UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARK PIROZZI and KEILA GREEN, individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	No. 4:19 CV 807 CDP
v.	)	
MASSAGE ENVY FRANCHISING, LLC,	)	
Defendant.	)	

MEMORANDUM AND ORDER OF REMAND

When plaintiff Mark Pirozzi originally filed this class action in state court on January 31, 2017, defendant Massage Envy Franchising, LLC, knew with near certainty the number of 1-hour massage sessions that formed the basis of Pirozzi's petition. When coupled with its knowledge of the price paid for such sessions, it could ascertain that the actual damages involved in this controversy totaled about $1.5 million. But because the amount of attorneys' fees and punitive damages sought by the putative class could not be ascertained absent speculation and guesswork, the $5 million threshold for federal jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d), 1453, was not met.

On March 29, 2019, however, the putative class filed a second amended petition in state court, which Massage Envy removed to this Court on April 1,

2019, invoking CAFA. In its notice of removal, Massage Envy contends that the second amended petition expanded the class's claims in such a manner that damages – including attorneys' fees and punitive damages – can now be ascertained to exceed $5 million. I disagree. As with the original petition, the damages sought in the second amended petition can meet the $5 million threshold only through speculation and guesswork. This Court therefore lacks subject-matter jurisdiction over the action, and I must remand the matter to state court. I will deny as moot plaintiffs' motion to remand, which is based on their argument that Massage Envy failed to timely remove the original petition.

Background

Mark Pirozzi filed his original class action petition in the Circuit Court of St. Louis County, Missouri, on January 31, 2017. He amended the petition in July 2017 and, with leave of court, filed a second amended class action petition on March 29, 2019, adding Keila Green as a named plaintiff.

In the original petition, Pirozzi alleged that between 2012 and 2016, Massage Envy harmed him and others similarly situated by committing unfair and deceptive practices in offering and selling to non-members what it stated were 1-hour massages that provided no more than 50-minutes of massage time.[1] Pirozzi claimed that, during this 5-year period, Massage Envy did not adequately disclose

[1] Pirozzi claimed that Massage Envy stopped its deceptive practices sometime between October 22 and November 5, 2016.

that consultation with the massage therapist and time to undress and re-dress were part of the advertised hour-long massage session. Therefore, he argued that he and the putative class received less value than what was promised for the amount they paid. Pirozzi alleged that Massage Envy violated the Missouri Merchandising Practices Act (MMPA), Mo. Rev. Stat. §§ 407.010, *et seq*., with its unfair practices and deception. Pirozzi also brought a claim of unjust enrichment as well as a claim for injunctive and declaratory relief. In his prayer for relief, Pirozzi requested the court to:

> 1. Award damages, including compensatory, exemplary, and statutory damages to Plaintiff and all members of the Class;
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> 2. Award Plaintiff and the Class actual damages sustained;
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> 3. Grant restitution to Plaintiff and members of the Class and require Defendant to disgorge its ill-gotten gains;
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> 4. Award injunctive and declaratory relief, as claimed herein;
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> 5. Award Plaintiff and the Class punitive damages;
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> 6. Award Plaintiff and the Class their reasonable attorneys' fees and reimbursement of all costs for the prosecution of this action; and
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> 7. Award such other and further relief as this Court deems just and appropriate.

ECF 5 at pp. 68-69.

In the July 2017 amended petition, Pirozzi limited the claims to only 1-hour "introductory" massages that were first-time massages. (ECF 6.) The second

amended petition filed March 29, 2019, added Green as a representative plaintiff, reverted back to basing the claims on all non-member 1-hour massage sessions (not just first-time massages), added 1½-hour and 2-hour massage sessions to the claims, and omitted the claim for unjust enrichment. The second amended petition continued to allege that Massage Envy engaged in its unfair and deceptive practices from 2012 to 2016, having ended its deceptive practices in late 2016. The nature of the relief sought also remained the same as that in the original petition. (ECF 7.)

Invoking CAFA, Massage Envy removed the second amended petition to this Court on April 1, 2019. Plaintiffs move to remand. Plaintiffs do not argue that this action fails to meet the CAFA requirements for federal jurisdiction, however. Instead, they contend that Massage Envy could have removed the *original* petition under CAFA and that its failure to do so within thirty days of receiving it requires me to remand the action to state court.

For the reasons that follow, the amount-in-controversy requirement for CAFA jurisdiction is not met. I therefore do not have subject-matter jurisdiction over the case, and the matter must be remanded to state court.

