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18
19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA
21 WESTERN DIVISION

22 PHILIP ALVAREZ, individually and
23 on behalf of all others similarly
situated,

24 Plaintiff,

25 v.

26 SIRIUS XM RADIO INC.,

27 Defendant.
28

Case No. 2:18-cv-08605

[Removal of Los Angeles County
Superior Court, Case No. BC719411]

**SIRIUS XM RADIO INC.’S
NOTICE OF REMOVAL**

Complaint Filed: August 28, 2018

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TO THE CLERK OF THE COURT:

PLEASE TAKE NOTICE that Defendant Sirius XM Radio Inc. (“Sirius XM”) hereby files this Notice of Removal for the above-captioned action from the Superior Court of California, County of Los Angeles, to the United States District Court for the Central District of California, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, and on the basis of the following facts, which show that this case may be properly removed to this Court:

1. Plaintiff filed a Complaint in the above-captioned matter in the Superior Court of California, County of Los Angeles, on August 28, 2018 (the “Complaint”).

2. Plaintiff seeks to represent a class of “[a]ll persons in California who purchased a lifetime subscription” of satellite radio services from Sirius XM and whose “lifetime subscription” Sirius XM allegedly “later failed to honor within the person’s lifetime without encumbrances.” Complaint ¶ 16. Specifically, Plaintiff alleges that Sirius XM sold lifetime subscriptions to him and the putative class members and that, contrary to Sirius XM’s alleged representations, each subscription was subject to a \$75 dollar-per-transfer fee. Complaint ¶ 15. He brings claims for Fraudulent Misrepresentation, Negligent Misrepresentation, violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et. seq.*, and violation of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et. seq.* Complaint ¶¶ 22-53. He seeks an injunction barring Sirius XM from “(1) terminating or purporting to terminate any lifetime subscriptions; (2) failing to honor any and all lifetime subscriptions previously purchased; and (3) charging and/or purporting to charge Plaintiff and/or Class members any additional monies for any such services.” Complaint ¶ 56; *see also id.* (“Prayer For Relief”). He also seeks attorneys’ fees, expenses, and costs. *Id.*

1 3. As more fully set out below, the Complaint makes this case properly
2 removable to this Court pursuant to 28 U.S.C. § 1441 because Sirius XM has satisfied
3 the procedural requirements for removal, and this Court has subject matter
4 jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).

5 **I. SIRIUS XM HAS SATISFIED THE PROCEDURAL**
6 **REQUIREMENTS FOR REMOVAL.**

7 4. The Summons and Complaint were served on Sirius XM on September
8 5, 2018. Sirius XM has not yet answered or otherwise responded to the Complaint,
9 nor has its time to respond expired.

10 5. As required by 28 U.S.C. § 1446(b), Sirius XM filed this Notice of
11 Removal within 30 days of service. *See Murphy Bros. v. Michetti Pipe Stringing*,
12 526 U.S. 344, 348 (1999) (the 30-day clock runs from the date of “formal service”).

13 6. Attached as Exhibit A is a copy of the Summons, Complaint, and Jury
14 Demand. These documents comprise all “process, pleadings, and orders served
15 upon” Sirius XM in this action to date. 28 U.S.C. § 1446(a)

16 7. Venue lies in the United States District Court for the Central District of
17 California pursuant to 28 U.S.C. § 1441(a) because the State Court Action was filed
18 within this District, at the Superior Court of California, County of Los Angeles.
19 Therefore, venue is proper in this Court because it is the “district and division
20 embracing the place where such action is pending.” *See* 28 U.S.C. § 1441(a).

21 8. Pursuant to 28 U.S.C. § 1446(d), Sirius XM will file a copy of this
22 Notice of Removal with the clerk of the State Court Action, and will serve Plaintiff
23 through his attorney of record in the State Court Action with this Notice promptly
24 after its filing.

25 **II. REMOVAL IS PROPER BECAUSE THE COURT HAS SUBJECT**
26 **MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332.**

27 9. This Court has original subject matter jurisdiction over this action
28 pursuant to 28 U.S.C. § 1332(d) (as amended by the Class Action Fairness Act of

1 2005, Pub. L. No. 109-2, 119 Stat. 14 (“CAFA”). CAFA grants federal courts
2 original jurisdiction over a class action whenever: (1) “any member of a [putative]
3 class of plaintiffs is a citizen of a State different from any defendant,” 28 U.S.C. §
4 1332(d)(2)(A); (2) “the number of members of all proposed plaintiff classes in the
5 aggregate is” not less than 100, *id.* § 1332(d)(5)(B); and (3) “the matter in controversy
6 exceeds the sum or value of \$5,000,000 exclusive of interest and costs,” *id.* §
7 1332(d)(2). “CAFA’s provisions should be read broadly, with a strong preference
8 that interstate class actions should be heard in a federal court if properly removed by
9 any defendant.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547,
10 554 (2014).

