of privacy claim due to express preemption under 18 U.S.C. §2518(10)(c)).[11]

22. The remedy for the alleged conduct is not found under the Texas Declaratory Judgment Act; rather, ECPA offers the "only judicial remedies and sanctions" available to Plaintiff. 18 U.S.C. §2518(10)(c), §2708. Because Congress has "unequivocally expressed an intent to 'occupy the field' and provide the exclusive remedies for conduct regulated by ECPA," Muskovich, 1995 WL 905403 at *1, Plaintiff's state law claims for declaratory and supplementary relief are completely preempted and removal is appropriate. See also Hoskins, 343 F.3d at 777-78 (finding complete preemption of state law claims by Carmack Amendment due, in large measure, to the statute's "exclusive" and "sole remedy" provision).

[11] Although other district courts have found ECPA preemption on other grounds, see In re Google Inc. Street View Elec. Commc'ns Litig., 794 F. Supp. 2d 1067, 1084-85 (N.D. Cal. 2011), Google submits that Muskovich correctly determined that ECPA completely preempts state law claims and provides grounds for removal. Muskovich, 1995 WL 905403 at *1.

C. The Amended Petition raises a substantial federal question.

23. In the alternative, Plaintiff's Amended Petition raises a substantial federal question. Substantial federal question is another variety of federal "arising under" jurisdiction that the U.S. Supreme Court has recognized for nearly 100 years. Grable, 545 U.S. at 312. In certain cases federal-question jurisdiction will lie over state law claims that implicate "significant federal issues." Id. This Court has found that federal question jurisdiction exists where "(1) resolving a federal issue is necessary to resolution of the state-law claim, (2) the federal issue is actually disputed, (3) the federal issue is substantial, and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." Clauer v. Heritage Homeowners Assoc., Inc., 2010 WL 446545, *3 (E.D. Tex. Feb. 3, 2010) (Schneider, J.). These elements are plainly met here.

24. As demonstrated above, Plaintiff requests declaratory relief and alleges interception and use of email without consent or unauthorized access to email – all of which are essential elements of an ECPA claim. See supra ¶¶17-18. Thus, Plaintiff's state law claim under the Texas Declaratory Judgment Act raises federal issues that are necessary, actually disputed and substantial. See Grable, 545 U.S. at 312. In Grable, a single element raising an important issue under federal law was held to be sufficient to confer federal jurisdiction. Id. at 314-15. Here, Plaintiff's Amended Petition concedes not only that there are many such elements, but also that these elements so completely control the outcome of Plaintiff's case, Plaintiff does not even assert supplemental relief under state law without positive declaratory findings on those issues. (Am. Petition at ¶¶32-34). In addition, the remedies available for Plaintiff's claim are limited to ECPA. 18 U.S.C. §2518(10)(c), §2708. ECPA's exclusivity of remedies provision further demonstrates that federal jurisdiction would not disturb "any congressionally approved balance of federal and state judicial responsibilities." Grable, 545 U.S. at 314. To the contrary, federal

question jurisdiction here would be in furtherance of the express intent of Congress. See 18 U.S.C. §2518(10)(c), §2708.

25. Plaintiff's State Court Action is removable to this Court and this Court has jurisdiction over this litigation under Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510 et seq., 18 U.S.C. §2701 et seq., and 28 U.S.C. §§ 1331 and 1441.

III. DIVERSITY OF CITIZENSHIP JURISDICTION

26. This Court has "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . (1) citizens of different States. . ." 28 U.S.C. §1332(a). Pursuant to 28 U.S.C. §1441(a), "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant, or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

27. Defendant is entitled to remove this action pursuant to 28 U.S.C. §1441 because diversity jurisdiction exists, giving this Court original jurisdiction pursuant to 28 U.S.C. §1331.

A. There is complete diversity among the parties.

28. Plaintiff's Amended Petition asserts that Plaintiff is a citizen of the State of Texas, and "is a resident of Bowie County, State of Texas." (Am. Petition at ¶3). Plaintiff is a citizen of the State of Texas at the time of the filing of the Petition and of this removal.

29. Plaintiff's Amended Petition asserts that Google is a Delaware corporation with a principal place of business in California. (Am. Petition at ¶4). Google is incorporated in a state other than the State of Texas and has its principal place of business in a state other than the State of Texas and therefore is not a citizen of the State of Texas for diversity purposes.

30. Plaintiff's Amended Petition asserts that Defendant Amazon.com, Inc. is a

Delaware corporation with a principal place of business in California. (Am. Petition at ¶5). Amazon.com, Inc. is incorporated in a state other than the State of Texas and has its principal place of business in a state other than the State of Texas and therefore is not a citizen of the State of Texas for diversity purposes. There is complete diversity.