Discussion

The Eighth Circuit has admonished district courts to "be attentive to a satisfaction of jurisdictional requirements in all cases." *Sanders v. Clemco Indus.*,

823 F.2d 214, 216 (8th Cir. 1987). Accordingly, I have the inherent power to determine, as a preliminary matter, subject-matter jurisdiction. *In re Gaines*, 932 F.2d 729, 731 (8th Cir. 1991).

CAFA "confers federal jurisdiction over class actions where, among other things, 1) there is minimal diversity; 2) the proposed class contains at least 100 members; and 3) the amount in controversy is at least $5 million in the aggregate." *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006) (citing 28 U.S.C. § 1332(d)); *see also Raskas v. Johnson & Johnson*, 719 F.3d 884, 886-87 (8th Cir. 2013). Here, neither side claims that the CAFA requirements for federal subject-matter jurisdiction are not met. Instead, the point of contention is whether Massage Envy timely removed this purportedly CAFA case from state court. Plaintiffs claim the original petition could have been removed under CAFA; Massage Envy claims that CAFA's jurisdictional requirements were not met until plaintiffs filed their second amended petition. Although the parties appear to agree with each other that this is a CAFA case, I nevertheless have an independent obligation to determine whether federal subject-matter jurisdiction exists. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Federal courts are courts of limited jurisdiction, and "[i]t is to be presumed that a cause lies outside this limited jurisdiction[.]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "[T]he burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citations omitted).

I may exercise jurisdiction over this removed case only if this Court would have had original subject-matter jurisdiction had the action initially been filed here. *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000) (citing 28 U.S.C. § 1441(b)). I review the state court petition pending at the time of removal to determine the existence of subject-matter jurisdiction. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938). I may also look to the notice of removal to determine jurisdiction. 28 U.S.C. § 1446(c)(2)(A)(ii).

Massage Envy, as the removing party invoking jurisdiction, bears the burden of proving that all prerequisites to jurisdiction are satisfied. *Kokkonen*, 511 U.S. at 377; *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010). *See also Westerfeld v. Independent Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) ("Although CAFA expanded federal jurisdiction over class actions, it did not alter the general rule that the party seeking to remove a case to federal court bears the burden of establishing federal jurisdiction."). While generally, a court must resolve all doubts about federal jurisdiction in favor of remand to state court, *In re Prempro*, 591 F.3d at 620, "no antiremoval presumption attends cases invoking

CAFA[.]" *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014).

If the initial pleading in a class action filed in state court pleads a case that satisfies the CAFA jurisdictional requirements, the defendant has thirty days from its receipt of the complaint to remove the case to federal court. *Gibson v. Clean Harbors Envtl. Servs., Inc.*, 840 F.3d 515, 518 (8th Cir. 2016); 28 U.S.C. § 1453; 28 U.S.C. § 1446(b)(1).

> If, on the other hand, the case as pled in the initial complaint does not satisfy CAFA's jurisdictional requirements, 28 U.S.C. § 1446(b)(3) requires that the defendant remove the case within thirty days after receiving "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Gibson, 840 F.3d at 518 (quoting 28 U.S.C. § 1446(b)(3)). A CAFA case becomes removable, and thus the 30-day removal period is triggered, when the relevant pleading, motion, order, or other paper "set[s] forth a sufficiently detailed and unequivocal statement from which the defendant may unambiguously ascertain that the CAFA jurisdictional requirements have been satisfied." *Id.* at 520. A defendant is not required to independently investigate a plaintiff's allegations or search its own business records to determine removability. *Id.* at 519.

Here, the second amended petition clearly establishes that the minimal diversity and class membership requirements of CAFA jurisdiction are met. It cannot be ascertained, however, either reasonably or unambiguously, that the

amount in controversy meets the jurisdictional threshold of $5 million to establish CAFA jurisdiction.

Neither the original nor second amended petition seeks a specific dollar amount in damages. In its notice of removal, however, Massage Envy identifies with specificity the amount of damages it claims the putative class allegedly sustained on account of Massage Envy's unlawful conduct as alleged in the second amended petition, with such damages totaling $2,885,672. (ECF 1 at ¶¶ 29-31.) To support its calculations, Massage Envy submitted the declaration of its Manager of Application Development, Daniel O'Meara, who described with particularity the method by which Massage Envy arrived at this number:

> On or about March 21, 2019, I was asked to develop queries to be run in the [Central Office] Database to determine the quantity of first-time and non-member customers at Massage Envy franchised locations in the state of Missouri who purchased a 1-hour, 1½-hour, or 2-hour massage session between January 31, 2012 and February 24, 2019 (the "Relevant Time") and the price paid for each such massage session.
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> . . .
>
> Once I had developed and ran this query, I was able to determine how many first-time and non-member massage sessions of each of the three session lengths had been purchased at a Massage Envy franchised location in Missouri during the Relevant Time and the price paid to these locations for each massage session.

