

Fact Pattern:

Mitnick is a world-renowned computer hacker, who goes by the code name Condor. Mitnick is a citizen of the State of California. Mitnick earns his living by gaining access to other peoples' private e-mail and other electronic communications and then selling the information that he obtains. Mitnick recently developed a device that intercepts cellular telephone calls and converts the conversations into an e-mailable text.

Terrance runs Petragraphers, Inc. His firm specializes in analyzing cement, e.g., provides water to cement ratios and analyzing the type of cement mixtures used. His work is greatly needed in states where "expansive" soils are alleged to exist. Terrance is a citizen of the State of Ohio. Although Terrance's only office is in Columbus, Ohio, he consults regularly with clients throughout the United States and in particular in states where expansive soils are alleged to exist. Terrance is very protective of his trade secrets and cement analyzing techniques. Even his own employees are own a need-to-know basis.

While attending a hackers' convention in Columbus, Mitnick intercepted and translated a cellular telephone call between Terrance and one of his employees in which Terrance revealed the correct water to cement ratio and type of cement that should be used in North Las Vegas, Nevada. Apparently, Terrance's employee was in North Las Vegas, Nevada on a very important business trip and the employee needed the answer right away. Assuming the call was secure; Terrance revealed the secret mixture necessary. Unfortunately, the call was not safe from Mitnick's device.

Mitnick took the text of the conversation to Nevada, where he met with Jim, a Nevada citizen, who was a large real estate developer. Jim only develops homes in Nevada and was always complaining that petragraphers charged too much and that they never revealed the proper cement mixtures, but instead provided them to ready-mix companies, who in turn charged large mark-ups. He was delighted to pay for Terrance's secret mixture formula and immediately began to use the formula.

After learning of Jim's activities, Terrance sued Mitnick and Jim in a California state court. Terrance's Complaint contains one count based on Ohio's law of trade secrets. Terrance seeks more than \$100,000.00 in damages from each defendant.

The Ohio trade secret statute provides that a defendant may be liable either if he acquires a trade secret by "improper means," or uses a trade secret received from a third-party, and knows that the third-party obtained the secret by improper means. Mitnick's act of intercepting the cellular phone call clearly violated the federal Economic Espionage Act of 1996. Although the federal Act does not give victims any civil remedies, Terrance nonetheless incorporates the

statute into his Complaint to establish that Mitnick's conduct was per se improper. Ohio law is clear and provides that violating a criminal statute is per se improper behavior. Consequently, Terrance's Complaint alleges that Mitnick is liable because he obtained the mixture secret improperly and Jim is liable because he used the mixture secret knowing of Mitnick's improper conduct.

Mitnick and Jim immediately file a timely notice of removal to the United States District Court for the Southern District of California. Terrance counters by filing a timely motion with the federal court asking for the case to be remanded back to California state court. Terrance states that the case does not meet the requirements for removal and that even if removal was otherwise proper, venue was not proper for the Southern District of California.

Questions:

How should the federal judge rule? Fully discuss each of Terrance's bases for remand.

Example Answer:

Terrance's Motion to Remand

Whether the court should grant Terrance's Motion will depend upon whether the case was properly removed to the federal district court. Terrance will argue that the federal court lacks subject matter jurisdiction, thus removal was improper. For the reasons discussed below, the district court judge should grant Terrance's Motion to Remand.

Removal

A case originally filed in a state court may be removed to federal court if: (1) the case could have originally been filed in a federal court; and (2) for cases removed on the basis of diversity, no defendant is a citizen of the state where the action is filed. To be timely, the Federal Rules of Civil Procedure (FRCP) requires a defendant to seek removal within 30 days of receiving the Plaintiff's Complaint. The facts indicated that Mitnick and Jim both filed a timely notice of removal. A case may be removed to federal court if the case could have originally been filed in a federal court and all defendants join in the motion for removal.

Subject Matter Jurisdiction

Subject Matter Jurisdiction refers to a court's power to decide the type of case before it. Federal courts are courts of limited jurisdiction. There must be a jurisdictional basis for each claim filed in federal court. The two primary bases of

subject matter jurisdiction are: (1) federal question; and (2) complete diversity of citizenship [Art III § 2]. Subject matter cannot be waived.

A. Federal Question

A federal question action is one that arises under the Constitution, laws, or treaties of the United States. Federal question jurisdiction is premised on the principle that the federal courts should have authority to interpret and apply federal laws.

Mitnick and Jim are likely to argue that there is federal subject matter jurisdiction based on a federal question. The Complaint must show a right or interest founded substantially on federal law. While Terrance's Complaint mentions a federal statute (i.e, Economic Espionage Act of 1996), Terrance's Complaint is based on Ohio state law. As indicated by the facts, the Act does not provide for a private right of action. Additionally, Terrance's claim does not arise under the US Constitution or a federal law because he was not trying to vindicate a federal right. Instead, Terrance cited to the federal law to support her state law claim.

Accordingly, the federal district court does not have subject matter jurisdiction based on a federal question.

B. Diversity

Complete diversity of citizenship means that no plaintiff is a citizen of the same state as any defendant. The amount in controversy must also exceed \$75,000.00. The amount in controversy is met because Terrance's Complaint seeks more than \$100,000.00 from Mitnick and Jim.

Diversity is determined by the citizenship of the parties. Terrance is a citizen of Ohio. Mitnick is a citizen of California and Jim is a citizen of Nevada. Accordingly, complete diversity exists because Terrance does not reside in the same state as either Mitnick or Jim.

However, when removal is based on diversity of citizenship, removal is not permitted when any one of the defendants reside in the forum state which the case was originally filed. Here, Terrance filed in California state court. The federal district judge should remand because Mitnick is a citizen of California.

Venue

Venue refers to where a case may be tried. Under the federal rules of civil procedure, venue is proper where either: (1) any Defendant resides, so long as all Defendants reside in the same state; (2) a substantial part of cause of action arose.

Assuming that removal was permissible, the California court must be the proper place for trial. Venue for an action removed to federal court lies in the district that encompasses the state court where the Complaint was originally filed. Terrance originally filed in a California state court. The facts are silent as to whether the Southern District of California encompasses the state court where the Complaint was originally filed.

Accordingly, the venue question can not be answered properly.