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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PATRICIA FIERRO,

Plaintiff,

v.

CAPITAL ONE, N.A.,

Defendant.

Case No. 22-cv-00493-BAS-BLM

**ORDER DENYING PLAINTIFF’S
MOTION TO REMAND (ECF No. 12)**

Presently before the Court is Plaintiff Patricia Fierro’s Motion to Remand this action to state court. (Mot. to Remand, ECF No. 12.) Defendant Capital One, N.A. invoked federal diversity jurisdiction to remove the case to federal court. (Notice of Removal, ECF No. 1.) Plaintiff argues that this case fails to meet the amount in controversy to satisfy diversity jurisdiction under 28 U.S.C. § 1332. (Mot. 3:10–12.) Defendant opposes the motion (Opp’n, ECF No. 16) and Plaintiff replies (Reply, ECF No. 18).

The Court finds this Motion suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L. R. 7.1(d)(1). For the following reasons, the Court finds removal was appropriate and **DENIES** Plaintiff’s Motion to Remand.

1 **I. BACKGROUND**

2 In August 2014, Plaintiff purchased a used car from El Cajon Ford, a non-party car
3 dealership. (Compl. ¶ 13, Ex. A to Notice of Removal, ECF No. 1-2.) To complete the
4 purchase, Plaintiff signed a retail installment sales contract (the “Sales Contract”) requiring
5 her to pay the dealership monthly installments of \$301.85 for five years. (*Id.*; Sales
6 Contract, Ex. 2 to Compl.) The dealership retained a security interest in the vehicle. (Sales
7 Contract at 1.)

8 For an additional \$795.00, Plaintiff executed a Guaranteed Asset Protection
9 Addendum (the “GAP Addendum”). (Compl. ¶ 14; GAP Addendum, Ex. 1 to Compl.) In
10 the event Plaintiff’s car was stolen or totaled before she made all her payments under the
11 Sales Contract, the GAP Addendum would cover the difference between her car insurance
12 payout and the remaining balance on the Sales Contract. (Compl. ¶ 8.) Without the GAP
13 Addendum, Plaintiff would remain obligated to make payments under the Sales Contract
14 even after her car is gone. (*Id.*)

15 After Plaintiff bought the car, Defendant acquired the Sales Contract and GAP
16 Addendum and assumed the dealership’s rights and liabilities. (*Id.* ¶ 18.) A few years
17 later, Plaintiff was involved in a collision and her car was totaled. (*Id.* ¶ 20.) At the time
18 of the accident, Plaintiff still owed Defendant \$6,232.33 on the Sales Contract. (*Id.* ¶ 21.)
19 Plaintiff’s insurance company paid Defendant proceeds of \$3,758.34, leaving a remaining
20 balance of \$2,473.99. (*Id.*) Plaintiff performed the conditions required to obtain her
21 benefits under the GAP Addendum, expecting that Defendant would then waive the
22 outstanding balance on the Sales Contract pursuant to the GAP Addendum. (*Id.* ¶ 22.)
23 Defendant, however, did not waive the entire gap. (*Id.*) Instead, without providing a
24 satisfactory explanation, Defendant waived only \$48.82 and pursued Plaintiff for the
25 remaining deficiency. (*Id.* ¶¶ 22–23.)

26 Defendant indicated to Plaintiff that her three late payments and fourteen late
27 charges resulted in its low waiver calculation. (*Id.* ¶ 23.) According to Defendant’s own
28 records, however, at the time of the accident Plaintiff had only one late payment and two

1 late charges due. (*Id.*) In the weeks after the accident, she made additional payments to
2 bring her account current as of the date of the accident. (*Id.*) Nonetheless, Defendant
3 attempted to collect over \$2,000 from Plaintiff and incorrectly reported to credit bureaus
4 that she had defaulted on the Sales Contract. (*Id.* ¶ 22.)

5 Plaintiff claims that Defendant breached the implied covenant of good faith and fair
6 dealing by interpreting her Sales Contract and GAP Addendum in an unfair, unreasonable,
7 and dishonest manner. (*Id.* ¶ 33.) Plaintiff also alleges that the GAP Addendum she
8 executed is deceptive and designed to mislead consumers. (*Id.* ¶ 16.) She thus claims that
9 Defendant violated provisions of California’s Commercial Code and Consumer Credit
10 Reporting Agencies Act and brings independent claims for declaratory and injunctive
11 relief. (*Id.* ¶¶ 35–56.)

