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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 WADE GRANT, on behalf of himself, all
12 other persons similarly situated and the
general public,

13 Plaintiff,

14 vs.

15 CAPITOL MANAGEMENT SERVICES,
L.P.,

16 Defendant.

CASE NO. 10cv2471 WQH (BGS)

ORDER OF REMAND

17
18 HAYES, Judge:

19 The matter before the Court is the Motion to Remand the Case to State Court filed by
20 Plaintiff. (ECF No. 11).

21 **I. Background**

22 On September 17, 2010, Plaintiff initiated this action by filing a Complaint in California
23 Superior Court for the County of San Diego. (ECF No. 1 at 1). On December 1, 2010,
24 Defendant Capitol Management Services, L.P., filed a Notice of Removal of Action Under
25 Class Action Fairness Act. *Id.*

26 **A. Allegations of the Complaint**

27 The Complaint asserts three claims: (1) Negligent Violations of the Telephone
28 Consumer Protection Act 47 U.S.C. § 227 et seq.; (2) Knowing and/or Willful Violations of

1 the Telephone Consumer Protection Act 47 U.S.C. § 227 et seq.; and (3) Unlawful,
2 Fraudulent and Unfair Business Acts and Practices in Violation of California Business &
3 Professions Code § 17200 et seq.

4 Plaintiff Wade Grant is a California citizen. Defendant Capitol Management
5 Services, L.P. is a citizen of New York.

6 Plaintiff brings the Complaint on behalf of himself and “all other similarly situated
7 [individuals] defined as all persons within California who received any telephone call from
8 Defendant to said person’s cellular telephone through the use of any automated telephone
9 dialing system or an artificial or prerecorded voice, within the four years prior to filing of
10 this Complaint.” *Id.* at 8.

11 The Complaint seeks damages in the amount of \$500 for each negligent violation of
12 the Telephone Consumer Protection Act and \$1,500 for each knowing or willful violation
13 of the Telephone Consumer Protection Act. *Id.* at 13-14. The Complaint alleges that “[n]o
14 federal diversity jurisdiction exists between Plaintiff and Defendant because Plaintiff’s
15 claim is less than \$75,000 exclusive of attorney’s’ [fees] and interest.” *Id.* at 7.

16 Plaintiff states that he “does not, as yet, know the exact size of the Class.” *Id.* at 8.
17 Plaintiff alleges that based on the nature of Defendant business, “Plaintiff believes that
18 there are numerous Class members” *Id.* at 8-9.

19 **B. Removal**

20 Defendant states in his Notice of Removal that the removal is pursuant to the Class
21 Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2), 1332(d)(5) and 1453(a). *Id.* at 1.
22 Defendant alleges that “(1) Plaintiff’s counsel has advised Defendant’s counsel that the
23 combined claims exceed \$5,000,000.00; (2) there are at least 100 class members; and (3)
24 class members are a citizen of a different state than Defendant.” *Id.* at 2.

25 **C. Motion to Remand**

26 Plaintiff contends that this case should be remanded because there is a presumption
27 against removal jurisdiction and Defendant has not satisfied its burden. Plaintiff contends
28 that Defendant has not submitted sufficient evidence to establish the requisite amount in

1 controversy and the requisite number of members in the class.

2 Defendant contends that the amount in controversy exceeds \$5,000,000 because
3 Plaintiff seeks statutory damages for each phone call in the amount of at least \$500 and
4 Capitol Management Services, L.P. has made over 10,000 calls to cell phones during the
5 relevant time period. Defendant also contends that the proposed class exceeds 100
6 individuals because Capitol Management Services, L.P. has attempted to collect from over
7 1,000 individuals in California during the relevant time period.

8 Defendant submits the Declaration of Stephen Florczak, executive vice president of
9 information technology at Capitol Management Services, L.P., who states that Defendant
10 “employs computerized debt collection assistance and tracking software to manage its
11 collections.” (ECF No. 12-2 at 2). Florczak states in his Declaration that Defendant “trains
12 its collectors to input information into the computer database each time an action is taken
13 on an account, or a communication is attempted or occurs.” *Id.* Florczak states in his
14 Declaration that he performed searches of the systems and databases to determine the
15 answers to the following questions: “First, how many times did [Capitol Management
16 Services, L.P.] dial numbers ostensibly assigned to cell phones in California between the
17 dates of September 17, 2006 and September 17, 2010? [and] Second, how many California
18 Debtors did [Capitol Management Services, L.P.] attempt to collect from over the past four
19 years?” (ECF No. 12-2 at 1-2). Florczak states in his Declaration that “[b]etween
20 September 17, 2006 and September 17, 2010, [Capitol Management Services, L.P.] dialed
21 numbers believed to have been associated with cell phones in California more than 10,000
22 times.” *Id.* at 3. Florczak states in his Declaration that “[b]etween September 17, 2006 and
23 September 17, 2010, [Capitol Management Services, L.P.] dialed over 1,000 phone
24 numbers identified with a unique debtor residing in California.” *Id.*; (ECF No. 14 at 2).

