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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SCHELLY FISHER,  
  
Plaintiff,  
  
v.  
  
FORD MOTOR COMPANY,  
  
Defendant.

Case No.: 22-cv-339-W-AHG

**ORDER (1) GRANTING  
MOTION TO REMAND [DOC. 4]  
AND (2) TERMINATING  
MOTION TO DISMISS [DOC. 3]  
AS MOOT**

Pending before the Court is Plaintiff Schelly Fisher’s motion to remand this case to the San Diego Superior Court. Defendant opposes.

The Court decides the matter on the papers submitted and without oral argument. See Civ. R. 7.1(d)(1). For the following reasons, the Court **GRANTS** the motion to remand [Doc. 4] and **ORDERS** the case remanded. In light of this order, Defendant’s pending motion to dismiss [Doc. 3] is **TERMINATED** as moot.

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1 **I. RELEVANT BACKGROUND**

2 This case arises from Plaintiff Schelly Fisher’s purchase of a 2017 Ford Edge (the  
3 “Vehicle”) from El Cajon Ford. (*Compl.* ¶ 4.<sup>1</sup>) The Complaint alleges that during the  
4 warranty period, the vehicle began exhibiting various symptoms of persistent defects,  
5 including “a loud clatter/knocking/rattle sound with the engine running; low coolant  
6 level; loss of coolant; abnormal burning smell from vehicle; coolant leaks into the engine  
7 cylinders; engine misfires; rough running; lack of power; hesitation on acceleration;  
8 and/or activation of the check engine light (in response to fault code P0302).” (*Id.* ¶ 7).

9 Fisher alleges that while under warranty, he took the Vehicle to Defendant Ford  
10 Motor Company’s (“Ford”) authorized repair facility. (*Compl.* ¶ 8.) However, Ford was  
11 unable to repair the Vehicle “to conform to the applicable express warranties within a  
12 reasonable number of opportunities.” (*Id.*)

13 On February 9, 2022, Fisher filed a lawsuit against Ford in the San Diego Superior  
14 Court. The Complaint asserts five causes of action for: (1) Breach of Warranty  
15 Obligation to Provide Restitution or Replacement, Cal. Civ. Code § 1793.2(D)(2);  
16 (2) Breach of Obligation to Commence or Complete Repairs Within Thirty Days, Cal.  
17 Civ. Code § 1793.2(B); (3) Breach of Implied Warranty of Merchantability, Cal. Civ.  
18 Code § 1792; (4) Breach of Obligation to Supply Sufficient Service Literature or  
19 Replacement Parts, Cal. Civ. Code, § 1792(A)(3); and (5) Fraudulent Inducement –  
20 Concealment. (*See Compl.*) Fisher seeks, among other things, the entire purchase price,  
21 actual damages, restitution, a civil penalty of two times Plaintiff’s actual damages,  
22 consequential and incidental damages, punitive damages, reasonable attorney’s fees and  
23 costs, and prejudgment interest at the legal rate. (*Id.* at 10-11, prayer ¶¶ 1–7.)

24 On March 14, 2022, Ford removed the case to this Court based on diversity  
25 jurisdiction. (*Notice of Removal* [Doc. 1].) Fisher now moves to remand, arguing that  
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28 <sup>1</sup> The Complaint is attached to the Notice of Removal [Doc. 1] as Exhibit A [Doc. 1-2].

1 Ford cannot establish the amount in controversy exceeds \$75,000. Ford responds that the  
2 amount-in-controversy requirement is satisfied by aggregating actual damages, a civil  
3 penalty, and attorney’s fees.

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5 **II. LEGAL STANDARD**

6 “Federal courts are courts of limited jurisdiction.” Kokkonen v. Guardian Life Ins.  
7 Co. of Am., 511 U.S. 375, 377 (1994). “They possess only that power authorized by  
8 Constitution or a statute, which is not to be expanded by judicial decree.” Id. (internal  
9 citations omitted). “It is to be presumed that a cause lies outside this limited jurisdiction  
10 and the burden of establishing the contrary rests upon the party asserting jurisdiction.”  
11 Id. (internal citations omitted).

12 Consistent with the limited jurisdiction of federal courts, the removal statute is  
13 strictly construed against removal jurisdiction. Gaus v. Miles, Inc., 980 F.2d 564, 566  
14 (9th Cir. 1992). “The strong presumption against removal jurisdiction means that the  
15 defendant always has the burden of establishing that removal is proper.” Id. “Federal  
16 jurisdiction must be rejected if there is any doubt as to the right of removal in the first  
17 instance.” Id.

18 To determine whether the amount in controversy has been met on removal, “[t]he  
19 district court may consider whether it is ‘facially apparent’ from the complaint that the  
20 jurisdictional amount is in controversy.” Singer v. State Farm Mutual Auto Ins. Co., 116  
21 F.3d 373, 377 (9th Cir. 1997). Where the state-court complaint does not specify an exact  
22 damage figure, the defendant “must provide evidence that it is ‘more likely than not’ that  
23 the amount in controversy” satisfies the federal diversity-jurisdiction requirement.  
24 Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).

