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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 MICHAEL GERBER,

12 Plaintiff,

13 v.

14 FCA US LLC, A Delaware Limited
15 Liability Company; DOES 1 through 10,
16 Inclusive,

17 Defendant.
18

Case No.: 17-CV-0518-AJB-BGS

**ORDER DENYING PLAINTIFF'S
MOTION TO REMAND**

(Doc. Nos. 9, 10)

19 Presently before the Court is Plaintiff Michael Gerber's ("Gerber") motion to
20 remand. (Doc. Nos. 9, 10.) Defendant FCA US LLC ("FCA") opposes the motion. (Doc.
21 No. 15.) Having reviewed the parties' moving papers and controlling legal authority, and
22 pursuant to Local Civil Rule 7.1.d.1, the Court finds the matter suitable for decision on the
23 papers and without oral argument. Accordingly, the hearing currently set for **July 6, 2017,**
24 **at 2:00 p.m. in Courtroom 4A** is hereby **VACATED**. For the reasons set forth below, the
25 Court **DENIES** Gerber's motion.

26 **BACKGROUND**

27 This dispute arises from FCA's alleged breach of warranty obligations owed to
28 Gerber for a new 2012 Jeep Grand Cherokee ("Jeep") he purchased from FCA. Gerber

1 asserts FCA concealed a known defect from him, specifically, a defect with the totally
2 integrated power module (“TIPM”), which is responsible for controlling and distributing
3 electrical power to the entire vehicle. (Doc. No. 1 at 9 ¶ 4.) Based on this concealment,
4 Gerber instituted this action in San Diego Superior Court on June 30, 2016, bringing causes
5 of action for breaches of express and implied warranties in violation of California’s Song-
6 Beverly Consumer Warranty Act (“Song-Beverly Act” or “Act”), as well as a cause of
7 action for fraudulent inducement/concealment under California state common law. (Doc.
8 No. 1 at 2 ¶ 1.)

9 FCA removed the action to this Court on March 16, 2017, asserting the Court has
10 diversity jurisdiction. (Doc. No. 1 at 1.) On April 17, 2017, Gerber filed the instant motion
11 to remand, arguing FCA has failed to carry its burden of establishing that the amount in
12 controversy exceeds \$75,000 and that the parties are completely diverse. (Doc. Nos. 9, 10.)
13 FCA filed an opposition, (Doc. No. 15), and Gerber replied, (Doc. No. 20). This order
14 follows.

15 LEGAL STANDARD

16 The right to remove a case to federal court is entirely a creature of statute. *See*
17 *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal
18 statute, 28 U.S.C. § 1441, allows defendants to remove an action when a case originally
19 filed in state court presents a federal question, or is between citizens of different states and
20 involves an amount in controversy that exceeds \$75,000. *See* 28 U.S.C. §§ 1441(a), (b); 28
21 U.S.C. §§ 1331, 1332(a). Only state court actions that could originally have been filed in
22 federal court can be removed. 28 U.S.C. § 1441(a); *see also Caterpillar Inc. v. Williams*,
23 482 U.S. 386, 392 (1987); *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir.
24 1988).

25 “[J]urisdiction founded on [diversity] requires that parties be in complete diversity
26 and the amount in controversy exceed \$75,000.” *Matheson v. Progressive Specialty Ins.*
27 *Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam); *see* 28 U.S.C. § 1332(a)(1).
28 Complete diversity requires that the plaintiff’s citizenship is diverse from that of each

1 named defendant. 28 U.S.C. §§ 1332(a)(1), 1332(c)(1); *Caterpillar Inc. v. Lewis*, 519 U.S.
2 61, 68 n.3 (1996). Whether or not complete diversity is present is determined at the time
3 of removal. *See Am. Dental Indus., Inc. v. EAX Worldwide, Inc.*, 228 F. Supp. 2d 1155,
4 1157 (D. Or. 2002) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283,
5 (1938)).

6 The Ninth Circuit “strictly construe[s] the removal statute against removal
7 jurisdiction,” and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right
8 of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per
9 curiam) (citations omitted). “The ‘strong presumption’ against removal jurisdiction means
10 that the defendant always has the burden of establishing that removal is proper.” *Id.*; *see*
11 *also McNutt v. Gen. Motors Acceptance Corp., Inc.*, 298 U.S. 178, 189 (1936) (finding that
12 the removing party must prove its allegations by a preponderance of the evidence). The
13 Court takes this proof from the notice of removal and may, if it chooses, construe the
14 opposition to the motion to remand as an amendment to the notice of removal. *See Cohn v.*
15 *Petsmart Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002).

