

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ALEX ISAAC, on behalf of himself and all others
similarly situated,

Plaintiff,

vs.

ASHLEY FURNITURE INDUSTRIES, INC.,
and BARGAIN DISCOUNT MARKETS, INC.
(d/b/a BD's FURNITURE),

Defendants.

CIVIL ACTION NO. 17-11827

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453, Defendant Ashley Furniture Industries, Inc. ("Ashley") removes to this Court the above-styled action, commenced in Suffolk County Superior Court (Massachusetts), Case No. 1784-cv-2617-H (the "Action"). As grounds for removal, Defendant states as follows:

1. On August 15, 2017, plaintiff Alex Isaac ("Plaintiff") filed the Action in Suffolk County Superior Court against Ashley and Defendant Bargain Discount Markets, Inc., d/b/a BD's Furniture ("BD"). The Complaint asserts claims on behalf of Plaintiff, and on behalf of two overlapping classes defined as follows: "(a) all Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts; and (b) All Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts from BD." (Compl. ¶ 17). Plaintiff asserts a single claim: violation of Chapter 93A (Compl. ¶¶ 20-76). Ashley accepted service on August 23, 2017.

2. This Action is a civil class action over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) (the "Class Action Fairness Act" or "CAFA"), and is one that may be removed to this Court pursuant to the provisions of 28 U.S.C. §§ 1446 and 1453. This is a (i) putative class action; (ii) in which at least one member of the

class of plaintiffs is a citizen of a state different than Ashley;¹ (iii) the number of members of the putative class of plaintiffs is not less than 100; and (iv) the amount allegedly in controversy exceeds \$5,000,000, exclusive of interests and costs. *See* 28 U.S.C. § 1332(d)(2), (d)(5)(B).

3. Venue is proper in this Court because the Suffolk County Superior Court is located within this District. *See* 28 U.S.C. § 1446(a).

4. Ashley denies the allegations contained in the state court pleadings and files this Notice without waiving any rights, defenses, expectations, or obligations that may exist in its favor in state or federal court.

CAFA Elements

5. Covered Class Action. A case satisfies CAFA’s class action requirement if it is “filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute authorizing an action to be brought by 1 or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). The present action satisfies this definition, as Plaintiff’s suit is brought “on behalf of himself and others similarly situated” including “(a) all Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts; and (b) All Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts from BD.” (Compl. ¶ 3). The Complaint itself is also styled as a “class action complaint,” and contains an entire section devoted to “Class Allegations.” (*Id.* ¶¶ 7-8).

6. The Properly Joined Parties Are Completely Diverse. The diversity requirement of § 1332(d) is satisfied when any member of a class of plaintiffs is a citizen of a state different from any defendant.

a. The citizenship of a corporation for purposes of determining diversity jurisdiction is based on the place of incorporation and the principal place of business. *See* 28 U.S.C. § 1332(c). Defendant Ashley Furniture Industries, Inc. is a corporation organized and existing under the laws of Wisconsin with its principal place

¹ As discussed *below*, Defendant BG, the store where Plaintiff purchased his furniture, was improperly joined in an attempt to prevent removal, and therefore citizenship should be disregarded for purposes of determining diversity jurisdiction. *See* 28 U.S.C. § 1359.

of business in Arcadia, Wisconsin. (See Declaration of Troy Muller in Support of Defendants' Notice of Removal of Action Under 28 U.S.C. § 1441 ("Muller Decl."), ¶ 3; see also Compl. at ¶ 2).

b. The Complaint alleges that Plaintiff Isaac resides in Massachusetts. (Compl. ¶ 1). Accordingly, Plaintiff's allegations that Ashley is a citizen of Wisconsin and he is citizen of Massachusetts establishes complete diversity under 28 U.S.C. § 1332, with the exception of BD addressed *infra*.