(ECF 1-5, O'Meara Decl. at ¶¶ 12, 14.) O'Meara calculated that, during the Relevant Time, 281,425 relevant 1-hour sessions were purchased; 51,938 relevant

1½-hour sessions were purchased; and 3,814 2-hour sessions were purchased. (*Id.* at ¶ 14.)

With O'Meara's calculations, Massage Envy avers in its notice of removal that the average price per minute for a 1-hour session is $0.88; the average price per minute for a 1½-hour session is $0.74; and the average price per minute for a 2-hour session is $0.65. (ECF 1 at ¶ 30.) Extrapolating the price-per-minute calculations to the total number of minutes during the Relevant Time that were allegedly spent in consultation or undress/re-dress (*i.e.*, 10 minutes per session), Massage Envy avers that the putative class allegedly suffered the following actual damages: 1) from 1-hour sessions, a total of $2,476,540; 2) from 1½-hour sessions, a total of $384,341; and 3) from 2-hour sessions, a total of $24,791 — for an aggregate total of $2,885,672 in actual damages for which Massage Envy is purportedly liable in this action. (*Id.*)

To get to the $5 million threshold for CAFA jurisdiction, Massage Envy relies on plaintiffs' request for attorneys' fees and punitive damages given that such fees and damages are available under the MMPA. Massage Envy estimates that plaintiffs could be awarded up to $720,000 in attorneys' fees, averring that "Plaintiffs in the Eighth Circuit are often awarded attorneys' fees based on a benchmark percentage of twenty-five (25) percent of the recovery." (ECF 1 at ¶ 32.) Massage Envy also estimates that any potential award for punitive damages

would equal the net amount of judgment (actual damages plus attorneys' fees), that is, $3.6 million. Accordingly, adding together actual damages ($2,885,672), attorneys' fees ($720,000), and punitive damages ($3.6 million), Massage Envy contends that the amount in controversy as pled in the second amended petition totals at least $7.2 million and thus exceeds the CAFA threshold of $5 million.

I am not required to accept a defendant's amount-in-controversy allegation made in its notice of removal. *Dart Cherokee*, 135 S. Ct. at 553. Instead, when challenged, "a party seeking to remove under CAFA must establish the amount in controversy by a preponderance of the evidence[.]" *Bell v. Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). *See also Dart Cherokee*, 135 S. Ct. at 554; *Raskas*, 719 F.3d at 887. Under this standard, the jurisdictional fact "is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are[.]" *Kopp v. Kopp*, 280 F.3d 883, 885 (8th Cir. 2002). *See also Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 944 (8th Cir. 2012). This inquiry is fact intensive. *Hartis*, 694 F.3d at 944.

Damages, attorneys' fees, and punitive damages may all be considered when determining whether a class action meets the $5 million threshold. *Holzum v. Wal-Mart Stores, Inc.*, No. 4:17-CV-2275 RLW, 2018 WL 3826679, at *2 (E.D. Mo. Aug. 10, 2018). Considering the actual damages and the potential for attorneys' fees and punitive damages in the circumstances of this case, I cannot accept either

side's representation that a fact finder might legally conclude that the amount in controversy is at least $5 million.

First, Massage Envy overstates the actual damages that plaintiffs could recover in this case. Massage Envy relies on O'Meara's calculations regarding what it contends are the challenged massage sessions, that is, those sessions purchased "between January 31, 2012 and February 24, 2019." But both the original petition and the second amended petition limit plaintiffs' claims to those massages purchased from 2012 through 2016, given that Massage Envy stopped its unfair and deceptive practices in late 2016. Including massages from 2017 through February 24, 2019, overstates the potential damages incurred here.[2]

In addition, Massage Envy offers nothing but speculation that potential awards of attorneys' fees and punitive damages push the amount in controversy over $5 million. "Such speculation is insufficient to meet the defendant's burden of proof under the preponderance of the evidence standard." *Rosenbloom v. Jet's Am., Inc.*, 277 F. Supp. 3d 1072, 1075 (E.D. Mo. 2017); *see also Hill v. Ford Motor Co.*, 324 F. Supp. 2d 1028, 1036 (E.D. Mo. 2004). And to engage in this speculation would be unreasonable in light of the nature of plaintiffs' allegations.