25 In cases involving dismissal, the general test is that “[i]t must appear to a legal  
26 certainty that the claim is really for less than the jurisdictional amount to justify  
27 dismissal.” St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).  
28 However, the “legal certainty” test must consider “where a rule of law or measure of

1 damages limits the amount of damages recoverable.” See Morris v. Hotel Riviera, Inc.,  
2 704 F.2d 1113, 1115 (9th Cir. 1983).

3  
4 **III. DISCUSSION**

5 The Complaint does not specify a damage figure. Fisher argues remand is required  
6 because Ford cannot establish that the amount in controversy exceeds \$75,000. (*P&A*  
7 [Doc. 4-1] 3:21–9:18.) Ford responds that the jurisdictional amount-in-controversy  
8 requirement is satisfied by aggregating the restitution, a two-time civil penalty and  
9 typical attorney’s fees in similar cases. (*Opp’n* [Doc. 9] 2:13–16.) For the reasons that  
10 follow, the Court finds Ford has failed to establish the amount in controversy exceeds  
11 \$75,000.

12  
13 **A. Restitution**

14 Ford contends that the amount of restitution at issue (in the form of a statutory  
15 repurchase) totals \$39,629.03. (*Opp’n* 5:13–15.) In his motion, Fisher argues this figure  
16 is inflated because Ford fails to account for two deductions to restitution. (*P&A* 4:7–6:5.)

17 First, Fisher argues the amount of restitution must be deducted based on the  
18 Vehicle’s usage/mileage. (*P&A* 4:18–5:12.) Under the Song Beverly Act, the buyer is  
19 entitled to reimbursement “in an amount equal to the purchase price..., less that amount  
20 directly attributable to use by the buyer prior to the discovery of the nonconformity.”  
21 Cal. Civ. Code § 1793.2(d)(1). This deduction “is calculated based on the number of  
22 miles the buyer drove the car before the first relevant repair.” Cox v. Kia Motors  
23 America, Inc., 2020 WL 5814518, \*3 (N.D.Cal. Sept. 30, 2020). According to Fisher,  
24 the Vehicle’s milage was 41,370 when he first “presented” the car to Ford for repair,  
25 resulting in a deduction of \$13,000. (*Id.* 5:13–24, n.2; *Chae Decl.* [Doc. 4-2] ¶¶ 2, 3.)  
26 Ford responds that there is no evidence supporting Fisher’s claim regarding the Vehicle’s  
27 mileage when first taken for repair. (*Opp’n* 6:4–7.) However, Fisher’s attorney declares  
28 that based on the repair records “available to [him], it appears that the first presentation of

1 the Subject Ford Edge to Ford’s dealer was made at 41,370 miles.” (*Chae Decl.* ¶ 3.)  
2 Accordingly, the Court finds a mileage/usage deduction of \$13,000 is appropriate.

3 Fisher also contends a \$10,145.99 deduction for negative equity is appropriate.  
4 (*P&A* 5:13–24.) This deduction is based on the negative equity from Fisher’s trade-in  
5 vehicle that was rolled into the financing. (*Chae* ¶ 4.) Ford does not dispute that this  
6 deduction is appropriate or the amount of the negative equity. (*See Opp’n* n. 1;  
7 *Silverman Decl.* [Doc. 9-1] ¶ 11.) Instead, Ford insists that with even with the deduction,  
8 the amount in controversy exceeds \$75,000. (*Opp’n* n. 1.) Accordingly, the Court also  
9 finds that the amount of restitution at issue should be reduced by negative equity.

10 Based on the deductions for mileage/usage and negative equity, the amount of  
11 restitution at issue is \$16,483.04, not \$39,629.03 as alleged by Ford.

### 12 13 **B. Civil Penalty**

14 Ford’s amount-in-controversy calculation also assumes a two-time civil penalty  
15 totaling \$79,258.06. (*Opp’n* 5:18–20.) There are two problems with this calculation.

16 First, the Court is not convinced that a civil penalty should automatically be  
17 included in the calculation. In Conrad Associates v. Hartford Accident & Indemnity  
18 Company, 994 F.Supp. 1196 (N.D. Cal. 1998), an insurance company defendant in a bad-  
19 faith case argued punitive damages should be included in the amount in controversy  
20 calculation. As support, defendant attached a number of jury verdicts awarding punitive  
21 damages and asserted the average amount of those verdicts should be used to calculate  
22 the amount in controversy. *Id.* at 1200. The court rejected the argument because the  
23 “defendant has made no effort to compare the facts of those cases with the alleged facts  
24 of this case.” *Id.* at 1201. The court reasoned that “Defendant’s burden cannot be met  
25 simply by pointing out that the complaint seeks punitive damages and that any damages  
26 awarded under such a claim *could* total a large sum of money, particularly in light of the  
27 high burden that must be met in order for a plaintiff even to be eligible for receipt of  
28 discretionary punitive damages.” *Id.*