25 **D. Discussion**

26 “A civil action in state court may be removed to federal district court if the district
27 court had ‘original jurisdiction’ over the matter.” *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479
28 F.3d 994, 997 (9th Cir. 2007) (quoting 28 U.S.C. § 1441(a)). The Class Action Fairness

1 Act (“CAFA”) vests district courts with “original jurisdiction of any civil action in which
2 the matter in controversy exceeds the sum or value of \$5,000,000.00, exclusive of interest
3 and costs,” and the aggregate number of proposed plaintiffs is 100 or greater, and any
4 member of the plaintiff class is a citizen of a state different from any defendant. 28 U.S.C.
5 § 1332(d). “[U]nder CAFA the burden of establishing removal jurisdiction remains, as
6 before, on the proponent of federal jurisdiction.” *Lowdermilk*, 479 F.3d at 997 (quoting
7 *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) (per curiam));
8 *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007).

9 In determining whether the amount-in-controversy requirement is satisfied, the
10 appropriate procedure is as follows:

11 The district court may consider whether it is ‘facially
12 apparent’ from the complaint that the jurisdictional amount is in
13 controversy. If not, the court may consider facts in the removal
14 petition, and may require parties to submit summary-judgment-type
15 evidence relevant to the amount in controversy at the time of
16 removal.

17 *Abrego Abrego*, 443 F.3d at 690 (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116
18 F.3d 373, 377 (9th Cir. 1997); (citing *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th
19 Cir. 2005)). When the plaintiff fails to plead a specific amount in damages and it is not
20 otherwise facially apparent that the jurisdictional amount is in controversy, “the defendant
21 seeking removal ‘must prove by a preponderance of the evidence that the amount in
22 controversy requirement has been met.’” *Lowdermilk*, 479 F.3d at 998 (quoting *Abrego*
23 *Abrego*, 443 F.3d at 683). “[W]hen a state-court complaint affirmatively alleges that the
24 amount in controversy is less than the jurisdictional threshold, the ‘party seeking removal
25 must prove with legal certainty that [Class Action Fairness Act’s] jurisdictional amount is
26 met.’” *Guglielmino*, 506 F.3d at 699 (quoting *Lowdermilk*, 479 F.3d at 1000).

27 In this case, the amount in controversy is not facially apparent from the Complaint.
28 However, the Complaint does not affirmatively allege that the amount in controversy for
the proposed class is less than the Class Action Fairness Act jurisdictional threshold of
\$5,000,000.00. Thus, the issues before the Court is whether Defendant has satisfied its
burden of proving by a preponderance of the evidence that the amount in controversy

1 exceeds \$5,000,000.00 and whether Defendant has satisfied its burden of proving by a
2 preponderance of the evidence that the putative class includes 100 or more persons.

3 The proposed class is comprised of individuals who received any call from
4 Defendant to their “cellular telephone through the use of any automated telephone dialing
5 system or an artificial or prerecorded voice....” (ECF No. 1 at 8). With regard to the
6 amount in controversy, Defendant has submitted evidence that Capitol Management
7 Services, L.P. trains “its collectors” to input information into the “computerized debt
8 collection assistance and tracking software” whenever “a communication is attempted or
9 occurs.” (ECF No. 12-2 at 2). While Defendant has submitted evidence that Capitol
10 Management Services, L.P. has dialed over 10,000 phone numbers assigned to cell phones,
11 Defendant has not shown that those calls were made using an automated telephone dialing
12 system or an artificial or prerecorded voice. (ECF No. 1 at 8). With regard to the size of
13 the class, Defendant has submitted evidence that Capitol Management Services, L.P. has
14 dialed over 1,000 phone numbers identified with unique debtors in California. However,
15 Defendant has not shown that 100 or more of those unique debtors were contacted on their
16 cell phone using an automated telephone dialing system or an artificial or prerecorded
17 voice. After considering the allegations of the Complaint and the evidence submitted by
18 Defendant, the Court concludes that Defendant has failed to establish by a preponderance
19 of the evidence that plaintiff class members seek greater than \$5,000,000.00 in this case
20 and that the total number of plaintiff class members equals 100 or more individuals.

21 **E. Request for Attorney’s Fees and Costs**

22 Plaintiff seeks an award of attorney’s fees and costs in the amount of \$12,235.00.
23 (ECF No. 11-1 at 11). Plaintiff contends that the actual fees and costs incurred in preparing
24 the motion to remand is \$20,860.00. (ECF No. 11-2 at 2). Defendant contends that there is
25 an objectively reasonable basis for removal; thus, attorney’s fees and costs should not be
26 awarded. 28 U.S.C. § 1447 (c) provides: “An order remanding the case may require
27 payment of just costs and any actual expenses, including attorney fees, incurred as a result
28 of the removal.” “[T]he standard for awarding fees should turn on the reasonableness of

1 the removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (“Absent
2 unusual circumstances, courts may award attorney's fees under §1447(c) only where the
3 removing party lacked an objectively reasonable basis for seeking removal.”). The Court
4 does not find that Defendant Capitol Management Services, L.P. lacked an objectively
5 reasonable basis for seeking removal.

6 **F. Conclusion**

7 IT IS HEREBY ORDERED that the Motion to Remand the Case to State Court filed
8 by Plaintiff (ECF No. 11) is GRANTED. Pursuant to 28 U.S.C. § 1447(c), this action is
9 REMANDED to the California Superior Court for the County of San Diego, where it was
10 originally filed and assigned Case No.3702010-00100521-CU-NP-CTL. Plaintiff’s request
11 for attorney’s fees and costs is DENIED.

12 DATED: April 11, 2011

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14 **WILLIAM Q. HAYES**
15 United States District Judge
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