UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHEL CHAHINI, et al., Plaintiffs, vs. HAZE TOBACCO, LLC, et al., Defendants.	CASE NO. 16cv1922-LAB (AGS) **ORDER OF REMAND**

Michel Chahini filed a class action in state court against a Texas tobacco purveyor after buying some Don Fizzle flavored tobacco. Chahini alleges that Don Fizzle's label falsely claims that the tobacco is "made in the United States" and that the nicotine content is no more than .05%. Chahini maintains that if he and other California hookah-smokers had known that the tobacco wasn't grown in the U.S., and that the nicotine content was "at times" as much as .10%, they wouldn't have bought Don Fizzle.[1]

Chahini filed his complaint in California state court in the summer of 2015. Haze Tobacco filed a notice of removal about a year later. Chahini moved to remand. The parties dispute two issues: (1) how much the case is worth; and (2) was the removal timely?

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[1] Second Amended Complaint, dkt. 1-2 ¶ 2–4, 56.

I. Jurisdiction

A defendant may remove a case if the federal court would have had original jurisdiction. 28 U.S.C. § 1441. Haze Tobacco argues that this Court has jurisdiction based on diversity, and, the Class Action Fairness Act. 28 U.S.C. § 1332(a),(d). Two distinctions between CAFA and diversity jurisdiction are relevant to the remand motion.

First, CAFA requires the Court to aggregate the claims of all plaintiffs to determine if $5 million is at stake; under diversity jurisdiction, the Court must find that at least one plaintiff has claims that add up to $75,000.

Second, "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 555 (2014). But removal based on diversity must "be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

A. The Court lacks jurisdiction under the Class Action Fairness Act.

The Class Action Fairness Act's "primary objective" is to ensure that federal courts handle "interstate cases of national importance." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). CAFA grants federal jurisdiction over class actions where the aggregate amount of class claims surpasses $5 million. 28 U.S.C. § 1332(d)(6). Determining the amount in controversy is usually straightforward: the Court accepts "the plaintiff's amount-in-controversy allegation" "if made in good faith." *Dart*, 135 S. Ct. at 553; 28 U.S.C. § 1446(c). But when, as here,[2] the complaint says the amount is less than $5 million, the plaintiff hasn't plead a specific amount in controversy and the defendant may allege the amount in the notice of removal. 28 U.S.C. § 1446(c); *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 701 (9th Cir. 2007). A removing defendant has the burden of establishing federal jurisdiction. To meet that burden, initially, the "notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart*, 135 S. Ct. at 554.

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[2] SAC, dkt. 1–2 ¶ 9.

1. Haze Tobacco fails to plausibly allege jurisdiction.

As an initial matter, the Court finds that Haze Tobacco's notice of removal fails to plausibly allege that the amount in controversy exceeds $5 million. Essentially, all Haze Tobacco has done is copy and paste Chahini's requests for relief and incant "the amount in controversy in the instant action exceeds $5,000,000."[3] Haze Tobacco didn't include any calculation, or even a rough estimate, showing how the potential relief could amount to more than $5 million. Instead, it simply attached an email to Chahini requesting a stipulation that the amount in controversy was less than $5 million; Chahini responded by asking for sales data.[4] Under *Standard Fire v. Knowles*, a precertification stipulation doesn't affect the amount in controversy. *Standard Fire*, 133 S. Ct. at 1349. Chahini's silence in the face of Haze Tobacco's requested stipulation doesn't amount to a plausible allegation. And, for that matter, Chahini wasn't silent—he responded by asking for sales data. In fact, Chahini went on to say that he has repeatedly requested sales information for the past year and that he can't estimate damages because Haze Tobacco won't provide it.

The notice of removal need not "contain evidentiary submissions," but a defendant must still "allege the requisite amount plausibly." *Dart*, 135 S. Ct. at 551 (removal notice calculated specific damages of $8.2 million). Conclusory allegations don't cut it because they don't provide the Court any meaningful basis to determine that it has jurisdiction. *Gaus*, 980 F.2d 567 (reversing summary judgment and ordering remand to state court because removal notice failed to allege the necessary "underlying facts supporting" amount in controversy). In sum, Haze Tobacco has given the Court no basis for accepting its representation that damages will exceed $5 million.

2. Haze Tobacco fails to produce evidence showing jurisdiction.

Even had Haze Tobacco plausibly alleged the $5 million figure, it still failed to produce evidence showing the amount in controversy was met. If "the plaintiff contests, or the court questions," allegations in the notice of removal, then "both sides submit proof and the court

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[3] Notice of Removal, dkt. 1 ¶¶ 37–46.

