

defendants shared New York citizenship with plaintiff Weiss. WINI asserted that the case was removable nonetheless (that is, despite the absence of complete diversity) because plaintiff Weiss had been fraudulently joined.

Two days later, WINI filed a “Supplemental Notice of Removal.” In the Supplemental Notice of Removal, WINI asserted that, contrary to the allegations of the complaint, neither of the Caputo defendants was a citizen of New York. Contemporaneously with the filing of the Supplemental Notice of Removal, Michael Caputo, individually, *but not Michael Caputo Public Relations, Inc.*, filed, *pro se*, his consent to removal.¹ Moreover, Michael Caputo submitted, by way of an attachment to the Supplemental Notice of Removal filed by WINI, an affidavit (later supplemented with a further affidavit as a part of WINI’s opposition to the motion to remand), in which he argues strenuously (and convincingly) that he is and has long been a domiciliary of Florida.² Now relying on its assertion that complete diversity exists, WINI has effectively abandoned its claim of fraudulent joinder.

¹It is not entirely clear whether Michael Caputo Public Relations, Inc., has been served with process; certainly, it has not appeared in the action. Although plaintiffs assert that service on Michael Caputo Public Relations, Inc., was effected by personal service in New York, they have not filed a return of service (but they have included a purported return of service as an exhibit to their motion to remand). Moreover, not even the defendants that have appeared have filed an answer to the complaint or any Rule 12 motions. *But see* Fed.R.Civ.P. 81(c)(2)(C). This may be explained by the fact that, in addition to the motion to remand, plaintiffs have also filed an opposition to motions for admission *pro hac vice* filed on behalf of proposed counsel for WINI. (Plaintiffs assert that such counsel will be witnesses in the trial of this action.) It may be that the parties have agreed among themselves not to file answers or preliminary motions until after the remand and counsel issues are resolved.

²In view of the Caputo affidavits, the court finds that he has adequately established that at the time this case was removed, he was a domiciliary of Florida.

In their rejoinder to WINI, plaintiffs (while conceding that Michael Caputo is a domiciliary of Florida) argue that the court should not credit Michael Caputo's "self-serving" attestation that Michael Caputo Public Relations, Inc., does not have its principal place of business in, and thus is not a citizen of, New York. Plaintiffs point to the trove of evidence they have marshaled, from online sources (including Internet material posted by Michael Caputo Public Relations, Inc., itself) and otherwise, indicating that although Michael Caputo Public Relations, Inc., is a Florida corporation (apparently now dormant, *see infra* n. 3), its principal place of business is indeed in New York.³ Plaintiffs contend, further, that at a

³Plaintiffs' contentions, fully supported by admissible evidence, are as follows:

[W]hile Caputo Public Relations was originally incorporated in Florida, its "principal place of business [is] in Orchard Park, New York," a suburb of Buffalo Through Caputo Public Relations, Caputo provides services to clients, including WIN and Whitney, that include "the design and content of commercial websites" and the employment of "websites and email campaigns" to advance his clients' interests

Caputo has repeatedly been identified publicly as a resident of New York. On August 23, 2007, for example, a New York Times Article described Caputo as "a Buffalo-area Republican" and reported on e-mail campaigns that Caputo waged in New York under the names of SpitzerFile.com and NYFacts.net

On his Spitzer File website, Caputo identifies himself as editor of NYFacts, an enterprise that he claims to be "a news service," and he gives his location as "Buffalo, NY" Caputo also lists his telephone number as 716-662-6166. The telephone is located at 5820 Big Tree Road, Orchard Park, New York 14127, and the telephone number is the same number that Caputo has posted on the website of Caputo Public Relations

On his Caputo Public Relations website, Caputo gives two addresses for Caputo Public Relations The first address, and apparently the only legitimate business premises for that enterprise, is the commercial building located at 5820 Big Tree Road, Orchard Park, New York The second address, although made to appear as another business premises, is actually post office box number 332 at the Mailboxes Etc. location at 12864 Biscayne Boulevard, North Miami, Florida Caputo apparently abandoned the post office box earlier this year, and, until after the present suit was filed, it was

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minimum, WINI has not carried its burden to establish that the principal place of business of Michael Caputo Public Relations, Inc., is not in New York. The Caputo affidavits assert, in response to plaintiffs' showing, that Caputo merely "puffed" the New York situs of

³(...continued)

marked closed for failure to pay rental Only recently, apparently for reasons related to the present controversy, was the mailbox reactivated

On March 4, 2008, Martha Dreyer, a private process server with T.C. Mann, Inc. of Miami, Florida, attempted to serve Caputo Public Relations at the Biscayne Boulevard address Ms. Dreyer found that the premises was only a private post office and that the Caputo Public Relations box had expired Ms. Dreyer also made "several attempts" to effect service at a Miami townhouse that, upon information found through his website registration, had once been associated with Caputo, but no one was at those premises On March 6, 2008, Richard S. Abrahamson, a private process server with United States Process Serving Corp. of Buffalo, New York, served Caputo and Caputo Public Relations at 5820 Big Tree Road, Orchard Park, New York. Wendy Burchfield, the receptionist at the Big Tree Road location, and Ramon H. Caputo, Caputo's father, accepted service on behalf of both.