12 In her Complaint, Plaintiff does not include a specific dollar amount for damages,
13 but she is seeking declaratory relief; actual, economic, and non-economic damages;
14 restitution; statutory penalties; injunctive relief; attorneys’ fees and costs; and prejudgment
15 interest. (*Id.* at 18.) Her request for injunctive relief includes prohibiting Defendant from
16 accepting assignment of sales contracts that include the same form of addendum as Plaintiff
17 signed here. (*Id.* ¶ 57(e).) In addition, at the time of removal, Plaintiff had made a statutory
18 offer to compromise to Defendant for \$46,500. (Mot. 3:7–9; Section 998 Offer, Ex. A to
19 Mot., ECF No. 12-2.)

20 On April 11, 2022, Defendant filed its Notice of Removal pursuant to 28 U.S.C.
21 § 1332. (Notice of Removal 1.) Defendant alleges Plaintiff is domiciled in California and
22 Defendant, a national banking association, is “a citizen of Virginia as its main office is
23 located there.” (*Id.* ¶¶ 7–8.) As for the amount in controversy, Defendant contends it
24 would cost more than \$75,000 to comply with Plaintiff’s requested injunctive relief. (*Id.*
25 ¶ 13.) Defendant also alleges that Plaintiff would be entitled to attorneys’ fees if she
26 prevailed, and Defendant asserts her fees “would undoubtedly exceed \$75,000” if this case
27 went to trial. (*Id.* ¶ 17.) On August 15, 2022, Plaintiff filed a motion to remand the action
28 to state court. (Mot. 1.)

1 II. LEGAL STANDARD

2 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*
3 *Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized by
4 Constitution and statute, which is not to be expanded by judicial decree.” *Id.* (citations
5 omitted). “[A]ny civil action brought in a State court of which the district courts of the
6 United States have original jurisdiction, may be removed by the defendant or the
7 defendants, to the district court of the United States.” 28 U.S.C. § 1441(a).

8 In order to invoke a district court’s diversity jurisdiction, a party must demonstrate
9 there is complete diversity of citizenship between the parties and that the amount in
10 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. *See* 28
11 U.S.C. § 1332; *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). “The burden of
12 establishing federal jurisdiction is on the party invoking federal jurisdiction.” *United States*
13 *v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008); *see also Geographic Expeditions, Inc. v.*
14 *Estate of Lhotka*, 599 F.3d 1102, 1106–07 (9th Cir. 2010) (“[I]n a case that has been
15 removed from state court to federal court . . . on the basis of diversity jurisdiction, the
16 proponent of federal jurisdiction—typically the defendant in the substantive dispute—has
17 the burden to prove, by a preponderance of the evidence, that removal is proper.”).

18 III. ANALYSIS

19 The requirement at issue here is the amount in controversy, as Defendant has
20 adequately alleged complete diversity. (Notice of Removal ¶¶ 7–8.) *See also* 28 U.S.C.
21 §§ 1332(a), 1348; *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307 (2006) (holding “that a
22 national bank, for § 1348 purposes, is a citizen of the State in which its main office” is
23 located).

24 To assert the amount in controversy in the removal notice, a “short and plain”
25 statement need not contain evidentiary submissions and must include only “a plausible
26 allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart*
27 *Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 84, 89 (2014). “Thereafter, the
28 plaintiff can contest the amount in controversy by making either a ‘facial’ or ‘factual’ attack

1 on the defendant’s jurisdictional allegations.” *Harris v. KM Indus., Inc.*, 980 F.3d 694, 699
2 (9th Cir. 2020) (quoting *Salter v. Quality Carriers*, 974 F.3d 959, 964 (9th Cir. 2020)).

3 “A ‘facial’ attack accepts the truth of the [jurisdictional] allegations but asserts that
4 they ‘are insufficient on their face to invoke federal jurisdiction.’” *See Salter*, 974 F.3d at
5 964 (quoting *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)). By contrast, a
6 factual attack “‘contests the truth of the . . . allegations’ themselves.” *Harris*, 980 F.3d at
7 699 (alteration in original) (quoting *Salter*, 974 F.3d at 964). A plaintiff may contest the
8 truth of the allegations “by introducing evidence outside the pleadings,” *see Salter*, 974
9 F.3d at 964, or by “making a reasoned argument as to why any assumptions on which [the
10 allegations] are based are not supported by evidence,” *Harris*, 980 F.3d at 700. “In the
11 event that the plaintiff does contest the defendant’s allegations, both sides submit proof
12 and the court decides, by a preponderance of the evidence, whether the amount-in-
13 controversy requirement has been satisfied.” *Dart Cherokee*, 574 U.S. at 82.

