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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MB SERVICE STATION, LLC, a
California limited liability
company,

NO. CIV. 2:09-01868 WBS DAD

Plaintiff,

v.

MEMORANDUM AND ORDER RE:
MOTION TO REMAND

CONOCOPHILLIPS COMPANY, a
Texas corporation, and DOES 1
through 10, inclusive,

Defendants.

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Plaintiff MB Service Station, LLC brought this action
in state court against defendant ConocoPhillips Company alleging
violations of the California Franchise Act, Cal. Corp. Code §§
31101, 31201, and 31202, and California's Unfair Competition Law
("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210 and asking for
damages, declaratory relief, and injunctive relief. Defendant
subsequently removed this action to this court. Before the court
is plaintiff's motion to remand the action to state court.

1 I. Factual and Procedural Background

2 Plaintiff operates a Union 76 gasoline station at 35550
3 Fremont Boulevard, in Fremont, California,¹ which is leased from
4 defendant. (Notice of Removal, Ex. A ¶¶ 1, 10.) Plaintiff was
5 in a franchise relationship with defendant and operated the
6 station as a franchisee pursuant to a "76 Dealer Station Lease
7 and Motor Fuel Supply Agreement" ("Franchise Agreement"). (Id. ¶
8 11.) The most recent agreement became effective on May 1, 2008,
9 and is to expire on April 30, 2011. (Singh Declaration ("Singh
10 Dec.") ¶ 4.) In the agreement, plaintiff's rent was initially
11 set at \$ 5,848 per month. (Id. ¶ 5.) As part of the agreement,
12 plaintiff also had to accept credit and debit cards at his
13 station and pay transaction fees and charges. (Bonilla
14 Declaration ("Bonilla Dec.") Ex. B 5-6.) From May 1, 2008, to
15 July 31, 2009, plaintiff allegedly paid \$73,795 in credit and
16 debit card fees to defendant. (Curtis Declaration ("Curtis
17 Dec.") ¶ 2, Ex. A.) Plaintiff claims that such fees are
18 excessive, and that portions of these fees are being kept by
19 defendant as a "kickback" from credit and debit card companies.
20 (Reply 6:3-28, 7:1-17.)

21 On March 30, 2009, defendant sent a letter to plaintiff
22 indicating that the rent amount would increase by \$1,049 a month
23 to \$6,987, effective July 1, 2009. (Id. ¶ 6, Ex. C.) Defendant
24

25 ¹ The City of Fremont is in the Northern District of
26 California. Counsel's assertion at oral argument that there are
27 two cities in the State of California named Fremont falls on
28 unsympathetic ears. Whereas there is an unincorporated community
sometimes referred to as Fremont, also referred to as Elkhorn, in
Yolo County, there is only one city by the name of Fremont in
California, and that is in Alameda County. This action should
have been filed there.

1 claims that this rent increase was part of its "Rent Policy,"
2 which plaintiff was subject to. (Eldredge Declaration ("Eldredge
3 Dec.") Ex. A ¶ 11.) Under the Rent Policy rent at defendant's
4 west coast gasoline stations was to increase gradually until
5 2013, to maximize defendant's rate of return on its property.
6 (Id. at ¶¶ 10-11.) Under the plan the rent would be increased
7 beginning July 1, 2009, to include maintenance and property
8 taxes. (Id. at ¶ 11.) Starting on the anniversary of the
9 previous dealer agreements in 2010, rent would be increased by a
10 set increment each year, so that rent would ultimately reach nine
11 percent of the appraised market value of the underlying property
12 plus maintenance and property tax costs by 2013.² (Id.)

13 On May 15, 2009, plaintiff filed this action in Yolo
14 County Superior Court. (Docket No. 1.) Plaintiff alleged that
15 defendant's rent modifications and credit card service fee
16 charges violated the California Franchise Act and UCL, and
17 requested declaratory and injunctive relief, as well as damages
18 and restitution. (Notice of Removal, Ex. A 7-9.) On July 7,
19 2009, defendant filed a notice of removal, based upon diversity
20 jurisdiction pursuant to 28 U.S.C. § 1441(b). (Id. 2:19-21.)
21 Defendant filed the instant motion to remand on August 8, 2009,
22 arguing that its action falls below the amount in controversy

23
24 ² Defendant claims that pursuant to the Rent Policy,
which is posted on its website, plaintiff's monthly rent would be
as follows:

- January 1 to June 30, 2009: \$5,848
- July 1, 2009 to April 30, 2010: \$6,897
- May 1, 2010 to April 30, 2011: \$8,345
- May 1, 2011 to April 30, 2012: \$9,908
- May 1, 2012 to April 30, 2013: \$11,652
- May 1, 2013 and thereafter: \$13,766

28 (Bonia Dec. ¶ 2.)