7. Defendant BD Has Been Fraudulently Joined To This Action to Prevent Removal. In the Complaint, Plaintiff claims that BD is a Massachusetts corporation. (Compl. ¶ 3). BD's citizenship is not an obstacle to removal because it is fraudulently joined.

a. The right to remove is determined by the pleadings at the time of removal. See *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939). "This right of removal cannot be defeated by a fraudulent joinder of a non-diverse defendant 'having no real connection with the controversy.'" *Mills v. Allegiance Healthcare Corp.*, 178 F. Supp. 2d 1, 4 (D. Mass. 2001) (quoting *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)). "A joinder is a sham and fraudulent if it is without any reasonable basis in fact and without any purpose to prosecute the case in good faith against the [defendant]." *Id.* (internal quotations omitted). "The linchpin of the fraudulent joinder analysis is whether the joinder of the non-diverse party has a reasonable basis in law and fact." *Id.* In other words, the First Circuit looks to whether "plaintiff has failed to state a cause of action against the fraudulently joined defendant." *Id.* at 4-5 (quoting *Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 877 (1st Cir. 1983)).

b. Plaintiff has asserted a single claim against Defendants for violation of G.L. c. 93A. (Compl. ¶¶ 20-26). Plaintiff does not assert a claim against BD insofar as he has failed to allege the existence of any unfair or deceptive act by BD specifically. The purpose of Chapter 93A is to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in

the marketplace. *See, e.g., Darviris v. Petros*, 442 Mass. 274, 278 (Mass. 2004). “A practice or act is unfair under Chapter 93A if it is within the penumbra of a common-law, statutory, or other established concept of unfairness; it is immoral, unethical, oppressive or unscrupulous; or it causes substantial injury to competitors or other business people.” *Morrison v. Toys “R” Us, Inc.*, 441 Mass. 451, 457 (Mass. 2004). Here, Plaintiff has not pled any specific facts that suggest BD marketed DuraBlend® upholstery, let alone that BD improperly represented the nature of DuraBlend® furniture.²

8. The Proposed Class Exceeds 100 Members. Plaintiff defines the putative class as “(a) all Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts; and (b) All Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts from BD.” (Compl. ¶ 17). Ashley’s records indicate that, in the four years proceeding August 15, 2017, the number of purchasers who purchased furniture with DuraBlend® upholstery in Massachusetts far exceeds 100 people. *See Muller Decl.*, ¶ 4.

9. Amount in Controversy. CAFA requires that the “aggregate[] matter in controversy exceed[] the sum or value of \$5,000,000, exclusive of interest and costs.” 28 U.S.C. § 1332(d)(2) & (6). “[A] defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). It is sufficient for a defendant to “show a reasonable probability that more than \$5 million is at stake.” *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 80 (1st Cir. 2014). The amount in controversy is determined by accepting Plaintiff’s allegations as true. In calculating the amount in controversy, the Court should consider the total amount of monetary relief that the plaintiff seeks to recover, or the financial impact the relief sought would have on the defendant. *See Richard C. Young & Co. v. Leventhal*, 389 F.3d 1, 3 (1st Cir. 2004) (the amount is measured by “the judgment’s pecuniary

² Because BD was fraudulently joined, it does not need to consent to removal. *See In re Pharm Indus. Average Wholesale Price Litig.*, 431 F.Supp. 29 109, 117 (D. Mass. 2006).

consequences to those involved in the litigation”); *see also Dept. of Recreation & Sports v. World of Boxing*, 942 F.2d 84, 90 (1st Cir. 1991).

a. Although it is unclear exactly the amount, or even the kind, of damages Plaintiff is seeking, Plaintiff is requesting “an order awarding damages to Mr. Isaac and the other members of the Class, including compensatory and multiple or exemplary damages” for “all Massachusetts residents who purchased furniture with DuraBlend® upholstery in Massachusetts” (Compl. Prayer for Relief, ¶ 17). The only information the complaint provides is that Plaintiff paid \$1,100 for his DuraBlend® sofa. (Compl. ¶ 10).

b. Sales of DuraBlend® by Ashley at wholesale in the state of Massachusetts exceed \$5,000,000 for the class period. *See Muller Decl.*, ¶ 4. It is reasonable to infer that retail sales to consumers, including Plaintiff, would far exceed wholesale sales. Plaintiff alleges that the DuraBlend® furniture sold by Ashley “was of such nature and quality that it would not hold up to normal wear and tear and that it would peel or disintegrate.” (Compl. ¶ 9). He further alleges that “[h]ad he known that DuraBlend upholstery would not hold up to normal wear and tear and that it would begin to peel or disintegrate, he would not have purchased it or would only have been willing to pay a significantly lower purchase price.” (*Id.* at ¶ 15). Thus, Plaintiff is claiming either the full return of his purchase price, or, at the very least, a return of a significant portion of the purchase price to reflect the “significantly lower purchase price” he would have paid absent the alleged misrepresentation by Ashley. In light of these allegations, and taking into consideration Plaintiff’s request for multiple³ and exemplary damages, it is clear that the amount in controversy exceeds \$5 million.

