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

ROBERT A. WALLER, JR., on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY, etc.,
et al.,

Defendants.

CASE NO. 11cv0454-LAB (RBB)
**ORDER DENYING MOTION TO
REMAND**

This case involves a putative class action against Hewlett Packard, Costco, Western Digital Corporation, and Staples. Plaintiff's grievance is that a Hewlett Packard "SimpleSave" hard drive he purchased from Costco did not operate as advertised; he asserts claims under California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Act.

There are three motions now pending: a motion to dismiss Plaintiff's claims and a motion to strike Plaintiff's class action allegations, both filed by HP, and a motion to remand filed by the Plaintiff. The Court previously stayed HP's motions. (Doc. No. 16.) The motion to remand is now fully briefed and ready for a ruling.

I. Legal Standard

Under the Class Action Fairness Act, "district courts shall have original jurisdiction of

1 any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000,
2 exclusive of interest and costs, and is a class action in which . . . any member of a class of
3 plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2). But
4 there are exceptions to CAFA, one of which is the so-called “local controversy” exception.
5 Even when a district court has jurisdiction under § 1332(d)(2), it “shall decline to exercise
6 jurisdiction”

7 (i) over a class action in which—

8 (I) greater than two-thirds of the members of all
9 proposed plaintiff classes in the aggregate are
10 citizens of the State in which the action was
11 originally filed;

12 (II) at least 1 defendant is a defendant—

13 (aa) from whom significant relief is
14 sought by members of the plaintiff
15 class;

16 (bb) whose alleged conduct forms a
17 significant basis for the claims
18 asserted by the proposed plaintiff
19 class; and

20 (cc) who is a citizen of the State in
21 which the action was originally filed;
22 and

23 (III) principal injuries resulting from the alleged
24 conduct or any related conduct of each defendant
25 were incurred in the State in which the action was
26 originally filed; and

27 (ii) during the 3-year period preceding the filing of that class
28 action, no other class action has been filed asserting the same
or similar factual allegations against any of the defendants on
behalf of the same or other persons

28 U.S.C. § 1332(d)(4)(A). A district court should also decline to exercise jurisdiction under
§ 1332(d)(2) when “two-thirds or more of the members of all proposed plaintiff classes in the
aggregate, and the primary defendants, are citizens of the State in which the action was
originally filed.” 28 U.S.C. § 1332(d)(4)(B). This is called the “home state” exception, but

1 because Costco and Staples aren't California residents, Plaintiff does not rely on it.¹

2 There appears to be some confusion in the briefing over the legal basis of Plaintiff's
3 motion to remand, because he *quotes* § 1332(d)(4)(A) — the local controversy exception —
4 and *cites* § 1332(d)(2) — the original jurisdiction provision. He also makes no mention in the
5 motion, although he does in his reply brief, of the local controversy exception. Moreover, in
6 a joint motion to stay the motions to dismiss and strike while the motion to remand is
7 pending, filed (and presumably drafted) by the Plaintiff, the parties indicate that “[t]he motion
8 for remand challenges the court’s jurisdiction over the action on the ground there is not the
9 requisite diversity amongst the parties under the Class Action Fairness Act (28 U.S.C.
10 §1332(d)(2)).” (Doc. No. 15 at 2:3–5.) The motion apparently left HP with the impression
11 that Plaintiff’s argument for remand is simply that the Court lacks original jurisdiction under
12 § 1332(d)(2) — not that even if it *does* have jurisdiction under § 1332(d)(2) the local
13 controversy exception of § 1332(d)(4)(A) applies anyway.

14 But that’s not exactly reasonable on HP’s part. Plaintiff’s remand motion, front and
15 center in a section titled “Legal Argument,” quotes § 1332(d)(4)(A) and (B) in their entirety
16 and proceeds to make arguments that are only meaningful in reference to the local
17 controversy exception. The Court doesn’t understand why HP focuses almost exclusively
18 on § 1332(d)(2) in its opposition, and even goes so far as to assert that “Plaintiff has not
19 raised any argument based on the ‘local controversy’ or ‘home state’ exceptions to CAFA
20 jurisdiction” and that “Plaintiff’s Motion contains a vague reference to at least one CAFA
21 exception.” (Opp’n Br. at 9 n.13.) Plaintiff could have provided more accurate citations to
22 the actual legal basis for its motion, to be sure, but it’s obvious, nonetheless, that he believes
23 the local controversy exception of § 1332(d)(4)(A) applies here. And that doesn’t foreclose
24 him from arguing, also, that the Court lacks original jurisdiction under § 1332(d)(2) in the first
25 place.