B. Amazon's consent to removal is not required.

31. When defendants have been both properly joined and served, they are generally required to consent to removal pursuant to section 1441(a). 28 U.S.C. § 1446(b)(2)(A). Neither is true as to Amazon and consent is not required.

32. First, there is no indication that Amazon has been served. The docket sheet for the State Court Action does not show that Amazon has been served, and Google is not otherwise aware of service upon Amazon. (Ex. 8). Thus, Amazon's consent to removal is unnecessary. Waffer v. City of Garland, 2001 WL 1148174, at *2 (N.D. Tex. Sep. 19, 2001) (holding that because state court case file gave no indication that non-removing defendant was served, consent to removal was unnecessary); LinkEx, Inc. v. CH Robinson Co., Inc., CH, 2011 WL 1447570, at **1-2 (N.D. Tex. Apr. 12, 2011) (denying remand and noting that even though non-removing defendant was served, state court docket sheet did not reflect service).

33. Second, Amazon is not properly joined to this action under the doctrine of fraudulent misjoinder. See Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529, 533 (5th Cir.), cert. denied, 548 U.S. 907 (2006).[12] Fraudulent misjoinder exists when the claims against the defendants are (1) improperly joined under state law and (2) "the connection between the joined claims is 'so tenuous as to justify disregarding the citizenship of the joined parties.'" Wells Fargo Bank, N.A. v. American Gen. Life Ins. Co., 670 F. Supp. 2d 555, 563 (N.D. Tex. 2009)

[12] "Fraudulent misjoinder" or "Tapscott-misjoinder" was first recognized by the Eleventh Circuit in Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996). The Fifth Circuit relied on the reasoning of the Tapscott opinion in allowing removal when it would otherwise have been barred in Crockett. See Crockett, 436 F.3d at 533; Wells Fargo Bank, 670 F. Supp. 2d at 561-62.

(citation omitted).

34. Here, joinder is governed by the Texas Rule of Civil Procedure 40, Wells Fargo Bank, 670 F. Supp. 2d at 563, which provides that defendants may be joined in the same action only if:

> (1) there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (2) at least one question of law or fact common to all of them will arise in the action.

TEX. R. CIV. P. 40(a).[13] Neither element is satisfied here.

35. There is no common occurrence as between the claims against Amazon and the claims against Google. Google and Amazon have no affiliation with one another. (Am. Petition at ¶5). Plaintiff's claims against Amazon allege theft of customer account information from the Zappos.com, Inc. network. (Am. Petition at ¶¶25-26). In contrast, the claims asserted against Google relate to the alleged unauthorized access, interception and use of purported "data in the 'envelope' and in the header fields of Plaintiff's email." (Am. Petition at ¶¶11-14). There is also no common question of law or fact. While Plaintiff artfully pleads some of the same state laws for each defendant, Plaintiff seeks separate and distinct declaratory and supplemental relief as to Amazon. (Am. Petition at ¶¶35-36). Thus, Plaintiff's Amended Petition misjoins Amazon under Texas Rule of Civil Procedure 40(a).

36. As the above makes clear, Plaintiff's claims against defendants Google and Amazon have no relation to one another. Indeed, the "connection is not just tenuous, it is non-existent." Wells Fargo Bank, 670 F. Supp. 2d at 564 (finding fraudulent misjoinder where there was no palpable connection between the claims against the defendants). As a result, Amazon has

[13] The Fifth Circuit has recognized that the joinder requirements under Federal Rule of Civil Procedure 20(a) and Texas Rule of Civil Procedure 40(a) are the same. Crockett, 436 F.3d at 533.

been fraudulently misjoined and Amazon's consent is unnecessary. Id.; see also Augustine v. Employers Mut. Cas. Co., 2010 WL 4930317, at *17 (W.D. La. Nov. 30, 2010) (denying removal and recognizing defendant had been fraudulently misjoined).

C. The amount in controversy exceeds $75,000.

37. The matter in controversy in the State Court Action easily exceeds the sum or value of $75,000, exclusive of interest and costs.[14] Against Google, Plaintiff claims she seeks a declaration of property rights in Plaintiff's data and a Court order to show why Google's acts would not amount to tortious conduct and violations of various Texas statutes. In Count I of the Amended Petition, Plaintiff contends she is entitled to a declaration of personal property interest from the Court that "all data" in "Plaintiff's email header fields" she has sent to Gmail recipients, "prior to the receipt of that email by a Gmail user, is the sole personal property of Plaintiff. . ." (Am. Petition at ¶32). Plaintiff asserts she is entitled to such declaratory relief based on common law, and the definitions of the term "property" in Texas Penal Code Ann. §§ 31.01(5), 32.01(2), and 33.01(16). (Am. Petition at ¶32a.-d.).[15] In Count II of the Amended Petition, entitled "Supplementary Relief," Plaintiff alleges: "should the Court find in favor of Plaintiff's requested declarations . . . Plaintiff respectively [sic] asks the Court to order Google . . . to show cause why further relief should not be granted forthwith, to include a demonstration by Google as to why future acts adverse to Plaintiff's property interests would not amount to:" conversion and violations of Texas Penal Code §§ 31.03, 32.21, et seq., and 33.02." (Am. Petition at ¶36 a.-d.). Plaintiff also asserts "Google should be required to provide and disclose to the Court and Plaintiff all uses it makes of Plaintiff's data for purposes of Gmail, and, after March 1, 2012, any