c. Claimed damages is not the only factor that can be considered in determining whether Defendant satisfied the \$5 million amount in controversy

³ Plaintiff’s request for “multiple” damages may be considered for purposes of the amount in controversy. *See, e.g., Provanzano v. Parker*, 796 F. Supp. 2d 247, 252 (D. Mass. 2011).

requirement. Plaintiff also seeks “an order awarding declaratory and injunctive relief as permitted by law, including: enjoining Defendants from continuing their unlawful practices.” (Compl. Prayer for Relief). Costs of compliance with an injunction are relevant in ascertaining whether the amount in controversy is satisfied. *See* 28 U.S.C. § 1332(d) (excluding only interest and costs from the aggregated amount in controversy); *see also McKenna v. Wells Fargo Bank, N.A.*, 693 F.3d 207, 210 (1st Cir. 2012). An injunction would impose additional costs on Ashley to the extent it would be required to re-label and re-ticket its merchandise, or revise its promotional materials and other sales-related materials. *See* Muller Decl., ¶ 5.

d. Attorneys’ fees can also be “included in an assessment of the amount in controversy when provided by statute.” *Speilman v. Genzyme Corp.*, 193 F.R.D 19, 21 (D. Mass. 2000); *see also Department of Recreation and Sports of Puerto Rico v. World Boxing Ass’n*, 942 F.2d 84, 89-90 (1st Cir. 1991). Here, Plaintiff seeks attorneys’ fees pursuant to Mass. Gen. L. ch. 93A, § 9. (*See* Compl. Prayer For Relief). Mass. Gen. L. ch. 93A, § 9(4) provides that “[i]f the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney’s fees and costs incurred in connection with said action.” “The First Circuit Court of Appeals has approved of at least two different methods for calculating attorneys’ fees in the context of a class action: the ‘percentage of the fund’ method or the ‘lodestar’ method.” *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 2014 U.S. Dist. LEXIS 125041, at *23 (D. Mass. Sep. 8, 2014) (*citing In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995)). The percentage of the fund approach “awards counsel a reasonable percentage of the common fund,” and “[t]he First Circuit has explained that [this] approach may be more efficient and less burdensome on the court, particularly in complex cases.” *Id.* When using the percentage of the fund approach, “[c]ourts in this

Circuit generally award between 20% and 30% of the amount recovered for the class.” *Id.* at 23-24.

e. In short, while Ashley denies Plaintiff is entitled to any of the relief sought in the Complaint, the relief the Complaint seeks through damages (including compensatory and multiple or exemplary damages, declaratory and injunctive relief, and attorneys’ fees and costs) exceeds CAFA’s \$5,000,000 amount-in-controversy requirement.

Procedural Matters

10. Removal is Timely. Defendant accepted service on August 23, 2017. Thus, this notice of removal is timely, as the 30-day period for removal has not expired.

11. Pleadings and Process. Pursuant to 28 U.S.C. § 1446(a), attached hereto as Exhibit A is “a copy of all process, pleadings, and orders served upon” or obtained by Ashley.

12. Filing and Service. A copy of this Notice of Removal is being filed with the Clerk of the Suffolk County Superior Court, and is being served on all counsel of record, consistent with 28 U.S.C. § 1446(d). Suffolk County Superior Court is located within this district.

13. Arbitration. Ashley reserves any and all contractual rights to require arbitration of this controversy. This Notice of Removal is filed without prejudice to the exercise of such contractual rights.

Accordingly, Ashley respectfully removes this action, now pending in Suffolk County Superior Court to the United States District Court for the District of Massachusetts.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

ASHLEY FURNITURE INDUSTRIES, INC.

By its attorneys,

September 22, 2017

/s/ Matthew G. Lindenbaum

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CERTIFICATE OF SERVICE

I, Matthew G. Lindenbaum, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this date.

Dated: September 22, 2017

/s/ Matthew G. Lindenbaum