26
27 ¹ There is a third enumerated exception to the jurisdiction conferred by CAFA,
28 although it is discretionary, called the “interests of justice” exception. See 28 U.S.C. §
1332(d)(3). It too is unavailable to Plaintiff because, like the home state exception, it
requires that the primary defendants be citizens of California. *Id.*

1 So the Court confronts two questions here. The first is whether it has original
2 jurisdiction over this action pursuant to § 1332(d)(2). Assuming it does, the second question
3 is whether the local controversy exception of § 1332(d)(4)(A) prevents it from exercising that
4 jurisdiction.

5 **II. Original Jurisdiction**

6 The Court has original jurisdiction over this action if more than \$5 million is in
7 controversy and any member of the putative class is from a different state than any
8 defendant. 28 U.S.C. § 1332(d)(2). The minimal diversity requirement is obviously
9 satisfied. Plaintiff is a California citizen (all putative plaintiffs are), and Defendants Costco
10 and Staples are not. (Second Amended Complaint ¶¶ 17, 19, 21.) The contested question
11 is whether the amount-in-controversy requirement is satisfied.

12 Plaintiff's complaint does not specify the amount of damages sought, which means
13 HP "bears the burden of showing, by a preponderance of the evidence, that the amount in
14 controversy exceeds the statutory amount."² *Lewis v. Verizon Commc'ns, Inc.*, 627 F.3d
15 395, 397 (9th Cir. 2010). It may rely upon affidavits and declarations to make that showing;
16 the law in the Ninth Circuit "expressly contemplate[s] the district court's consideration of
17 some evidentiary record." *Id.* at 400; *see also Valdez v. Allstate Ins. Co.*, 372 F.3d 1115,
18 1117 (9th Cir. 2004) (court may consider "summary-judgment-type evidence relevant to the
19 amount in controversy at the time of removal"). It is best to make this showing in the notice
20 of removal itself, but a party can supplement its showing in an opposition to a motion to
21 remand. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n. 1 (9th Cir. 2002).

22 HP claims to "not know the number of SimpleSave devices actually purchased from
23 every store that carries them in California." (Opp'n Br. at 6 n. 7.) To approximate the

24
25 ² Plaintiff suggests that HP must show to a "legal certainty" that the amount in
26 controversy is greater than \$5 million. That's incorrect. The Ninth Circuit has identified "at
27 least three different burdens of proof which might be placed on a removing defendant under
28 varying circumstances," and the "legal certainty" burden does not apply when, as is the case
here, "it is unclear or ambiguous from the face of a state-court complaint whether the
requisite amount in controversy is pled." *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696,
699 (9th Cir. 2007). In fairness, Plaintiff does come around in his reply brief and concede
the proper standard. (Reply Br. at 2.)

1 number, instead, it multiplies 725,000 — the number of SimpleSave units shipped to retailers
2 in the United States from the product’s launch in July 2009 through March 4, 2011 — by the
3 percentage of Americans who live in California (12 percent), and by the price of the
4 SimpleSave (\$79.99). By the Court’s calculation, 12 percent of the 725,000 units shipped
5 is 87,000 units. At \$79.99 a unit, the compensatory damages sought for the SimpleSave
6 units alone comes out to \$6,959,130.³ HP suggests this is even a conservative estimate,
7 considering that a SimpleSave with greater storage capacity than Plaintiff’s retails for \$99.99.

8 The Court admires HP’s resourceful attempt to calculate the amount in controversy
9 in this action, but it is reticent to work from the number of SimpleSave units shipped to
10 retailers in America. *Shipping* data is very different from *sales* data, and it’s unsafe to
11 assume, as HP’s method does, that every SimpleSave shipped to a retailer was actually sold
12 by that retailer. A good number surely remain on shelves or in some kind of storage. (The
13 Court has less of a problem with the 12 percent multiplier, considering that the average
14 California resident is plausibly more likely to buy a SimpleSave than the average resident
15 of many other states.)

16 HP doesn’t need to rely on the number of SimpleSave devices *shipped* to retail
17 outlets, though. Costco submitted the declaration of its Assistant General Manager of
18 Merchandise, who provides the number of SimpleSave units Costco sold through July 6,
19 2010, the day the original complaint was filed, and October 5, 2010, the day the first
20 amended complaint was filed. (See Shavery Decl., Doc. No. 24.) The number is
21 confidential, but it is a very useful one. If the Court assumes that Costco sold as many
22 SimpleSave units as all other California retailers combined, and doubles that number, and
23 then multiplies it by \$79.99, it arrives at an amount in controversy greater than \$5,000,000.

