UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:18-cv-23072

BRANDON OPALKA, an individual,
on behalf of himself and all others
similarly situated,

Plaintiff,

v.

AMALIE AOC, LTD.,
a Florida limited partnership,

Defendant.
_____/

NOTICE OF REMOVAL

1. Pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendant Amalie AOC, Ltd., a Florida Limited Partnership ("Amalie AOC") hereby removes this action from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County to the United States District Court for the Southern District of Florida, being the federal district embracing the place where the case is pending. In support of this Notice of Removal, Amalie AOC states the following:

TIMELINESS OF THE REMOVAL

2. On June 14, 2018, Brandon Opalka commenced this action by filing a Complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, entitled *Brandon Opalka v. Amalie AOC, Ltd.*, No. 18-19664-CA-44.[1]

[1] Pursuant to 28 U.S.C. § 1446(a), the Complaint is attached hereto as Exhibit A, and copies of all other process, pleadings, and orders served upon Amalie AOC in this action, along
(footnote continued on next page)

3. Amalie AOC's counsel agreed to accept service of the Complaint, effective June 28, 2018. In return, plaintiffs' agreed to an enlargement of Amalie AOC's time to serve a responsive pleading through August 13, 2018. Amalie AOC filed its Answer and Defenses to the Complaint on July 27, 2018.

4. This Notice is timely because it was filed within thirty days of service of process on Amalie AOC. 28 U.S.C. § 1446(b); *see also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (holding "that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from the service of the summons, but not by mere receipt of the complaint unattended by any formal service").

5. Written notice of the filing of this Notice of Removal and the removal of the state court action is being served on plaintiff through his counsel of record. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being promptly filed with the Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County.

THE PARTIES

6. Plaintiff Brandon Opalka ("plaintiff") is a citizen of the State of Florida.

7. Amalie AOC is a Florida limited partnership with five members, including one general partner, Packers Acquisition Company ("Packers"), and four limited partners which are Florida revocable trusts (the "Trust Members"). Packers is incorporated and has its principal place of business in Florida. The Trust Members of Amalie AOC are traditional revocable trusts, whose trustees possess the power to hold, manage, and dispose of the trust assets for the benefit of themselves and others. The Trust Members of Amalie AOC include the Harry J. Barkett

---

with other documents in the state court file, are attached as Exhibit B.

Trust, whose trustee is Harry J. Barkett; the Anthony J. Barkett Living Trust, whose trustee is Anthony J. Barkett; the Richard A. Barkett Revocable Trust, whose trustee is Richard A. Barkett; and the Kenneth D. Barkett Revocable Trust, whose trustee is Kenneth D. Barkett. Harry J. Barkett, Anthony J. Barkett, Richard A. Barkett, and Kenneth D. Barkett are all citizens of Florida. Because Amalie AOC's members are all citizens of the State of Florida, Amalie AOC is a citizen of the State of Florida. Moreover, because Amalie AOC is an unincorporated association organized under the laws of the State of Florida and with its principal place of business in Florida, Amalie AOC is a citizen of the State of Florida pursuant to 28 U.S.C. § 1332(d)(10).

NATURE OF THE ACTION

8. Plaintiff alleges that he is an individual consumer who "purchased a bottle of XCEL Premium SAE 10W30" motor oil (the "Product") at a gas station in Miami-Dade County, Florida. Compl. ¶ 7. According to the Complaint, Amalie AOC "manufactures, markets, advertises, and/or sells" the Product, the Product is "obsolete," and it is "harmful and ineffective as a motor oil for automotive engines manufactured after 1930." Compl. ¶ 2.[2] Plaintiff contends that the label on the motor oil container led him to believe that the Product "offered engine protection for his vehicle." Compl. ¶ 7. Plaintiff acknowledges in the Complaint that the Product includes a "CAUTION" label on the back panel which discloses the API SA rating of the oil about which plaintiff complains. Compl. ¶ 46. Plaintiff also acknowledges that the label states that the motor oil "contains no additives," and that it is "not suitable for use in most