11 10. As an initial matter, this lawsuit is a proposed “class action” as defined
12 by CAFA because it is brought by a representative of a putative class and filed in
13 state court pursuant to a rule authorizing a class action. *See* 28 U.S.C. §
14 1332(d)(1)(B). Plaintiff brings his claims as a “class action lawsuit individually and
15 on behalf of all other persons similarly situated.” Complaint ¶ 16. Section 382 of
16 the California Civil Procedure Code authorizes class actions. *Hernandez v.*
17 *Restoration Hardware, Inc.*, 409 P.3d 281, 285 (Cal. 2018).

18 **A. MINIMAL DIVERSITY EXISTS.**

19 11. The named Plaintiff here is diverse from Sirius XM. Plaintiff alleges
20 that he is a citizen of California, while Sirius XM is a Delaware corporation with its
21 principal place of business in New York. Complaint ¶¶ 6-7. Accordingly, the
22 minimal diversity requirement under CAFA is satisfied. *See* 28 U.S.C. §
23 1332(d)(2)(A).

24 **B. THE PURPORTED CLASS CONSISTS OF MORE THAN 100**
25 **MEMBERS.**

26 12. Although Sirius XM does not believe that Plaintiff has defined a proper
27 class or that a class can be defined or maintained under the circumstances alleged,
28 Plaintiff’s allegations indicate that the proposed class of California lifetime

1 subscribers includes at least 100 members, as required by 28 U.S.C. § 1332(d)(5)(B).
2 Plaintiff himself alleges that the class consists of “thousands of consumers
3 throughout California.” Complaint ¶ 17. And Sirius XM’s business records indicate
4 that, as of February 2017, there are 105,953 active lifetime subscriptions in
5 California.¹ The purported class therefore far exceeds 100 members.

6 **C. THE COMPLAINT PLACES IN CONTROVERSY A SUM**
7 **GREATER THAN \$5 MILLION.**

8 13. Although Sirius XM concedes neither liability on Plaintiff’s claims nor
9 the propriety of the relief he seeks, the Complaint places in controversy a sum greater
10 than \$5 million. *See* 28 U.S.C. § 1332(d)(2). “[A] defendant’s notice of removal
11 need include only a plausible allegation that the amount in controversy exceeds the
12 jurisdictional threshold.” *Dart*, 135 S. Ct. at 554. Where, as here, a complaint does
13 not specify an amount sought, “the defendant’s amount-in-controversy allegation
14 should be accepted.” *Id.* at 553. If the figure is challenged by the plaintiff, the Court
15 may request evidentiary submissions and must decide whether the amount-in-
16 controversy requirement is met by a preponderance of the evidence. *Id.* at 554. For
17 purposes of assessing the jurisdictional amount, what matters is the amount put in
18 controversy by the Complaint, not whether the Plaintiff’s claims are meritorious.
19 “The amount in controversy is simply an estimate of the total amount in dispute, not
20 a prospective assessment of defendant’s liability.” *Lewis v. Verizon Commc’ns, Inc.*,
21 627 F.3d 395, 400 (9th Cir. 2010).

22 14. “[T]he amount in controversy includes . . . the costs of complying with
23 an injunction.” *Fritsch v. Swift Transportation Co. of Arizona, LLC*, 899 F.3d 785,
24 793 (9th Cir. 2018). Plaintiff here seeks to enjoin Sirius XM from “continuing to

25 ¹ Sirius XM has not burdened the Court with unnecessary evidentiary
26 submissions in support of the factual assertions in this Notice. *See Dart*, 135 S. Ct.
27 at 551 (for removal purposes, “[a] statement ‘short and plain’ need not contain
28 evidentiary submissions”). Sirius XM will make such submissions at the Court’s
request or if Plaintiff moves to remand the case to state court.