14 The amount in controversy is “not a prospective assessment of [a] defendant’s
15 liability.” *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 400 (9th Cir. 2010). Rather, it
16 is the “amount at stake in the underlying litigation.” *Theis Rsch., Inc. v. Brown & Bain*,
17 400 F.3d 659, 662 (9th Cir. 2005). In assessing the amount in controversy, a court must
18 “assume that the allegations of the complaint are true and assume that a jury will return a
19 verdict for the plaintiff on all claims made in the complaint.” *Campbell v. Vitran Exp.,*
20 *Inc.*, 471 F. App’x 646, 648 (9th Cir. 2012) (quoting *Kenneth Rothschild Tr. v. Morgan*
21 *Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002)). “In that sense, the
22 amount in controversy reflects the maximum recovery the plaintiff could reasonably
23 recover.” *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 927 (9th Cir. 2019) (citing
24 *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 417 (9th Cir. 2018)).

25 In challenging removal, Plaintiff first argues that her \$46,500 settlement offer is a
26 reasonable estimate of the amount in controversy. (Mot. 6:18–8:2.) Second, she contends
27 the Court should not include any post-removal attorneys’ fees in the amount in controversy.
28

1 (*See id.* 7:19–8:2.) Finally, Plaintiff argues Defendant does not show it would cost more
2 than \$75,000 to comply with the requested injunctive relief. (*Id.* 8:4–9:2.)

3 **A. Section 998 Offer to Compromise**

4 Under California Code of Civil Procedure section 998, “not less than 10 days prior
5 to commencement of trial . . . any party may serve an offer . . . to allow judgment to be
6 taken . . . in accordance with the terms and conditions stated at that time.” Cal. Civ. Proc.
7 Code § 998. A settlement offer, like one made under section 998, “is relevant evidence of
8 the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff’s
9 claim.” *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). An offer may not
10 be determinative, however. *See id.* (citing *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097
11 (11th Cir. 1994)); *see also Nuguid v. Mercedes-Benz USA, LLC*, No. 21-cv-00435-BEN,
12 2021 WL 5356240, at *13 (S.D. Cal. Nov. 17, 2021) (citing *Cohn*, 281 F.3d at 840)
13 (reasoning an offer to compromise is only “one factor” for determining the amount in
14 controversy).

15 Plaintiff’s offer to compromise totals \$46,500. (Section 998 Offer ¶¶ 3–4.) Of this
16 amount, \$25,000 is for damages and penalties. (Mot. 7:2–3; Section 998 Offer ¶ 3.) More
17 specifically, Plaintiff seeks \$19,500 in noneconomic damages, \$500 in penalties under one
18 statute, and \$5,000 in penalties under another statute. (Mot. 7:10–18.) Finally, the
19 remainder of her offer—\$21,500—is for pre-removal attorneys’ fees and costs. (Section
20 998 Offer ¶ 4.)

21 The Court finds Plaintiff’s offer to compromise is relevant for determining the
22 amount in controversy, but it is inconclusive. Namely, the offer does not address the two
23 items used in Defendant’s Notice of Removal—the cost to comply with the injunctive relief
24 and the total amount of attorneys’ fees at issue. Again, the amount in controversy is the
25 amount at stake in the litigation and reflects the maximum amount Plaintiff could
26 reasonably recover. *See Arias*, 936 F.3d at 927; *Theis Research*, 400 F.3d at 662. Hence,
27 although Plaintiff was willing to abandon her request for injunctive relief to obtain a quick
28 monetary settlement, that does not mean the Court should ignore injunctive relief when

1 assessing the amount in controversy. Likewise, Defendant has the right to litigate this case
2 through trial, even if that choice would expose Defendant to a larger fee-shifting award if
3 Plaintiff were to prevail. The Court is therefore unpersuaded that the offer to compromise
4 contests Defendant's plausible allegation that the amount in controversy exceeds \$75,000.

5 **B. Attorneys' Fees**

6 Defendant alleges that Plaintiff's attorneys' fees through trial would exceed the
7 amount in controversy. (Notice of Removal ¶ 17.) Indeed, as mentioned, Plaintiff's offer
8 to compromise demonstrates she had incurred approximately \$21,500 in fees at the time of
9 removal. With \$25,000 in damages and \$21,500 in pre-removal fees, Plaintiff would need
10 to incur only about \$28,500 in additional fees for the amount in controversy to exceed
11 \$75,000.