1 requirement of \$75,000, making subject matter jurisdiction on the
2 basis of diversity of citizenship improper.³ (Docket No. 17.)

3 II. Discussion

4 "Under 28 U.S.C. § 1441, a defendant may remove an
5 action filed in state court to federal court if the federal court
6 would have original subject matter jurisdiction over the action."
7 Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1243 (9th
8 Cir. 2009). A district court will have original jurisdiction
9 based on diversity when the amount in controversy is greater than
10 \$75,000 and there is complete diversity between the
11 parties--i.e., the parties are "citizens of different states."
12 28 U.S.C. § 1332(a). When a plaintiff moves to remand a case,
13 the defendant bears the burden of establishing that removal was
14 proper. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).
15 Any questions regarding the propriety of removal are resolved in
16 favor of the party moving for remand. Matheson v. Progressive
17 Speciality Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003). If
18 removal was improper, "the district court lack[s] subject matter
19 jurisdiction, and the action should [be] remanded to the state
20

21 ³ Defendant urges that the court not rule on plaintiff's
22 motion because the Judicial Panel on Multidistrict Litigation
23 ("MDL") granted defendant's request conditionally transferring
24 this case to the MDL on September 1, 2009. (Docket No. 13.)
25 Plaintiff has opposed the transfer, which is currently pending
26 before the MDL. Given the opposition to the transfer, the court
27 may rule on any pending motions before it. In fact, Hon. Ronald
28 M. Whyte, who is assigned the MDL cases consolidated by
defendant, recently ruled that he would wait to determine the
relationship between two of these MDL cases until their motions
to remand were decided. See Singh v. ConocoPhillips Co., No.
MDL-0-0240 RMW, (N.D. Cal. Sept. 11, 2009). Accordingly, the
court finds it appropriate to rule on the motion, given that this
case should not be heard by the MDL if the action lacks federal
subject matter jurisdiction.

1 court." Toumajian v. Frailey, 135 F.3d 648, 653 (9th Cir. 1998)
2 (citing 28 U.S.C. § 1447(c)).

3 A. Amount in Controversy

4 The parties concede that they are completely diverse--
5 the only question in this case is whether defendant has met the
6 amount in controversy requirement. Jurisdictional facts are
7 assessed on the basis of plaintiff's complaint at the time of
8 removal. 28 U.S.C. § 1441. "In cases where a plaintiff's state
9 court complaint does not specify a particular amount of damages,
10 the removing defendant bears the burden of establishing, by a
11 preponderance of the evidence, that the amount in controversy
12 exceeds \$[75,000]." Sanchez v. Monumental Life Ins. Co., 102
13 F.3d 398, 404 (9th Cir. 1996). "The district court determines
14 whether [a] defendant has met this burden by first considering
15 whether it is 'facially apparent' from the complaint that the
16 jurisdictional amount has been satisfied." Simmons v. PCR Tech.,
17 209 F.Supp.2d 1029, 1031 (N.D. Cal. 2002)(citing Singer v. State
18 Farm Mut. Auto Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997)).

19 In determining whether defendant has met this test,
20 courts may consider "facts presented in the removal petition as
21 well as any summary-judgment-type evidence relevant to the amount
22 in controversy at the time of removal." Matheson v. Progressive
23 Specialty Ins. Co., 319 F.3d 1089, 1090-1091 (9th Cir.
24 2003)(citing Singer, 116 F.3d at 377; Gaus, 980 F.2d at 567). In
25 the Ninth Circuit, the amount in controversy in suits other than
26 class actions can be calculated from the defendant's viewpoint
27 (the amount the defendant stands to lose) or the plaintiff's
28 viewpoint (the amount the plaintiff stands to gain). Ridder

1 Bros., Inc. v. Blethen, 142 F.2d 395, 399 (9th Cir. 1944) ("The
2 value of the 'thing sought to be accomplished by the action' may
3 relate to either or any party to the action." (citation
4 omitted)); see also Kanter v. Warner-Lambert Co., 265 F.3d 853,
5 858 (9th Cir. 2001)(noting that Ridder Bros. remains good law
6 only in non-class action cases).

7 Plaintiff's complaint at the time of removal did not
8 specify an amount of damages, simply asserting "on information
9 and belief" that its damages are less than \$75,000. (See Notice
10 of Removal, Ex. A 7-9.) Instead, plaintiff prayed generally for
11 damages, an injunction restraining defendant "from implementing
12 CONOCO's Rent Modification at [p]laintiff's station, charging
13 fees for credit and debit card processing, assigning
14 [p]laintiff's Franchise Agreement and prohibiting CONOCO from
15 engaging in any retaliatory conduct," declaratory relief, and an
16 unknown amount in restitution. (Id. at 7:24-28, 8:1-15.)

