NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FABIAN ARKLISS, Plaintiff, v. NISSAN EXTENDED SERVICES NORTH AMERICA, INC., and DIFEO NISSAN PARTNERSHIP d/b/a HUDSON NISSAN, Defendants.	**OPINION** Civ. No. 18-5681 (WHW-CLW)

Walls, Senior District Judge

In this putative class action involving allegedly misleading vehicle-service contracts, Defendants Nissan Extended Services North America, Inc. ("NESNA") and Difeo Nissan Partnership ("Difeo") move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). ECF Nos. 8, 10. Plaintiff Fabian Arkliss opposes, and cross-moves to remand or, alternatively, engage in jurisdictional discovery. ECF No. 24. Decided without oral argument under Federal Rule of Civil Procedure 78, Defendants' motions are granted, and Plaintiff's cross-motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On April 28, 2015, Arkliss purchased a used Nissan Altima (the "Vehicle") at Hudson Nissan in Jersey City, New Jersey. *Id.* ¶ 6. He did so on credit, and entered into a Retail Installment Contract ("RIC") with Difeo at a 23.99% interest rate. *Id.* ¶ 7. At the time Arkliss purchased the Vehicle, he also purchased a "Vehicle Service Agreement" ("VSA") for $1500, for which NESNA is the service contractor. *Id.* ¶ 15. The gravamen of Arkliss's Complaint is

[1] Unless stated otherwise, all facts are drawn from the Complaint, ECF No. 1.

that the VSA falsely represented that it "was subject to 0% financing." *Id.* ¶ 21. In fact, the VSA was subject to the same 23.99% interest rate that applied to Arkliss's RIC. *Id.* ¶ 22.

Arkliss filed a February 15, 2018 class-action Complaint in New Jersey Superior Court, Bergen County on behalf of two putative classes. The Complaint alleges two counts of Magnuson-Moss Warranty Act ("MMWA") violations—one against each defendant. Defendants removed the case to the District of New Jersey on April 6, 2018 under the Class Action Fairness Act ("CAFA").

STANDARD OF REVIEW

Rule 12(b)(6) allows for dismissal where the non-moving party fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (internal quotation marks omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—that the pleader is entitled to relief." *Id.* at 679.

In assessing a plaintiff's claims, a district court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint. *See Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 216 (3d Cir. 2003); Charles A.

Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1357 at 299 (3d ed. 2014). "A 'document integral to or explicitly relied on in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.'" *Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 256 n.5 (3d Cir. 2004) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

DISCUSSION

1. Arkliss's Cross-Motion

The Court will first address Arkliss's cross-motion to remand or, alternatively, engage in jurisdictional discovery. Arkliss contends that NESNA failed to meet CAFA's removal requirements because it has failed to show that the amount in controversy exceeds $5 million. ECF No. 24-1 at 6–9.

CAFA confers on district courts original jurisdiction of any civil action in which three requirements are met: (1) an amount in controversy that exceeds $5 million when aggregated across all individual claims; (2) minimally diverse parties; and (3) that the class consists of at least 100 or more members. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) (citing 28 U.S.C. § 1332(d)(2), (5)(B), (6)). The removing party bears the burden of showing that the case is properly before the federal court. *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006). Arkliss does not dispute that the second and third jurisdictional requirements are met.

Where, as here, the amount-in-controversy is challenged, "both sides submit proof and the court decides, by a preponderance of the evidence," whether the requirement has been met. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). A defendant's "plausible allegations" regarding the amount in controversy will ordinarily suffice. *Dart Cherokee Basin Operating Co., LLC*, 135 S.Ct. 547, 554 (2014). But a defendant must do more

than provide "fanciful 'pie-in-the-sky,' or simply wishful amounts." *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 403 (3d Cir. 2004).