[2] While Mr. Opalka names Amalie AOC as the defendant in this case, and contends that Amalie AOC manufactures, markets, advertises, and/or sells the motor oil he purchased, this is incorrect. Amalie AOC, Ltd. does not manufacture, market, advertise, or sell the Product. The Product is manufactured and sold by an affiliate, referred to herein as "Amalie".

gasoline powered automobiles built after 1930." *Id*. Plaintiff alleges he did not read this part of the Product's label, and that "no reasonable person" would have done so. Compl. ¶ 49.

9. Although the Complaint includes no mention of plaintiff's intended use for the motor oil, or the make or vintage of his automobile, plaintiff contends that the Product is "worthless," and that he was damaged in the entire amount of the unidentified purchase price that he paid for it. Compl. ¶¶ 60-61. Plaintiff does not allege that he used the motor oil or made any attempt to return it.

10. Based on his allegation that the Product is worthless, and that its label is deceptive, plaintiff asserts claims for violations of the Florida Deceptive and Unfair Trade Practices Act, violations of the Florida's Misleading Advertising Law, and Unjust Enrichment. Compl. ¶¶ 77-130.

11. In addition to his own claims, plaintiff seeks to represent a "class" of "[a]ll persons in Florida who have a post-1930 automobile, and have purchased, an 'XCEL Premium Motor Oil' Product in Florida for use in their automobile." Compl. ¶ 64. The putative class is not limited to citizens of Florida, but includes all persons in Florida. *Id*. Plaintiff alleges that the putative class consists of "thousands of members." Compl. ¶ 67.

12. Plaintiff also alleges that the statute of limitations has been tolled for all members of the putative class, some of whom may have purchased the Product more than four years prior to the filing of the Complaint (Compl. ¶ 132-33), and plaintiff does not place any temporal limits on the class definition. Compl. ¶ 64.

13. Plaintiff seeks to recover – individually and on behalf of the alleged class – actual damages, in the "amount of the purchase price" of all oil sold to the putative class (Compl. ¶ 60), equitable relief in the form of restitution and/or "restitutionary disgorgement," an injunction that

would prohibit the future sale of the Product, "compensatory damages," interest, attorneys' fees, and costs, and "[s]uch other and further relief as the Court may deem necessary and appropriate." Compl. at Prayer for Relief.

BASIS FOR FEDERAL JURISDICTION

14. This action is removable to this Court because federal jurisdiction exists over plaintiff's claims pursuant to the Class Action Fairness Act.

CLASS ACTION FAIRNESS ACT

15. Federal diversity jurisdiction exists over plaintiff's claims pursuant to the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA") codified in various sections of Title 28 of the United States Code, including 28 U.S.C. §§ 1332(d) & 1453.

16. CAFA became effective on February 18, 2005, and applies to civil actions commenced on or after that date, including this action.

17. CAFA was enacted to enlarge federal jurisdiction over proposed class actions. CAFA provides that a class action against a non-governmental entity may be removed if: (a) the number of proposed class members is not less than 100; (b) there is requisite "minimal" diversity of citizenship among the parties; and (c) the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5) & 1453(b). As demonstrated below, all of CAFA's removal requirements are satisfied in this case.

18. Further, it is clear from both Supreme Court precedent and CAFA's legislative history that any doubts should be resolved in favor of federal jurisdiction. *See, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (holding that "no anti-removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court"); S. Rep. 109-14, at 43 (2005) ("Overall,

[CAFA] is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant."); *id*. at 35 (explaining that the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"). Indeed, the Eleventh Circuit has recognized that, in light of the Supreme Court's holding in *Dart*, courts can "no longer rely on any presumption in favor of remand in deciding CAFA jurisdictional questions." *Dudley v. Eli Lilly & Co*., 778 F.3d 909, 912 (11th Cir. 2014) (citation omitted).