17 Therefore, the court must evaluate if defendant has proved by a
18 preponderance of the evidence that the case exceeds the amount in
19 controversy requirement. Sanchez, 102 F.3d at 404. Defendant
20 presents three arguments to support that the amount in
21 controversy requirement is met: (1) that the value of the Rent
22 Policy is over \$75,000; (2) the value of the credit and debit
23 card fees exceeds \$75,000; and (3) the cost of the injunction
24 prohibiting assignment of plaintiff's Franchise Agreement exceeds
25 \$75,000.

26 1. Value of the Rent Policy

27 Plaintiff and defendant differ in their method of
28 calculating the damages to plaintiff from the increases in the

1 rent policy. Plaintiff contends that its damages should be
2 calculated based on the amount of rent it will pay over its
3 original rate of \$5,848 a month, multiplied by the twenty-two
4 months it will need to pay the increased amount until the
5 expiration of the Franchise Agreement on April 30, 2011. (Mot.
6 Remand 5:18-26.) This would make the maximum damages plaintiffs
7 could claim from the rent increase \$23,078. (Id.)

8 Defendant argues that this calculation is faulty, and
9 that the court should determine the value of the rent policy
10 based on the difference between the monthly rent charges that
11 would accrue under the Rent Policy and the original rate from
12 July 1, 2009, to April 30, 2013, when the rent adjustments will
13 fully be in effect. (Opp'n 10:15-23.) Defendant contends this
14 is appropriate because plaintiff's requested injunction would
15 prevent defendant from "implementing the Rent Policy in
16 perpetuity," thereby causing harm to the defendant in excess of
17 the damages claimed by plaintiff. (Id. at 11:2-5.) Defendant
18 therefore values the harm of the injunction at approximately
19 \$159,000. (Id.)

20 The correct answer lies between these two arguments.
21 The court may evaluate the pecuniary loss to the defendant from
22 an injunction to determine if the amount in controversy
23 requirement is met. See In re Ford Motor Co./ Citibank (South
24 Dakota), N.A., 264 F.3d 953, 958 (9th Cir. 2001) ("where the value
25 of a plaintiff's potential recovery . . . is below the
26 jurisdictional amount, but the potential cost to the defendant of
27 complying with the injunction exceeds that amount, it is the
28 latter that represents the amount in controversy for

1 jurisdictional purposes."); Jackson v. American Bar Ass'n, 538
2 F.2d 829, 831 (9th Cir. 1976). In this case, the loss to the
3 defendant should be based on the length of the Franchise
4 Agreement. Defendant could not possibly lose more from an
5 injunction restraining the rent increases than the length of the
6 Franchise Agreement with plaintiff. When plaintiff's current
7 agreement expires in 2011 defendant can simply choose not to
8 renew the agreement with plaintiff, and enter into an agreement
9 with a franchisee willing to accept rent increases. Plaintiff's
10 complaint lies not with the rent increases themselves, but rather
11 defendant's alleged failure to provide adequate notice for the
12 increases under California law, which defendant may cure during
13 the negotiation of the next Franchise Agreement. (See Notice of
14 Removal Ex. A 4.)

15 However, plaintiff's calculation of potential damages
16 fails to take into account that under the Rent Policy,
17 plaintiff's rent will increase again on May 1, 2010 by an
18 additional \$1,448. (Bonita Dec. ¶ 2.) Taking into account
19 defendant's evidence of this increase, the total rent increase
20 plaintiff would face from the Rental Policy under the term of its
21 Franchise Agreement is actually \$40,904.⁴ Therefore, the damages
22 to plaintiff and pecuniary losses to defendant from the Rent
23 Policy's rent increases are not alone sufficient to satisfy the
24 amount in controversy requirement.

25

26 ⁴ This number was calculated by multiplying the rent
27 increase amount, \$1,049 times ten months and adding it to the
28 difference between the original rent and the rent from May 1,
2010 to April 30, 2011 under the Rent Plan, \$2,497, times twelve
months. $((\$1,094 \times 10) + (\$2,497 \times 12) = \$40,904)$