In its removal notice, NESNA asserted that it "has entered into over 5,000 [VSAs] that contain the allegedly offending '0% Financing' language." Notice of Removal ¶ 15, ECF No. 1. NESNA then calculated that Arkliss seeks to recover at least $1,079.55 in interest that he paid since purchasing the Vehicle, assuming that the interest is non-compounding. *Id.* ¶ 16. By multiplying the amount of Arkliss's interest payments ($1,079.55) by the number of VSAs sold by NESNA with the "0% Financing" language (5,000), NESNA estimated that the amount in controversy is at least $5.3 million. *Id.* ¶ 19. This is a conservative estimate, according to NESNA, because it assumes non-compounding interest, and does not take into account the attorneys' fees or injunction that Arkliss seeks. *Id.*

Arkliss contends that remand, or at least jurisdictional discovery, is necessary at this stage because NESNA has not demonstrated that the amount-in-controversy requirement is met. NESNA's failure, according to Arkliss, stems from its decision to use the 5,000 VSAs containing "0% Financing" language as one of its multiplicands; that figure overestimates the amount-in-controversy because Arkliss brings this action only on behalf of persons who signed such VSAs, and then were charged a higher—i.e., non-zero—rate of interest. ECF No. 24-1 at 8.

NESNA responds by noting that Arkliss does not dispute the reasonableness of using $1,079.55 as one of the amount-in-controversy multiplicands. *C.f. Judon v. Travelers Property Cas. Co. of Am.*, 773 F.3d 495, 507 (3d Cir. 2014) (finding that it is "not unreasonable to assume that [plaintiff], as the proposed class representative, has damages that are typical of the class"). It also offers the certification of Isaias Ramos, establishing that Difeo has sold 1,529 VSAs written by NESNA since January 1, 2014, which includes the Complaint's purported class. ECF

No. 28-3. Those VSAs (i) contained the offending "0% Financing" language, and (ii) "were subject to a higher than zero percent interest rate." *Id.* Using Arkliss's claimed damages, the amount-in-controversy from VSA purchases at Difeo, then, is $2,145,829. ECF No. 28 at 7. Because (i) Difeo is just one of thirty-five Nissan dealers in New Jersey; and (ii) Arkliss purports to sue on behalf of a nationwide class, NESNA claims that the amount-in-controversy requirement is easily met. This is particularly so when taking into account Arkliss's request for attorneys' fees.

The Court finds that NESNA has shown by a preponderance of the evidence that the amount-in-controversy requirement is met. Arkliss does not dispute that his damages are at least $1,079.55. Using NESNA's damages-calculation method, which the court finds to be reasonable and objective, damages of the putative class are over $2 million at the Difeo dealership alone. When multiplied by the thirty-five Nissan dealers in New Jersey, that figure results in statewide damages of over $70 million, which is more than enough to meet the $5 million amount-in-controversy requirement. NESNA's calculations do not rely on "fanciful" or "wishful" amounts; they are based on Arkliss's own claimed damages, and objective, sworn facts about NESNA's Difeo-specific sales and likely statewide sales. Arkliss's cross-motion is denied.

2. **Defendants' Motions to Dismiss**

Defendants argue that Arkliss's claims must be dismissed because (i) he failed to provide Defendants with a reasonable opportunity to cure the alleged violation; (ii) he failed to notify Defendants that he is acting on behalf of a putative class; (iii) he has failed to plead a cause of action under state law; and (iv) he has not alleged damages.[2] Difeo further argues that the conduct Arkliss complains of is not redressable under the MMWA.

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[2] Difeo joins in NESNA's arguments, and vice versa. ECF Nos. 28, 29.

The MMWA allows for lawsuits by "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the MMWA], or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). The MMWA contains a notice-and-cure provision. It states:

> No action (other than a class action . . .) may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought under subsection (d) for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 2310(e). Defendants contend that, under this provision, Arkliss was required to (i) provide Defendants with a reasonable opportunity to cure the alleged violation, and (ii) notify Defendants that he is acting on behalf of a putative class. Arkliss responds that, under the MMWA, a plaintiff may file a class action without providing pre-suit notice or an opportunity to cure.