Class Size

19. Although Amalie AOC does not concede that plaintiff has defined a proper class or that a class can be certified, the number of members of the class proposed by plaintiff is not less than 100. Plaintiff's Complaint alleges that "[p]laintiff reasonably estimates that there are thousands of members of the class." Compl. ¶ 67.

20. The Product has been sold in Florida for more than 20 years. The volume of sales is substantial. On average, Amalie has sold more than 730,000 gallons of the Product in Florida each year over the last six years.

21. Amalie is not a retailer and does not sell the product directly to consumers. Amalie prices the product for sale to wholesalers and retailers by the gallon, but the Product is packaged for sale to consumers in quart and gallon-sized containers. Consumers generally purchase the Product from retailers in small quantities. For example, Mr. Opalka alleges he bought a single "bottle" of the Product from a gas station shelf. The Complaint includes a picture of a quart bottle of XCEL Premium Motor Oil. Many consumers purchase the Product by the quart or gallon in this manner. Others may purchase several containers at one time.

22. Accordingly, the proposed class of all consumer purchasers of the Product in Florida exceeds 100 members.

Minimal Diversity of Citizenship

23. CAFA's requirement of minimal diversity is satisfied because, although plaintiff is a citizen of Florida, the putative class includes citizens of states other than Florida, and Amalie AOC is a citizen of Florida. 28 U.S.C. § 1332(d)(2)(A).

24. No exception to CAFA jurisdiction applies here, because plaintiffs have not alleged and cannot establish that any particular percentage of the members of the proposed class are Florida residents. *See* 28 U.S.C. § 1332(d)(4). The proposed class includes all persons "in Florida" who purchased the Product, regardless of their residency. *See Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164, 1166 (11th Cir. 2006) (party seeking remand of removed case bears burden of establishing exception to jurisdiction, and local controversy exception did not apply to class action litigation removed from Alabama state court where court had "no way of knowing what percentage of the plaintiff class are Alabama citizens").

Aggregate Amount in Controversy

25. CAFA's third requirement is satisfied because "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs." 28 U.S.C. § 1332(d)(2). Although Amalie AOC disputes liability and damages as well as the propriety of class certification in this case, plaintiff's allegations and prayer for relief, irrespective of their merits, place in controversy an aggregate amount greater than $5 million.

26. The Complaint does not include a demand for any specific sum of monetary relief, but asserts that the amount in controversy "exceeds $750,000, exclusive of attorneys' fees and costs." As set forth below, the sum or value of the monetary and equitable relief sought by

plaintiff for himself and the putative class members exceeds $5 million, exclusive of interest and costs.

27. The United States Supreme Court has held that "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*., 135 S. Ct. at 554. The amount in controversy is not "the amount the plaintiff will recover," but rather "an estimate of the amount that will be put at issue in the course of the litigation." *Dudley*, 778 F.3d at 913 (citing *Pretka v. Kolter City Plaza II, Inc*., 608 F.3d 744, 751 (11th Cir. 2010)); *see also S. Fla. Wellness, Inc. v. Allstate Ins. Co*., 745 F.3d 1312, 1318 (11th Cir. 2014) ("[T]he pertinent question . . . is what is *in controversy* in the case, not how much the plaintiffs are ultimately likely to recover.") (citations and internal quotation marks omitted).

28. Plaintiff claims that the Product is worthless and should not be available for sale to consumers in Florida. He asserts several claims for damages and equitable relief, and contends that all statutes of limitations have been tolled.

29. In the six years preceding the filing of the Complaint – from June 2012 through May 2018 – Amalie sold more than 4,000,000 gallons of the Product in Florida, to wholesale and retail business locations in Florida. The gross revenues from these sales were approximately $20.5 million.