1 Numerous other cases have followed the approach in Conrad. In Pontiero v.  
2 GEICO Gen. Ins. Co., 2017 WL 3475666 (C.D. Cal. Aug. 14, 2017), for example, the  
3 court found that merely alleging the defendant acted intentionally did not provide  
4 sufficient information to infer that punitive damages may be available. Id. at \*4. In  
5 Mendoza v. Subaru of Am., Inc., 2020 WL 1433427 (C.D. Cal. Mar. 24, 2020), the court  
6 denied the inclusion of civil penalties reasoning that “while civil penalties are available  
7 for willful failure to comply with the Song-Beverly Act, Defendant has not offered any  
8 evidence to support such an award.” Id. at \*2. See also Simmons v. PCR Tech., 209 F.  
9 Supp. 2d 1029, 1033 (N.D. Cal. 2002) (noting that in evaluating punitive damages in  
10 context of the amount in controversy requirement, defendants may introduce evidence of  
11 jury verdicts in cases involving analogous facts).

12 This Court also agrees with Conrad’s approach. Rather than simply assuming that  
13 because a civil penalty is available, one will be awarded, the defendant must make some  
14 effort to justify the assumption by, for example, pointing to allegations in the Complaint  
15 suggesting such an award would be appropriate. Such an approach appears more  
16 consistent with the general principle that where the state-court complaint does not specify  
17 a damage figure, the defendant “must provide evidence establishing that it is ‘more likely  
18 than not’ that the amount in controversy” requirement is satisfied. Sanchez v.  
19 Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996); see also Matheson v.  
20 Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003) (finding that in  
21 evaluating amount in controversy, courts may consider facts presented in the removal  
22 petition as well as any summary-judgment-type evidence).

23 Second, even assuming a civil penalty of two times the amount of restitution is  
24 appropriate, Ford’s contention that a civil penalty of \$79,258.06 is erroneously based on  
25 the purchase price of the vehicle before deducting for usage/milage and negative equity.  
26 (*See Opp’n* 5:13–21.) Instead, the civil penalty is calculated as a multiplier of the  
27 plaintiff’s actual damages. See Ayala v. Ford Motor Co., No. 20-CV-02383-KSC, 2021  
28 WL 2644506, at \*4 (S.D. Cal. June 21, 2021) (using actual damages, offset by

1 deductions, to calculate the civil penalty); Degenhardt v. Ford Motor Co., No. 21-CV-  
2 1921-MMA (BLM), 2022 WL 103723, at \*5 (S.D. Cal. Jan. 10, 2022) (finding the Song-  
3 Beverly Act requires a reduction for mileage and usage *before* assessing the amount of  
4 the civil penalty). As a result, the civil penalty should be based on \$16,469.04 in  
5 restitution discussed above. Thus, the maximum civil penalty at issue in this case is  
6 \$32,938.08.

### 7 8 **C. Attorney's Fees**

9 Ford also contends that attorney's fees in the amount of \$20,000 should be  
10 included in the amount in controversy calculation. Ford's contention is based on Pappas  
11 v. Ford Motor Co., 2021 WL 5810661, at \*6 (S.D. Cal. Dec. 7, 2021) and Tapia v. Ford  
12 Motor Co., 2021 WL 5863597, at \*3 (S.D. Cal. Oct. 19, 2019), which involved attorney's  
13 fee award of \$21,165 and \$22,828 respectively. (*Opp'n* 8:7–19.) Fisher argues there is  
14 “no evidence to support FORD's reliance on attorney fees as an element of damages for  
15 purposes of calculating the amount in controversy.” (*P&A* 9:12–13.) The Court  
16 disagrees. Given Fisher's failure to provide any indication regarding her current fees, the  
17 Court is persuaded by Ford's reliance on similar cases from this district. Accordingly,  
18 the attorney's fees in the amount of \$20,000 are appropriate in evaluating the amount in  
19 controversy.

### 20 21 **D. The Amount in Controversy**

22 As discussed above, Ford has failed to attempt to justify the assumption that a civil  
23 penalty should be included in the amount in controversy in this case. However, even  
24 assuming Ford demonstrated that a civil penalty should be applied, the record establishes  
25 that the amount in controversy is \$69,421.12. Because the amount in controversy does  
26 not meet the diversity jurisdictional minimum, the Court will grant Fisher's motion to  
27 remand.

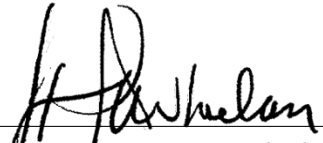


1 **IV. CONCLUSION & ORDER**

2 Because Defendant has not established the amount in controversy exceeds  
3 \$75,000, the Court **GRANTS** Fisher's motion [Doc. 4] and **ORDERS** the case remanded  
4 to the San Diego Superior Court. In light of this order, Ford's motion to dismiss [Doc. 3]  
5 is **TERMINATED** as **MOOT**.

6 **IT IS SO ORDERED.**

7 Dated: June 15, 2022

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10 Hon. Thomas J. Whelan  
11 United States District Judge  
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