16 DISCUSSION

17 Gerber argues four points that he contends require remand of this action to California
18 state court: (1) FCA’s amount-in-controversy calculation ignores California state law; (2)
19 FCA, as a limited liability company (“LLC”), has not established the citizenship of its
20 foreign member, nor has it established Gerber’s citizenship; (3) comity dictates that this
21 case be remanded to state court; and (4) FCA’s failure to attach all pleadings that were filed
22 in state court render FCA’s removal procedurally improper. (Doc. Nos. 9, 10, 20.) The
23 Court will consider each argument in turn.

24 ***I. Amount in Controversy***

25 In his complaint, Gerber seeks, *inter alia*, “reimbursement of the price paid for the
26 [Jeep] less that amount directly attributable to use by the Plaintiff prior to discovery of the
27 nonconformities” and “a civil penalty of up to two times the amount of actual damages in
28 that FCA [] has willfully failed to comply with its responsibilities under the [Song-Beverly]

1 Act.” (Doc. No. 1 at 31 ¶¶ 145, 148.) Gerber asserts that FCA has not proven the amount
2 in controversy exceeds \$75,000. (Doc. No. 9-1 at 7–10; Doc. No. 20 at 7–8.)

3 Gerber contends FCA’s notice of removal improperly relies on an approximation of
4 the cash price, but offers no explanation as to why this number is the proper figure to base
5 the amount-in-controversy calculation on. (Doc. No. 9-1 at 8–9.) In response, FCA points
6 to the retail installment sale contract (“RISC”), attached to the complaint, as well as FCA
7 warranty claim reports, documents upon which it bases its calculation that the actual
8 damages at issue are \$38,629.50. (Doc. No. 15 at 12–14.)

9 California Civil Code section 1793.2(d)(2)(B) defines “restitution” in relevant part
10 as “an amount equal to the actual price paid or payable by the buyer, . . . including any
11 collateral charges such as sales or use tax, license fees, registration fees, and other official
12 fees[.]” Section 1793.2(d)(2)(C) goes on to permit the defendant to reduce the amount
13 payable to the buyer “by that amount directly attributable to use by the buyer prior to the
14 time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized
15 service and repair facility for correction of the problem that gave rise to the
16 nonconformity.” Cal. Civ. Code § 1793.2(d)(2)(C).

17 The complaint does not allege the total amount sought with respect to these damages.
18 However, as noted, the RISC is attached to the complaint. (Doc. No. 1 at 36.) The RISC
19 lists the total cash price as \$45,022.73. (*Id.*) FCA predicates its actual damages analysis on
20 this figure. (Doc. No. 15 at 12; *see* Doc. No. 1 at 4 ¶ 19.) Given that the statute permits
21 Gerber to recover collateral charges, which FCA did not use in its amount-in-controversy
22 calculation, the Court finds FCA’s use of the total cash price conservatively estimates “the
23 actual price paid or payable by” Gerber.

24 As noted above, however, this figure does not end the inquiry. Rather, the restitution
25 awardable under section 1793.2(d)(2)(B) must be reduced by the amount directly
26 attributable to Gerber’s use of the Jeep prior to the first repair or attempted repair. This set-
27 off amount is determined by multiplying the “actual price of the new motor vehicle paid or
28 payable by the buyer . . . by a fraction having as its denominator 120,000 and having as its

1 numerator the number of miles traveled by the new motor vehicle prior to the time the
2 buyer delivered the vehicle” for correction of the problem. Cal. Civ. Code §
3 1793.2(d)(2)(C).