1 2. Credit and Debit Card Fees

2 Plaintiff seeks a "temporary restraining order,
3 preliminary injunction, and permanent injunction restraining and
4 enjoining CONOCO . . . from . . . charging fees for credit and
5 debit card processing" (Notice of Removal, Ex. A ¶¶ 25,
6 35.) Plaintiff also seeks damages and restitution of the amount
7 plaintiff has paid for "above and beyond a reasonable service
8 charge paid to the processor." (Id. at ¶ 20.) Defendant claims
9 that plaintiff's broad demand for an injunction to prevent it
10 from charging credit and debit card fees would cause substantial
11 economic losses. To this end, defendant presents evidence that
12 plaintiff's monthly average of credit and debit card processing
13 fees based on the last fifteen months was \$4,931. (Curtis Dec. ¶
14 2; Ex. A.) An injunction preventing defendant from collecting
15 credit card fees for the remaining twenty-one months of the
16 Franchise Agreement would therefore result in losses of
17 approximately \$103,565.⁵ (Id.) Additionally, defendant charged
18 plaintiff approximately \$73,795 in credit and debit card fees
19 from May 1, 2008, to July 31, 2009, which plaintiff could be
20 entitled to recover in restitutionary or consequential damages.
21 (Id.)

22 Plaintiff argues that it is only seeking the amount

23
24 ⁵ While defendant's original notice of removal did not
25 quantify the losses it would incur as the result of plaintiff's
26 requested relief related to credit and debit card fees and the
27 assignment of the Franchise Agreement, the court may consider new
28 evidence in opposition to a motion to remand and may deem the
notice of removal amended by the new evidence. See Willingham v.
Morgan, 395 U.S. 402, 407 fn. 3 (1969); Cohn v. Petsmart, Inc.,
281 F.3d 837, 840 fn.1 (9th Cir. 2002). Accordingly, the court
will consider defendant's opposition to remand as an amendment to
its notice of removal.

1 defendant "kept for itself or received from the credit and debit
2 card processing institution as a 'kick back'" and that it does
3 not ask for reimbursement of "pass-through fees" paid by
4 defendant. (Reply 6:3-28, 7:1-17.) However, even if this were
5 correct, it does not address the broad nature of the injunction
6 requested against the defendant presented in the complaint at the
7 time of removal. Defendant has presented uncontroverted evidence
8 that an injunction preventing it from charging credit and debit
9 card fees to plaintiff would result in approximately \$103,565 in
10 losses.

11 While plaintiff now seeks to minimize the scope of its
12 injunction in its reply, "[p]laintiff cannot have it both ways .
13 . . . By choosing to overplead in his complaint, plaintiff has
14 chosen to accept the risk that he will plead himself into federal
15 court." Simmons, 209 F. Supp. 2d at 1032. "The Supreme Court
16 has long discouraged reliance on post-removal stipulations and
17 affidavits," since such statements often attempt to manipulate
18 the amount in controversy to secure jurisdiction in a particular
19 court. Id. at 1033 (citing St. Paul Mercury Indemnity Co. v. Red
20 Cab Co., 303 U.S. 283, 292 (1938)). Given the broad nature of the
21 injunction sought in the complaint relating to credit and debit
22 card fees, it is clear that defendant would stand to lose much
23 more than \$75,000 were the injunction issued. Defendant has met
24 its burden to prove the amount in controversy requirement is met
25 by a preponderance of the evidence.⁶ Accordingly, the court will
26

27 ⁶ Since this action has met the amount in controversy
28 requirement due to costs of the credit and debit card fees
injunction to defendant and plaintiff's potential rent increase

1 deny plaintiff's request for an award of costs and attorney's
2 fees, as removal was proper.

3 B. Rule 11 Sanctions

4 Defendant mentions in its opposition to the motion that
5 the court should issue sanctions against plaintiff under Rule 11
6 of the Federal Rules of Civil Procedure. (Opp'n. 18-19.)
7 However, this request is procedurally deficient, and will not be
8 considered. Rule 11 plainly requires that "[a] motion for
9 sanctions must be made separately from any other motion"
10 Fed. R. Civ. P. 11(c)(2). In simply adding a section to their
11 opposition to plaintiff's motion for remand defendant has failed
12 to meet the precise requirements for a Rule 11 motion for
13 sanctions. See Arellano v. Home Depot U.S.A., Inc., 245 F. Supp.
14 2d 1102, 1109 (S.D. Cal. 2003)(declaring Home Depot's request for
15 sanctions "procedurally defective" because it "was contained in
16 its opposition to plaintiff's motion to remand").

17 IT IS THEREFORE ORDERED that plaintiff's motion to
18 remand be, and the same hereby is, DENIED.

19 IT IS FURTHER ORDERED that plaintiff's motion for
20 attorney's fees and costs be, and the same hereby is, DENIED.

21 DATED: October 28, 2009

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23 

24 WILLIAM B. SHUBB
25 UNITED STATES DISTRICT JUDGE
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damages, the court finds it unnecessary to evaluate the costs of
the injunction to prevent assignment of the Franchise Agreement.