Arkliss's argument is true to the text of § 2310(e). That provision plainly imposes different requirements on classes than it does on individual plaintiffs; an individual action may not be *brought* without first providing an opportunity to cure, while a class action may not *proceed* "except to the extent the court deems necessary to establish the representative capacity of the named plaintiffs . . . ." *Id.*; *see Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1004 (D.C. Cir. 1986) ("[A] plaintiff may *file* a class action [under the MMWA], but may not *proceed* with that

action, until she has afforded the defendant a reasonable opportunity to cure its alleged breach. While the class action is held in abeyance pending possible cure, the district court may rule on the representative capacity of the named plaintiffs, its determination to be made 'in the application of rule 23 of the Federal Rules of Civil Procedure.'") (emphasis in original).

Defendants' attempt to argue to the contrary is not persuasive, as they rely on authority either involving non-class actions or class actions that did not address the argument that Arkliss makes here. *See, e.g.*, *Heller v. Shaw Indus., Inc.*, Civ. No. 95-7657, 1997 WL 535163 (E.D. Pa. Aug. 18, 1997) (dismissing non-class action); *Moroz v. Alexico Corp.*, Civ. No. 07-3188, 2008 WL 109675 (E.D. Pa. Jan. 7, 2008) (dismissing putative class action under MMWA but not addressing distinction between class and non-class actions and not resting dismissal on failure to provide opportunity to cure); *McGarvey v. Penske Auto. Group, Inc.*, Civ. No. 08-5610, 2011 WL 1325210 (D.N.J. March 31, 2011) (same); *In re Elk Cross Timbers Decking Mktg.*, Civ. No. 15-018, 2015 WL 6467730 (D.N.J. Oct. 26, 2015) (dismissing MMWA class-action claims for failure to provide opportunity to cure where plaintiffs failed to address defendant's opportunity-to-cure argument). Defendants' motion to dismiss Arkliss's claims based on failure to provide an opportunity to cure is denied. For the same reason, Defendants' motion to dismiss for Arkliss's failure to notify that he is proceeding on behalf of a class is denied; that notification is plainly required "at the time" Arkliss gives Defendants a reasonable opportunity to cure, which, as discussed, must occur before Arkliss's claims "proceed" but not before they are "brought." 15 U.S.C. § 2310(e). The proper course under the MMWA is to hold this action in abeyance pending possible notice and cure. *Walsh*, 807 F.2d 1004. But because the Court will dismiss the Complaint on other grounds, abeyance is unnecessary.

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Defendants next argue that Arkliss's MMWA claims must be dismissed because he has failed to explicitly plead a requisite underlying state-law claim. Arkliss responds that his Complaint is not required to plead a separate cause of action under state law, so long as it "clearly alleges [Defendants] violated the terms" of the VSA. ECF No. 24-1 at 18. Arkliss is not correct. *See Granillo v. FCA US LLC*, Civ. No. 16-153, 2016 WL 9405772, at *16 (D.N.J. Aug. 29, 2016) (holding that MMWA claims by certain class members who failed to also assert state-law warranty claims must fail because "a plaintiff cannot bring an MMWA claim without an underlying state law claim"); *Johansson v. Central Garden & Pet Co.*, 804 F. Supp. 2d 257, 265 (D.N.J. 2011) ("A claim under the MMWA relies on the underlying state law claim."). Because Arkliss fails to plead an underlying state-law claim, its MMWA claims must be dismissed. Defendants' remaining contentions need not be addressed.

CONCLUSION

Defendants' motions to dismiss are granted. Plaintiff is granted 45 days from the date of the accompanying Order to seek leave to amend the Complaint if he wishes. An appropriate order follows.

DATE: 16 August 2018

William H. Walls
Senior United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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Walls, Senior District Judge

Defendants Nissan Extended Services North America, Inc. ("NESNA") and Difeo Nissan Partnership ("Difeo") move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). ECF Nos. 8, 10. Plaintiff Fabian Arkliss opposes, and cross-moves to remand or, alternatively, engage in jurisdictional discovery. ECF No. 24.

ORDERED that Defendants' motion to dismiss is GRANTED, and it is further

ORDERED that Plaintiff Arkliss's cross-motion is DENIED, and it is further

ORDERED that Plaintiff Arkliss will have 45 days from the date of this Order to seek to amend the Complaint if he wishes.

DATE: 16 August 2018

William H. Walls
Senior United States District Court Judge