12 The Court, however, need not resolve this issue because Plaintiff does not factually
13 contest Defendant's allegation regarding the attorneys' fees at stake. Instead, Plaintiff's
14 Motion incorrectly asserts that including post-removal attorneys' fees in the amount of
15 controversy is an unsettled issue in the Ninth Circuit. (Mot. 7:19–23.) Yet, as pointed out
16 by Defendant (Opp'n 12:16–21), and later acknowledged by Plaintiff (Reply 4:3–12), the
17 Ninth Circuit has held that future attorneys' fees must be included in the amount in
18 controversy where authorized by a fee-shifting statute like here. *See Fritsch v. Swift*
19 *Transp. Co. of Ariz.*, 899 F.3d 785, 795 (9th Cir. 2018). For the same reasons, the Court is
20 unpersuaded by Plaintiff's reliance on a comparable case that predated the Ninth Circuit's
21 decision. (*See* Mot. 6:23–26 (citing *Foltz v. Integon Nat'l Ins. Co.*, No. 14-cv-00907-KJM,
22 2014 WL 4960765 (E.D. Cal. Oct. 2, 2014)).)

23 Consequently, Plaintiff's challenge to Defendant's inclusion of post-removal
24 attorneys' fees in the amount of controversy is unpersuasive, and this challenge does not
25 reach the preponderance of evidence phase. *See Harris*, 980 F.3d at 699 (explaining that
26 a factual attack involves contesting the truth of the defendant's allegations or advancing "a
27 reasoned argument as to why any assumptions on which they are based are not supported
28 by evidence").

1 **C. Injunctive Relief**

2 “In actions seeking declaratory or injunctive relief, it is well established that the
3 amount in controversy is measured by the value of the object of the litigation.” *Hunt v.*
4 *Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977). In the Ninth Circuit, this
5 rule on money damages is extended to injunctive relief based on the “either viewpoint”
6 rule. *Ridder Bros. Inc., v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944). Under this rule,
7 either the plaintiff’s potential recovery or the potential cost to the defendant of complying
8 with the injunction must exceed the jurisdictional threshold. *See Corral v. Select Portfolio*
9 *Servicing, Inc.*, 878 F.3d 770, 775 (9th Cir. 2017); *In re Ford Motor Co./Citibank (S.*
10 *Dakota), N.A.*, 264 F.3d 952, 958 (9th Cir. 2001).

11 Based on the knowledge and experience of its Senior Business Director, Defendant
12 estimates in its Notice of Removal that the cost of complying with Plaintiff’s requested
13 injunctive relief will exceed the \$75,000 threshold. (Notice of Removal ¶ 13; Narayanan
14 Decl. ¶ 3, ECF No. 1-3.) In her Motion to Remand, Plaintiff asserts that Defendant’s cost
15 to stop financing deceptive GAP Addendums and to waive deductibles up to \$1,000 on
16 existing GAP Addendums will not “move the needle over the \$75,000 threshold.” (Mot.
17 8–9.) Likewise, her Reply argues that Defendant’s estimate is “too conclusory and short
18 on facts to prove anything.” (Reply 3:15–16.) Plaintiff’s Motion, however, never makes
19 a factual attack on Defendant’s assertion. She has only “challenged the form, not the
20 substance, of [Defendant’s] showing” and accordingly has “mounted only a facial attack,
21 rather than a factual attack,” on the Notice of Removal. *See Salter*, 974 F.3d at 964. Only
22 after a factual attack does the burden fall upon Defendant to show by a preponderance of
23 the evidence that the amount in controversy exceeds the jurisdictional threshold.¹ *See*
24 *Harris*, 980 F.3d at 700.

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26
27 ¹ Although unneeded here, Defendant also responded with a supplemental declaration from its
28 Senior Business Director that outlines the tasks Defendant would need to complete to comply with the
requested injunctive relief. (Narayanan Decl. ¶ 5, ECF No. 16-1.) Based on these tasks, the declarant
“estimate[s] that this project will cost at least \$300,000.00.” (*Id.*)


1 The Court rejects Plaintiff's facial challenge. Defendant plausibly alleges the cost
2 to comply with the requested injunctive relief would exceed \$75,000. The Court thus is
3 unpersuaded that the amount in controversy is less than \$75,000 from Defendant's
4 viewpoint.

5 **IV. CONCLUSION**

6 In sum, Plaintiff moves to remand based on an offer to compromise pending at the
7 time of removal, but this offer is inconclusive. It does not challenge Defendant's assertion
8 that either the amount of attorneys' fees at stake or the cost to comply with the requested
9 injunctive relief exceeds \$75,000. Moreover, Plaintiff's other arguments are unpersuasive.
10 The Court thus finds Defendant properly removed this case and **DENIES** Plaintiff's
11 Motion to Remand (ECF No. 12).

12 **IT IS SO ORDERED.**

13
14 **DATED: December 6, 2022**


Hon. Cynthia Bashant
United States District Judge