4 The complaint does not include the Jeep’s mileage when Gerber took it to the
5 dealership for the first relevant repair. Rather, the complaint lists April 29, 2013, as the
6 date he “delivered the [Jeep] to an authorized FCA [] repair facility for repair.” (Doc. No.
7 1 at 23 ¶ 95.) On that date, the Jeep had 17,082 miles on it. (Doc. No. 15-1 ¶ 10; Doc. No.
8 15-9 at 3.) When Gerber purchased the Jeep, it had 42 miles on its odometer. (Doc. No. 1
9 at 36.) Accordingly, the Court finds FCA has presented sufficient evidence to establish it
10 is more likely than not that the mileage attributable to Gerber’s use, for purposes of the
11 instant motion, is 17,040. Utilizing the formula provided by section 1793.2(d)(2)(C), this
12 results in a mileage offset of \$6393.23, which reduces the actual damages at issue to
13 \$38,629.50.

14 This does not end the inquiry either. In the complaint, Gerber also seeks civil
15 penalties. (Doc. No. 1 at 31 ¶ 148.) California Civil Code section 1794(c) and (e) permits
16 a buyer to recover a civil penalty not to exceed two times the amount of actual damages
17 where the buyer establishes the defendant’s failure to comply with the Song-Beverly Act
18 is willful. “Courts[,] as a matter of law, calculate the amount in controversy based upon the
19 maximum amount of civil penalties available to plaintiff.” *Garcia v. FCA US, LLC*, No.
20 1:16-cv-00730-DAD-BAM, 2016 WL 4445337, at *4 (E.D. Cal. Aug. 24, 2016) (quoting
21 *Saulic v. Symantec Corp.*, No. SA 07-cv-00610-AHS-PLAx, 2007 WL 5074883, at *4
22 (C.D. Cal. Dec. 26, 2007)); *see also Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d
23 1042, 1046 n.3 (9th Cir. 2000) (noting district courts can consider treble damages where
24 authorized by statute). Here, the Act permits recovery of up to two times actual damages.
25 Because Gerber “is seeking recovery from a pot that [FCA] has shown could exceed
26 [\$75,000] and [Gerber] has neither acknowledged nor sought to establish that the []
27 recovery is potentially any less,” the Court finds inclusion of a full civil penalty award is
28 appropriate. *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 401 (9th Cir. 2010); *see also*

1 *id.* at 401 (“Once the proponent of federal jurisdiction has explained plausibly how the
2 stakes exceed [the amount in controversy], . . . then the case belongs in federal court unless
3 it is legally impossible for the plaintiff to recover that much.” (quoting *Spivey v. Vertrue,*
4 *Inc.*, 528 F.3d 982, 986 (7th Cir. 2008))).

5 As determined above, the actual damages figure at issue is \$38,629.50. When
6 trebled, the amount in controversy, exclusive of incidental and consequential damages,
7 finance charges, and attorney’s fees and costs, is \$115,888.50. Because this figure exceeds
8 the jurisdictional threshold, the Court finds FCA has carried its burden as to the amount in
9 controversy. *Garcia*, 2016 WL 4445337, at *4.

10 ***II. Diversity of Citizenship***

11 Gerber next argues that FCA, as an LLC, has failed to establish the citizenship of its
12 foreign member. (Doc. No. 9-1 at 10–12; Doc. No. 20 at 4–6.) Gerber also asserts FCA has
13 failed to establish Gerber’s citizenship. (Doc. No. 20 at 3–4.) In opposition, FCA asks the
14 Court to consider Book 2 of the Dutch Civil Code, Article 2:64-1, which states that “[a]n
15 Open Corporation (*‘naamloze vennootschap’*) is a legal person” (Doc. No. 15 at 6–
16 10.) FCA argues that its ultimate owner is a naamloze vennotschap (“N.V.”); accordingly,
17 FCA is a citizen of the Netherlands and thus diverse from Gerber. (*Id.*)

18 Removal based on diversity requires that the citizenship of each plaintiff be diverse
19 from the citizenship of each defendant (*e.g.*, complete diversity). *Caterpillar Inc.*, 519 U.S.
20 at 68. For purposes of diversity, an LLC is a citizen of every state in which its
21 “owners/members” are citizens. *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d
22 894, 899 (9th Cir. 2006) (explaining that courts are to treat LLCs like partnerships, which
23 have the citizenships of all of their members). “Section 1332(a)(2) applies to foreign legal
24 entities of all kinds, so long as the entity is considered a juridical person under the law that
25 created it.” *Cohn v. Rosenfeld*, 733 F.2d 625, 629 (9th Cir. 1984). A “juridical person” is
26 an “entity, such as a corporation, created by law and given certain legal rights and duties
27 of a human being[.]” Black’s Law Dictionary 979, 1324–25 (10th ed. 2014). Factors
28 relevant to whether an entity is a juridical person include the entity’s ability to sue and be

1 sued in its own name, whether any recovery in such litigation becomes an asset of the
2 entity, and whether the laws of the foreign country recognize the entity as a legally
3 independent organized enterprise. *Cohn*, 733 F.2d at 629.