[2] Notably, O'Meara also made similar calculations for 1-hour massage sessions that were purchased during the period more relevant to plaintiffs' claims, that is, from September 26, 2011, through November 2016. (ECF 1-5 at ¶ 15.) Those massage sessions totaled 170,767. (*Id.*) Applying the per-minute rate of $0.88 for 1-hour sessions, the actual damages for the challenged 1-hour massages can be calculated at $1,502,749 – not $2,476,540 – which both sides acknowledge. No calculations are provided for the number of 1½-hour or 2-hour massage sessions purchased during that same period.

See, e.g., *Kina v. Mindland Funding, LLC*, No. 4:15-CV-00950 ERW, 2015 WL 5487357, at *3 (E.D. Mo. Sept. 16, 2015) (only conclusory allegations concerning defendant's conduct for punitive damages are insufficient to determine whether amount in controversy met).

With respect to punitive damages particularly, I must give a claim for such damages closer scrutiny than a claim for actual damages "because they are speculative in nature and often overstated[.]" *Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883-CV-W-ODS, 2008 WL 441962, at *1 (W.D. Mo. Feb. 14, 2008) (citing *State of Mo. ex rel. Pemiscot County v. Western Sur. Co.*, 51 F.3d 170, 173-74 (8th Cir. 1995); *Larkin v. Brown*, 41 F.3d 387, 388-89 (8th Cir. 1994)). *See also Rosenbloom*, 277 F. Supp. 3d at 1075. The plaintiffs here make only conclusory allegations concerning Massage Envy's conduct allegedly giving rise to punitive damages, making it nearly impossible to determine from the language of the state court petition whether a reasonable fact finder might conclude that punitive damages are even applicable. Indeed, given the nature of the allegations, it is more likely that a reasonable fact finder would not award several million dollars in punitive damages for failing to include in advertising and solicitations that a 60-, 90- or 120-minute massage session includes ten minutes for consultation, undress, and re-dress. Plaintiffs' damages are purely economic. They make no claim that Massage Envy's alleged conduct targeted a particularly

vulnerable group or that its actions had particularly egregious repercussions. *See Holzum*, 2018 WL 3826679, at *4.

Based upon the foregoing, Massage Envy has not met its burden of showing that federal CAFA jurisdiction exists because it has failed to establish that a fact finder might legally conclude that the amount in controversy meets or exceeds $5 million. The actual damages at issue are less than $2 million in the aggregate at most, and Massage Envy offers only speculation and guesswork to support its position that millions of dollars in attorneys' fees and/or punitive damages could be awarded. Neither the state court petition nor the notice of removal indicates that any special or extraordinary circumstances exist that would warrant such exorbitant awards. In addition, the value of injunctive relief, if awarded, would not add anything significant to the amount in controversy given plaintiffs' claim that Massage Envy ended its alleged unlawful practices months before this lawsuit was filed. This Court therefore lacks CAFA jurisdiction over this action.

In response to plaintiffs' motion for remand, however, Massage Envy argues that the motion for remand itself constitutes "other paper" from which it could ascertain that the amount in controversy exceeds $5 million because plaintiffs argue in the motion that the original petition filed in January 2017 satisfied CAFA's jurisdictional requirements. Massage Envy contends therefore that its removal, while arguably premature, was nevertheless proper. I disagree.

As noted above, I am obligated to independently determine whether federal subject-matter jurisdiction exists over any given cause of action regardless of any party's representation or belief that such jurisdiction exists. Further, as with Massage Envy's notice of removal, plaintiffs' motion for remand offers only speculation that the amount in controversy arising from the original petition exceeds $5 million. There is no specific demand made in the motion to remand. Nor do plaintiffs offer any factual support as to why the particular circumstances of this case as alleged in the original petition would warrant several million dollars in attorneys' fees and/or punitive damages. Plaintiffs' contention that "the court might award attorneys' fees" anywhere from $540,990 (representing 36% of the actual damages) to $1.4 million (representing time reasonably expended), and that punitive damages "could be" over $10 million given that state law permits punitive damages of up to five times the amount of judgment,[3] falls well short of what is needed in order to "unambiguously ascertain" that the requisite amount in controversy for CAFA jurisdiction exists. *See Gibson*, 840 F.3d at 521-22. Regardless, for the same reasons as stated earlier, these contentions are based on only speculation and guesswork and therefore cannot provide a basis to establish the requisite amount in controversy.

Accordingly, because this Court lacks subject-matter jurisdiction over the

[3] ECF 11, Mot. to Remand, at p. 11.

action, I must remand the matter to state court. 28 U.S.C. § 1447(c).

Therefore, for all of the foregoing reasons,

IT IS HEREBY ORDERED that this case is remanded to the Circuit Court of St. Louis County, Missouri, from which it was removed.

IT IS FURTHER ORDERED that plaintiffs' Motion for Remand [11] is denied as moot.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 15th day of July, 2019.