[4] Aiwazian Declaration, dkt. 1-5 ¶ 45; Wells Decl., dkt. 6-2 Ex. D.

decides, by a preponderance of the evidence, whether the amount in controversy requirement has been satisfied." *Dart*, 135 S. Ct. at 554. Haze Tobacco hasn't provided any evidence in its four-page opposition to support the claim that the action is worth $5 million. Instead, it argues that *Ibarra v. Manheim* interpreted *Dart's* instruction that "both sides submit proof" as a requirement that both sides, the defendant and the plaintiff, must provide evidence of the amount in controversy. Since Chahini didn't offer evidence, Haze contends it wins the point. That's wrong.

In *Ibarra*, the defendant made the same argument, but the Ninth Circuit demurred and remanded the case to the district court with instructions to establish "a reasonable procedure in the first instance so that each side has a fair opportunity to submit proof." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1199–1200 (9th Cir. 2015). Several courts have decided that "the burden of adducing evidence rests with defendant and that plaintiff need not proffer evidence until defendant has proffered sufficient proof to meet its initial burden." *Blevins v. Republic Refrigeration, Inc.*, 2015 WL 12516693, at *5 (C.D. Cal. Sept. 25, 2015). The Court agrees with this approach.

Ibarra was decided before Haze Tobacco removed this case. Haze Tobacco's submission shows that it was aware of *Ibarra*, and that it had a "fair opportunity to submit proof" in opposing Chahini's motion for remand. *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 691 92 (9th Cir. 2006) (it was "well within the court's discretion to remand to state court rather than ordering jurisdictional discovery" as it "avoids encouraging the sort of premature removal presented" and respects state court jurisdiction). Moreover, because Haze Tobacco has the sales data for its California customers, there's really no excuse for its failure to provide evidence supporting its claim that the amount in controversy exceeds $5 million.

Haze Tobacco has "the burden to put forward evidence showing that the amount in controversy exceeds $5 million" "and to persuade the court that the estimate of damages in controversy is a reasonable one." Instead, it asks the Court to "establish removal jurisdiction by mere speculation." *Ibarra*, 775 F.3d at 1197.

B. The Court lacks diversity jurisdiction.

In contrast to the CAFA claim, Haze Tobacco offers some evidence for diversity jurisdiction. Haze Tobacco estimates that it would cost $125,657.68 to replace its current inventory of "243,561 tin cans already bearing nicotine content that may ultimately be sold to distributors in the State of California."[5] But removal based on diversity must "be rejected if there is any doubt as to the right of removal in the first instance." *Gaus*, at 566. The Court has doubts.

Although California "has more lenient standing requirements, standing sufficient to meet federal standards is a jurisdictional requirement imposed by Article III of the U.S. Constitution and takes priority." *Cattie v. Wal Mart Stores, Inc.*, 504 F. Supp. 2d 939, 942 (S.D. Cal. 2007). Chahini has standing only to pursue injunctive relief if, specifically, he faces an imminent threat of harm and it's likely "that he will again be wronged in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.")

Haze Tobacco points to Chahini's request for a corrective advertising campaign to support the amount in controversy. But since Chahini apparently knows the tobacco is mislabeled, and doesn't say he plans to buy more, Chahini doesn't face an imminent threat of harm and isn't likely to be harmed again in a similar way. *Cattie*, 504 F. Supp. 2d at 951. As Chahini admits, without injunctive relief, "his claim is worth only a few dollars."[6] Haze Tobacco fails to meet its burden to establish jurisdiction because it hasn't shown that Chahini has standing to pursue injunctive relief.[7]

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[5] Notice of Removal, dkt. 1 ¶ 26.

[6] Motion to Remand, dkt. 6-1 at 1.

[7] The Court addresses standing in this section since Chahini only provides evidence to support the $75,000 amount in controversy, but observes that, to the extent Chahini relies on injunctive relief to tally-up his $5 million CAFA claim, this standing problem also exists.

Even if standing wasn't a problem and Chahini could pursue injunctive relief, the Court has doubts that removal is proper based on the value of the injunction. At least for diversity jurisdiction, the Court values the injunction by how much it's worth for consumers "to be protected from [Haze Tobacco's] allegedly deceptive advertising"—not the amount it would cost the company to comply. *Snow v. Ford Motor Co.*, 561 F.2d 787, 791 (9th Cir. 1977) (noting that if the court valued the injunction by the cost to defendant, then any plaintiff could meet the amount in controversy and access federal courts just by "praying for an injunction").

Haze Tobacco cites *In re Ford Motor* for the proposition that the court values the injunction based on "either viewpoint"—that is, the cost to plaintiff or defendant. *In re Ford Motor Co.*, 264 F.3d 952, 958 (9th Cir. 2001). But *Ford Motor* says the opposite. "We have specifically *declined* to extend the 'either viewpoint rule' to class action suits." *Id.* at 958 (italics supplied). *Ford* holds that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance" "of an injunction running in favor of one plaintiff would exceed $75,000." *Id.* at 961. *Ford* also requires a showing that all potential class members have a common and undivided interest in an injunction; Haze Tobacco fails to address this point. *Id.* at 959–60 (holding class action consumers didn't have "a common interest" to apply for an injunction because each consumer made individual purchases, "not as a group").