4 In the notice of removal and accompanying declaration, FCA explained it is an LLC
5 organized under the laws of the State of Delaware. (Doc. No. 1 at 3 ¶ 11; Doc. No. 1-2 ¶
6 2.) Its sole member is FCA North American Holding LLC, also a limited liability company
7 organized under the laws of the State of Delaware. (Doc. No. 1 at 3 ¶ 11; Doc. No. 1-2 ¶
8 3.) In turn, FCA North American Holding LLC’s sole member is Fiat Chrysler
9 Automobiles, N.V. (“Fiat N.V.”), which is a publicly traded company incorporated under
10 the laws of the Netherlands with its principal place of business in London, England. (Doc.
11 No. 1 at 3 ¶ 11; Doc. No. 1-2 ¶ 4.)

12 It is Fiat N.V.’s citizenship that Gerber contends FCA has failed to establish by a
13 preponderance of evidence. Specifically, Gerber asserts Kris Krueger’s declaration fails to
14 establish that Fiat N.V. is a juridical person under the laws of the Netherlands because the
15 Krueger declaration is conclusory, contains improper legal conclusions, lacks foundation,
16 and lacks any documentary evidence. (Doc. No. 9-1 at 12; *see* Doc. No. 9-3.)

17 The Court overrules Gerber’s objections. Federal Rule of Civil Procedure 44.1
18 provides, “In determining foreign law, the court may consider any relevant material or
19 source, including testimony, whether or not submitted by a party or admissible under the
20 Federal Rules of Evidence.” As such, FCA’s evidence need not pass muster under the
21 Federal Rules of Evidence to be considered on the instant motion.¹ Having considered
22 Krueger’s declaration, along with Scott Shepardson’s declaration and the accompanying
23 translation of the Dutch Civil Code provided, the Court is satisfied that FCA has proven it
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28 ¹ For this reason, the Court **DENIES** Gerber’s request for jurisdictional discovery. (Doc.
No. 9-1 at 12.)

1 is more likely than not a citizen of the Netherlands.² The Dutch Civil Code provides that
2 an N.V. is a “legal person” that can, *inter alia*, be held jointly and severally liable for its
3 directors’ juridical acts. (Doc. No. 15-2 at 2, 5.) The Court’s conclusion is in keeping with
4 those of other courts, finding N.V.s to be foreign entities. *See Garcia*, 2016 WL 4445337,
5 at *3 (finding FCA “adequately asserted and established that [Fiat N.V.] is a juridical
6 person under the laws of Netherlands and that [FCA] is not a citizen of California”);
7 *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 20 (D.D.C. 2005) (dismissing foreign
8 plaintiffs’ claims against defendant N.V. because 28 U.S.C. § 1332 “does not confer
9 jurisdiction over suits by a group consisting of only foreign persons against another foreign
10 person”).

11 Gerber further asserts that remand is appropriate because FCA has failed to establish
12 that Gerber is a citizen of California. (Doc. No. 20 at 3–4.) In the notice of removal, FCA
13 stated Gerber is a citizen and resident of California. (Doc. No. 1 at 3 ¶ 10.) That statement
14 references the complaint, which simply states that Gerber “is an individual residing in the
15 City of San Diego, County of San Diego, and State of California.” (*Id.* at 9 ¶ 1.) Gerber
16 argues that because the complaint does not allege that he is a citizen of California, and
17 because the notice of removal relies on the complaint, FCA has failed to prove Gerber’s
18 citizenship for purposes of removal. (Doc. No. 20 at 3–4.)