[14] This does not even take into account the costs associated with complying with the terms of any requested injunction order.

[15] Plaintiff also seeks declarations that "Google has no ownership interest or property rights in Plaintiff's data" (Am. Petition at ¶33), and that Gmail users have no authority "to grant any person rights to, license to, use of, or any control over Plaintiffs property interest in Plaintiff's data." (Am. Petition at ¶34).

other uses by Google for any other served offered by Google." (Am. Petition at ¶36e.).

38. In addition to declaratory and supplementary relief, Plaintiff requests the Court to "grant and award Plaintiff all other relief to which she may prove herself entitled." (Am. Petition at Prayer).

39. At the very least, a fact finder might legally conclude that damages are greater than the jurisdictional limit required for diversity jurisdiction. See Wofford v. Allstate Ins. Co., 2005 WL 755761, at *2 (N.D. Tex. Apr. 4, 2005) (denying remand where fact finder could award attorneys' fees and punitive damages above federal jurisdictional minimum). The tort claims and statutory provisions invoked by Plaintiff provide for various forms of relief. Plaintiff further demands "all other relief to which she may prove herself entitled." (Am. Petition at Prayer). The Texas Declaratory Judgment Act provides for an award of attorneys' fees to a successful litigant. TEX. CIV. PRAC. AND REM. CODE § 37.009. Where an award of attorneys' fees is provided by contract or statute, they count toward determining the amount in controversy. See Dow Agrosciences LLC v. Bates, 332 F.3d 323, 326 (5th Cir. 2003), vacated on other grounds, Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005). In addition, by seeking relief concerning conversion, Plaintiff raises the possibility of punitive damages, which also are included in determining the amount in controversy. See Dow Agrosciences, 332 F.3d at 326.[16]

40. Plaintiff purports to limit the "value of her declaratory relief and any supplemental relief . . . sought to less than $75,000." (Am. Petition at ¶6).

41. Plaintiff's allegations are ineffectual because Plaintiff has not expressly disclaimed actual damages, attorneys' fees, punitive damages, or any other damages. And, even

[16] Plaintiff further alleges: "Google uses Plaintiff's data in these header fields in connection with various activities, all of which have as their goal generating additional revenue for Google." (Am. Petition at ¶15); "Any value associated with Plaintiff's data is Plaintiff's personal property" (Am. Petition at ¶20); "Plaintiff has not authorized Google to in any way exercise control of Plaintiff's data for any purpose, but certainly not for the purpose of . . . deriving revenue from that data for Google" (Am. Petition at ¶21); and "Google has not and does not compensate Plaintiff for . . . the benefit of the value from Plaintiff's data" (Am. Petition at ¶23).

if Plaintiff's purported limitation were effective, it is incomplete. Plaintiff seeks three forms of relief: declaratory relief, supplementary relief, and an actual demand that the Court "grant and award Plaintiff all other relief to which she may prove herself entitled." (Am. Petition at Prayer). At most, Plaintiff's attempted limitation applies only to the first two types of relief, and not the third. This transparent attempt to avoid removal is unavailing, and Plaintiff's purported limitation is ineffectual.

42. Because the parties are citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds $75,000.00, this Court has diversity jurisdiction pursuant to 28 U.S.C. §1332. Accordingly, the State Court Action may properly be removed to this Court pursuant to 28 U.S.C. §1441.

43. Promptly after the filing of this Notice of Removal, Google shall provide notice of the removal to Plaintiff in the State Court Action and to the Clerk of the Court in the State Court action, as required by 28 U.S.C. §1446(d).

Wherefore, Google removes the State Court Action to federal court based on federal question jurisdiction and complete diversity of citizenship of the parties, and requests that this Court proceed with this action as if it had originally commenced in this Court and make all orders necessary and appropriate to effectuate this removal.

Respectfully submitted,

/s/ Charles L. Babcock

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ATTORNEYS FOR DEFENDANT GOOGLE INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Notice of Removal was served on the following persons on the 23rd day of March, 2012, as follows:

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