1 terminate, encumber, or otherwise fail to honor Plaintiff's and Class members'
2 lifetime subscriptions for their lifetimes without encumbrances." Complaint ("Prayer
3 for Relief."). The encumbrance that Plaintiff claims to have encountered is a \$75
4 dollar-per-transfer fee, Complaint ¶ 15, and he alleges that his claims "are typical of
5 Class members' claims," *Id.* at ¶ 19. Thus, the fees that, absent an injunction, Sirius
6 XM would be entitled to collect in the future are properly considered part of the
7 amount in controversy. *See Brown v. Select Portfolio Servicing, Inc.*, 2014 U.S. Dist.
8 LEXIS 183455, at *6 (C.D. Cal. March 31, 2014) ("[I]f the requested injunctive relief
9 were granted, defendant would be deprived of the future loan payments that each
10 plaintiff would otherwise be obligated to pay. The present value of that income
11 stream is the amount in controversy for purposes of determining jurisdiction.");
12 *Biendara v. RCI, LLC*, 2011 U.S. Dist. LEXIS 160193, at *17 (C.D. Cal. Jan. 24,
13 2011) ("[L]ost profits to Defendant, perhaps continuing indefinitely into the future,
14 show that the requested injunctive relief is highly valuable and therefore also boosts
15 the amount in controversy above \$5 million."). Even when viewed from the
16 prospective of the putative class members, these \$75 dollar-per-transfer fees
17 constitute part of "the value of the right sought to be gained"—*i.e.*, "the amount of
18 the relief from future payments." *Brady v. Mercedes-Benz USA, Inc.*, 243 F. Supp.
19 2d 1004, 1010 (N.D. Cal. 2002).²

20 15. The purported class is seeking relief from, among other things, having
21 to pay the \$75 dollar-per-transfer fees in the future. With the 105,953 active lifetime
22 subscriptions in California, the value of the injunction comes to at least \$7.9 million
23 (105,953 x 75). This figure actually undershoots the true amount in controversy, as
24 it does not account for the reality that some subscribers seek to transfer their
25 subscriptions multiple times. The amount in controversy, then, far surpasses \$5

26 ² The value of the injunction to each class member must be aggregated to
27 determine the amount in controversy. *See Pagel v. Dairy Farmers of Am., Inc.*, 986
28 F. Supp. 2d 1151, 1157 (C.D. Cal. 2013) ("[CAFA] explicitly tells federal courts to
'aggregate' the claims of individual class members when determining whether the
matter in controversy exceeds the \$5 million threshold.").

1 million. Indeed, Plaintiff’s own assessment of the injunction’s value is in the
2 “millions.” Complaint ¶ 14 (“Defendant’s refusal to honor the lifetime subscriptions
3 has allowed it to reap millions of dollars in profits.”).

4 16. The above figure does not even include Plaintiff’s request for attorneys’
5 fees, Complaint (“Prayer for Relief”), which would also factor into an amount-in-
6 controversy calculation. *See Fritsch*, 899 F.3d at 793 (“[T]he amount in controversy
7 includes . . . attorneys’ fees awarded under fee-shifting statutes.”). These fees need
8 not be separately described here, however, given that the value of the sought
9 injunction is sufficient to meet the jurisdictional amount.³

10 **III. RESERVATION OF RIGHTS.**

11 17. In alleging the amount-in-controversy for purposes of removal, Sirius
12 XM does not concede in any way that the allegations in the Complaint are accurate,
13 that Sirius XM committed any of the violations of law alleged in the Complaint, that
14 Plaintiff has asserted claims upon which relief can be granted, or that an injunction
15 or declaratory judgment is authorized or appropriate. Nor does Sirius XM concede
16 that Plaintiff’s class is properly defined or that class certification is appropriate.
17 Finally, this Notice of Removal does not waive any and all claims or defenses by
18 Sirius XM, all of which are expressly preserved herein

19 18. Sirius XM also reserves the right to amend or supplement this Notice of
20 Removal.

21 WHEREFORE, Sirius XM notices the removal of this case from the Superior
22 Court of California, County of Los Angeles to the United States District Court for
23 the Central District of California pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

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³ Sirius XM reserves the right to include these fees in any amount-in-
controversy calculation if Plaintiff moves to remand.

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Dated: October 5, 2018

Respectfully submitted,

JONES DAY

By: /s/ Laura G. Lim
Laura G. Lim

Attorneys for Defendant
SIRIUS XM RADIO INC.