19 If the record contained only the information Gerber asserts it does, the Court would
20 agree. “The natural person’s state citizenship is [] determined by her state of domicile, not
21 her state of residence. A person’s domicile is her permanent home, where she resides with
22 the intention to remain or to which she intends to return. A person residing in a given state
23 is not necessarily domiciled there, and thus is not necessarily a citizen of that state.” *Kanter*

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26 ² Gerber also raises evidentiary objections to the Shepardson declaration. (Doc. No. 20-4.)
27 First, Gerber’s filing violates the undersigned’s Civil Case Procedures, which require that
28 objections relating to the motion be set forth in the party’s opposition or reply. Second, the
Court **OVERRULES** the objections based on Federal Rule of Civil Procedure 44.1.

1 *v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (citations omitted). However,
2 while Gerber stated in the complaint that he is a resident of California, the civil cover sheet
3 clarifies that Gerber is also a California citizen. (Doc. No. 1-1 at 1.) In Item III, Gerber
4 indicated he is a citizen of this (*e.g.*, California) state. (*Id.*) In the absence of any evidence
5 or argument to the contrary, the record supports finding it is more likely than not that
6 Gerber is a citizen of California. *See Lastra v. PHH Mortg. Corp.*, No. 10cv2573–LAB
7 (BLM), 2011 WL 768135, at *1 n.2 (S.D. Cal. Feb. 28, 2011) (noting that defendant
8 intended to allege plaintiff is a citizen of California given that the civil cover sheet
9 identifies plaintiff as such). In sum, the Court finds FCA has carried its burden of
10 establishing diversity jurisdiction.

11 ***III. Gerber’s Remaining Arguments***

12 Gerber’s final arguments do not alter the foregoing conclusions. Gerber asserts that
13 the Court should decline jurisdiction on comity principles because this case involves
14 “consideration of numerous state-specific issues on sensitive, uniquely state-law issues of
15 regulation and statutory interpretation.” (Doc. No. 9-1 at 4–6.) As a federal district court
16 located within the State of California, this is not the Court’s first case dealing with claims
17 predicated on the Song-Beverly Act or similar California state consumer protection laws.
18 As such, the Court is confident in its ability to faithfully interpret and apply California state
19 law to the issues of this case. While the Court is cognizant that Gerber has litigated this
20 case for several months in state court, Gerber should rest assured that this district seeks to
21 move cases quickly in keeping with the spirit of Federal Rule of Civil Procedure 16. The
22 Court therefore declines to remand this case based upon principles of comity.

23 Gerber lastly contends that FCA’s removal of this action was procedurally improper
24 for FCA’s failure to attach certain pleadings to its notice of removal. (Doc. No. 9-1 at 13.)
25 Gerber cites no authority to support this position. In fact, the weight of authority provides
26 that the Court should not remand for defects in the removal procedure where the pleadings
27 that are attached to the notice of removal provide the Court with sufficient information
28 from which it can evaluate whether federal jurisdiction exists. *See, e.g., Kuxhausen v. BMW*


1 *Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 (9th Cir. 2013) (construing defendant’s failure
2 to attach original complaint to notice of removal as a “*de minimis* procedural defect [that]
3 was curable even after expiration of the thirty-day removal period” (citation and internal
4 quotation marks omitted)); *Romero v. Tornier Med. Grp. N.V.*, No. SA CV 16-1060-DOC
5 (JCGx), 2016 WL 3749695, at *3 (C.D. Cal. July 13, 2016) (“To the extent Plaintiff is
6 arguing the case should be remanded because Defendant failed to attach the motion to
7 consolidate, that argument fails.”). Furthermore, FCA’s failure is easily remedied by FCA
8 filing those pleadings on this Court’s docket.³ Accordingly, the Court declines to remand
9 the case on this basis.

10 **CONCLUSION**

11 Based on the foregoing, Gerber’s motion to remand is **DENIED**. (Doc. Nos. 9, 10.)
12 Because the Court denies his motion, Gerber’s request for attorney’s fees and costs is also
13 **DENIED**. (Doc. No. 9-1 at 13.) The parties’ requests for jurisdictional discovery are
14 **DENIED**. (*Id.* at 12; Doc. No. 15 at 16–17.)

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16 **IT IS SO ORDERED.**

17 Dated: June 23, 2017

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19 Hon. Anthony J. Battaglia
20 United States District Judge
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28 ³ Gerber attempted to file these documents as exhibits to his motion to remand; however,
all he attached were the exhibits cover sheets. (Doc. Nos. 9-4, 9-5.)