During the week of March 24, 2008, Suzette C. Sauers ("Sauers"), a legal assistant at the Law Offices of Arnold M. Weiner, spoke by telephone to Ruth Rodriguez ("Rodriguez"), the owner of the Mailboxes Etc. location at 12864 Biscayne Boulevard in North Miami Rodriguez stated that Caputo had previously rented box 332; that the rental had expired as of January 1, 2008; and that Caputo's box was, and still was, closed for non-payment On April 7, 2008, Rodriguez told Sauers that, while there had been a note on box 332 on March 4th (when the process server attempted service) stating that the box was closed, Caputo had actually paid the past due rent on February 19th, one and a half months late, and that, as a result, the rental was reinstated.

Pls.' Mem. at 12-13. Plaintiffs further contend, again as amply supported by admissible evidence, as follows:

Contrary to the assertions that Caputo makes in his most recent affidavit, the only address in Florida that CPR has ever listed with the Florida Division of Corporations as CPR's principal office in that State is a business office in Bay Harbor, Florida that has since been abandoned. . . . And, while Caputo also swears in his affidavit that CPR pays Florida taxes, and makes its corporate filings in Florida, the records of the Florida Division of Corporations show that CPR has been "inactive" in Florida since October 1, 2004 and has not filed any annual report in Florida since 2003.

Pls.' Reply Mem at 2.

Michael Caputo Public Relations, Inc., in an effort “to give the appearance of a larger organization” and “of a local presence.” 4/25/08 Caputo Aff., ¶ 20.

Recently, Judge Blake succinctly summarized the proper approach to the resolution of a factual challenge to subject matter jurisdiction as follows:

When . . . subject matter jurisdiction is challenged . . . , the plaintiff bears the burden of persuasion. There are two ways in which to present a 12(b)(1) motion for lack of subject matter jurisdiction. First, a defendant may claim that a complaint “simply fails to allege facts upon which subject matter jurisdiction can be based.” *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). In that case, all the facts alleged in the complaint are assumed to be true and the plaintiff is essentially given the same procedural protection as she would have under a Rule 12(b)(6) motion for failure to state a claim upon which relief may be granted. *Id.* Second, a defendant may claim that the jurisdictional allegations of the complaint are sufficient, but are not true. *Id.* In that event, the court may consider evidence beyond the pleadings in satisfying itself of its authority to hear the case without converting the proceeding to one for summary judgment. *Williams*, 50 F.3d at 304 (citing *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir.1977)). The court must then weigh all the evidence to determine if there is jurisdiction. *Adams*, 697 F.2d at 1219.

Kerns v. United States, 534 F.Supp.2d 633, 636 (D.Md. 2008)(Federal Tort Claims Act claim); *see also Quinteros v. Sparkle Cleaning, Inc.*, 532 F.Supp.2d 762, 767 (D.Md.2008) (Williams, J.); *and see Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982)(“A trial court may consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment. *See Mims v. Kemp*, 516 F.2d 21 (4th Cir.1975). Unlike the procedure in a 12(b)(6) motion where there is a presumption reserving the truth finding role to the ultimate factfinder, the court in a 12(b)(1) hearing weighs the evidence to determine its jurisdiction.”). Like principles apply in the removal context, in which the

removing defendant, rather than the plaintiff, bears the burden to prove the existence of federal subject matter jurisdiction. *See Oxendine v. Merck & Co., Inc.*, 236 F.Supp.2d 517, 524 (D.Md.2002)(Davis, J.).

Considering the record as a whole, including the Caputo affidavits, the court is satisfied that WINI has failed to sustain its burden to establish the requisites of complete diversity such that its removal of this case comports with federal law. Certainly, it has not had the assistance of Michael Caputo Public Relations, Inc., which simply has failed to appear in the action or to consent to removal. At best, the evidence is in equipoise on the issue of whether at the time the action was removed, the principal place of business, and thus, the citizenship of Michael Caputo Public Relations, Inc., was in Florida or, instead, New York.⁴

Importantly, the court is mindful, as well, of the longstanding principles (1) that doubts as to the propriety of removal in a given case are to be resolved against removal; and (2) that the removal statute is to be strictly construed. *Maryland Stadium Authority v. Ellerbe Becket, Inc.*, 407 F.3d 255, 260 (4th Cir.2005) (“We are obliged to construe removal jurisdiction strictly because of the ‘significant federalism concerns’ implicated

⁴This is true even considering Caputo’s undisputed assertion that he is the sole employee and officer of Michael Caputo Public Relations, Inc. WINI has opposed plaintiffs’ alternative request for jurisdictional discovery and the court agrees that it would be unconscionably wasteful on this record to order jurisdictional discovery. So viewed, then, the court draws a strong inference against WINI, as the removing defendant, from the failure of Michael Caputo Public Relations, Inc., to dispute by admissible evidence that it was validly served with process in New York at its widely-publicized business address in New York. *See supra* n.3. While carrying on a business enterprise in a corporate form augurs significant benefits for an entrepreneur such as Caputo, there are real world consequences from such a choice.

Therefore, “[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary.” (citing *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir.1994)(brackets in original)). Accordingly, the motion to remand shall be granted for lack of subject matter jurisdiction. An order follows.

Filed: May 28, 2008

/s/
Andre M. Davis
United States District Judge