Haze Tobacco argues that it would cost $125,000 to modify all of its current cans, and therefore, it's safe to assume that modifying California-destined cans would cost more than $75,000. But the Court can't just pull a percentage "from thin air" to embrace that assumption: A "damages assessment may require a chain of reasoning that includes assumptions," but the assumptions "need some reasonable ground underlying them." *Ibarra*, 775 F.3d at 1199. The total number of cans provides no basis for the Court to conclude that the cost of altering the California cans will amount to more than $75,000.

Finally, Haze Tobacco's removal based on diversity was untimely because it was filed "more than 1 year after the commencement of the action" in state court. 28 U.S.C. § 1446(c). The defendant must file "a notice of removal" "containing a short and plain statement of the grounds for removal, *together with a copy of all process, pleadings, and orders* served upon

such defendant or defendants in such action." 28 U.S.C.A. § 1446(a). Here, the action was "commenced" on July 31, 2015. *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005). Chahini filed the notice of removal on July 29, 2016,[8] but didn't file the "process, pleadings, and orders" until August 2, 2016. Under § 1446(a), Haze Tobacco's removal on the basis of diversity is time barred.

II. Timeliness

There's an additional ground for denying removal. A defendant must file a notice of removal "within 30 days" after receiving "a copy of the initial pleading." 28 U.S.C. 1446(b)(1). Only "if the case stated by the initial pleading is not removable," may the defendant file a notice of removal "within 30 days" after receiving a "paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. 1446(b)(3).

Haze Tobacco doesn't dispute that it missed the initial 30-day time line for removal, but argues that 1446(b)(3) applies because it didn't ascertain jurisdiction until this summer. According to Haze Tobacco, two happenings put them on notice that the amount in controversy was met: (1) the state court ruled against Haze's motion to disqualify Chahini's counsel; and (2) Chahini asked for sales data in response to the company's request for a stipulation that the case wasn't worth more than $5 million.[9] Haze Tobacco maintains that since it filed for removal within 30 days after these two events, removal is timely. But these explanations don't establish any relevant changes that would have triggered removal. The disqualification motion didn't change the value of the case. Neither did Haze Tobacco's request for a precertification stipulation. *Standard Fire*, 133 S. Ct. at 1349.

Moreover, section 1446(b)(3) doesn't help Haze Tobacco anyway. That section only applies "if the case stated by the initial pleading is not removable." All of the relief that Haze Tobacco alleges adds up to $5 million, or $75,000, is on the face of the initial complaint. *Cf. Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 691 (9th Cir. 2005) (removal clock begins

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[8] The Electronic Case Filing system had incorrectly posted the notice as filed on August 1, 2016; the Clerk's office updated the docket and generated a new notice of filing based on this date.

[9] Opposition, dkt. 8 at 1-2.

only "if the case stated by the initial pleading is removable on its face"). Indeed, effectively, Haze Tobacco has admitted that the initial complaint was removable, and in turn has implicitly conceded that its filing is late.

To be clear: the Court's not saying that it ever had jurisdiction. And a notice of removal, at least under CAFA, isn't untimely if the Court never had jurisdiction, because the two removal statute timelines wouldn't be triggered. *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1123 (9th Cir. 2013); *see also Jordan v. Nationstar Mortg. LLC*, 781 F.3d 1178, 1180 (9th Cir. 2015). What the Court holds is that Haze Tobacco failed to plausibly allege or produce evidence establishing jurisdiction. Even if it had, the removal would be late, because the company has tacitly admitted that its been on notice of the amount in controversy from the get-go. *See Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249, 1256 (9th Cir. 1989) (reversing and remanding to state court because notice of removal was late since plaintiff's "original complaint" put defendants on notice of removabilty).[10]

III. Fees

The Court has discretion to "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The case law and the removal statues concerning amount in controversy are complicated. Even though the Court has identified many problems with the removal, Haze Tobacco didn't act in an objectively unreasonable manner in removing the case.

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[10] Chahini didn't argue that Haze waived removal by actively litigating in state court, but the Court notes that may provide a basis for rejecting removal as well. *Acosta v. Direct Merchants Bank*, 207 F. Supp. 2d 1129, 1132 (S.D. Cal. 2002) (remanding because defendant waived removal by intentionally invoking state court jurisdiction).

IV. Conclusion

The Court finds that Haze Tobacco hasn't made plausible allegations or provided sufficient evidence to support a finding of federal jurisdiction. The case is remanded to state court. Chahini's request for attorney's fees is denied.

IT IS SO ORDERED.

DATED: January 12, 2017

HONORABLE LARRY ALAN Burns
United States District Judge