30. As compensatory damages, plaintiff seeks to recover the full retail price paid by class members for the Product. Amalie's sales records reflect its revenue from sales of the Product to wholesalers and retailers in Florida, not the revenue paid by consumers. However, individual retailers determine the prices that consumers pay for the Product, typically by applying a markup over and above the wholesale prices that they paid for the Product.

Accordingly, the compensatory damages sought by plaintiff would be greater than the price wholesalers and retailers paid to Amalie for the Product because any such damages would include those markups.

31. "Estimating the amount in controversy is not nuclear science; it does not demand decimal-point precision." *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1317 (11th Cir. 2014). The Eleventh Circuit has explained that determining the amount in controversy is an "undertaking . . . not to be defeated by unrealistic assumptions that run counter to common sense." *Id.* (finding removal proper and rejecting plaintiffs' characterization of amount in controversy as speculative given the "large number of medical bills at issue and the significant amount of money at stake"); *see also Scott v. Cricket Commc'ns, LLC*, 865 F.3d 189, 196 (4th Cir. 2017) (citing *S. Fla. Wellness, Inc.*, 745 F.3d at 1317, noting that "a removing defendant is somewhat constrained by the plaintiff," and rejecting plaintiff's contention that defendant's evidence of the amount in controversy was over-inclusive; explaining it is appropriate for defendant's allegations to rely on "reasonable estimates, inferences, and deductions").

32. Given Amalie's sales in Florida over the past six years alone, Plaintiff's allegations put well over $5,000,000 of controversy with respect to his claims for compensatory damages.

33. Plaintiff has also demanded that disgorgement of any money received through the sale of the Product in Florida as restitution for selling a product that is allegedly worthless. From June 2012 to May 2018, Amalie has collected approximately $20.5 million of revenue from sales of the Product delivered to wholesalers and retailers in Florida. Even after deducting Amalie's cost, that amount exceeds $5,000,000.

34. In determining whether the amount in controversy is satisfied, the Court may also consider the amount of punitive damages in controversy. *Booker v. Doyon Sec. Servs., LLC*, 2017 WL 5202682, at *3 (S.D. Fla. Jan. 20, 2017) (citing *Holley Equip. Co. v. Credit Alliance Corp.*, 821 F.2d 1531, 1535 (11th Cir. 1987)). Although plaintiff's Complaint does not include an express demand for punitive damages, and although Amalie AOC disputes that plaintiff would be entitled to recover any such damages, the Complaint asserts a claim for Misleading Advertising under Fla. Stat. § 817.41, which provides for an award of punitive damages. *See* Fla. Stat. § 817.41(6); *see also* Fed. R. Civ. P. 54(c) (providing that every final judgment, except a default judgment, "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"). Subject to Amalie AOC's constitutional and other defenses, punitive damages under Florida law would be limited to a maximum award of three times the amount of compensatory damages. *See McDaniel v. Fifth Third Bank*, 568 F. App'x 729, 732 (11th Cir. 2014) (citing Fla. Stat. § 768.73(1)(a)). Given the gross sales of $20.4 million in Florida over a limited six year period, the punitive damages in controversy exceed $60 million.

35. Thus, plaintiff's allegations demonstrate that the aggregated value of the "claims of the individual class members . . . exceed the sum or value of $5,000,000.00." 28 U.S.C. § 1332(d)(2).

CONCLUSION

For the reasons stated above, Amalie AOC hereby removes this action from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County to the United States District Court for the Southern District of Florida.

Dated: July 27, 2018

Respectfully submitted,

/s/ Julianna Thomas McCabe
Julianna Thomas McCabe (FBN 355010)
jtmccabe@carltonfields.com
Irma R. Solares (FBN 797073)
isolares@carltonfields.com
Michael N. Wolgin (FBN 0042962)
mwolgin@carltonfields.com
CARLTON FIELDS JORDEN BURT, P.A.
Miami Tower, Suite 4200
100 S.E. Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

Attorneys for Defendant Amalie AOC, Ltd.