24
25 ³ Plaintiff argues in his reply brief that “HP is being unrealistic when they argue that
26 the minimum amount in controversy should be evaluated on a 100% reimbursement to the
27 Class members.” (Reply Br. at 2.) Actually, Plaintiff’s complaint asks HP to “restore to
28 Plaintiff and the members of the Class the amount of money spent to purchase the
SimpleSave hard drives at the center of the dispute.” (SAC ¶ 48.) In determining the
amount in controversy, the Court considers the relief a plaintiff *seeks*, not what the plaintiff
may reasonably or ultimately *obtain*. *Korn v. Polo Ralph Lauren Corp.*, 536 F.Supp.2d 1199,
1205 (E.D. Cal. 2008) (“The ultimate inquiry is what amount is put ‘in controversy’ by the
plaintiff’s complaint, not what a defendant will *actually* owe.”).

1 That starting assumption is an extremely modest one, too; Costco most likely sold far fewer
2 SimpleSave units than all other California retailers combined, which means that merely
3 doubling the number of units sold by Costco generates a number of units that is substantially
4 smaller than the number actually sold in all of California.⁴

5 The volume of SimpleSave sales is also not the only number that factors into the
6 amount in controversy in this case. Plaintiff alleges that he paid \$1,335 to an outside
7 computer consultant to retrieve unsaved files after a hard drive crash, and he suggests that
8 other members of the putative class had to do the same. (SAC ¶¶ 16, 26, 38; Interrog. 15.)
9 Punitive damages, which Plaintiff seeks, may also be included in a computation of the
10 amount in controversy necessary for this Court's jurisdiction. *Davenport v. Mutual Ben.*
11 *Health & Acc. Ass'n*, 325 F.2d 785, 787 (9th Cir. 1963). These additional, potential damages
12 take the approximate amount in controversy, which already exceeds \$5 million, much higher
13 than that jurisdictional minimum.

14 The preponderance standard HP must satisfy is a "more likely than not" standard.
15 *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). Plaintiff's only
16 real rebuttal to HP's argument is that it is speculative and HP fails to meet this standard.
17 The Court disagrees. While it's true that the Court "cannot base [its] jurisdiction on a
18 [d]efendant's speculation and conjecture," *Lowdermilk v. United States Bank Nat'l Ass'n*,
19 479 F.3d 994, 1002 (9th Cir. 2007), it's equally true that HP isn't obligated to "research,
20 state, and prove" the amount of total damages Plaintiff seeks. *McCraw v. Lyons*, 863
21 F.Supp. 430, 434 (W.D. Ky. 1994). The Court bases its computation of the amount in
22 controversy on the *fact* that Costco sold a certain number of SimpleSave units in
23 California, on the very reasonable assumption that *at least* that many units were sold by

24
25 ⁴ It's unclear why HP doesn't urge this method and instead works from the number
26 of units shipped to retailers nationwide. HP does note that "[t]he number of SimpleSave
27 devices sold in California as of the filing of Plaintiff's FAC was insufficient to reach the
28 amount in controversy requirement." (Opp'n Br. at 9, n. 12.) That's true, but it's still easier,
in the Court's judgment, to reach an approximate number of units sold in California by
extrapolating from Costco's sales numbers rather than nationwide shipping data. To be
clear, the Court doesn't mean to reject HP's method out of hand; the Court would likely find
it sufficient if it had no other option.

1 other California retailers, on the *fact* that the SimpleSave unit retails for \$79.99, on the
2 *fact* that Plaintiff alleges he (and possibly other members of the putative class) spent
3 \$1,335 to recover lost computer files, on reasonable extrapolations from these numbers,
4 and on the fact that Plaintiff also seeks punitive damages. The ultimate amount in
5 controversy may not be *exact*, but neither is it a guess. The Court has sufficient
6 confidence, based on Plaintiff's own allegations, facts presented by HP, and assumptions
7 it believes are reasonable, that it is more likely than not that the amount in controversy in
8 this case exceeds \$5 million. The Court therefore has original jurisdiction over this case
9 pursuant to 28 U.S.C. § 1332(d)(2).

10 **III. Local Controversy Exception**

11 Plaintiff bears the burden of showing that the local controversy exception applies
12 here, and that remand is appropriate. *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018,
13 1021–22 (9th Cir. 2007) (“[W]e conclude that the party seeking remand bears the burden
14 to prove an exception to CAFA’s jurisdiction.”). The argument that the exception does
15 apply, however, hardly gets off the ground.

16 The local controversy exception applies to controversies that are *truly local*, and
17 Plaintiff’s action is local only in the trivial and almost tautological sense that the definition
18 of the putative class and the legal bases of the asserted claims make it so. Courts have
19 routinely looked beyond these formalities — and looked *to* the nature and scope of the
20 alleged wrong — and rejected a plaintiff’s invocation of the local controversy exception
21 that relies on them. *See, e.g., Brook v. UnitedHealth Group Inc.*, No. 06 CV 12954, 2007
22 WL 2827808 at *4 (S.D.N.Y. Sept. 27, 2007) (“Plaintiffs cannot simply evade federal
23 jurisdiction by defining the putative class on a state-by-state basis, and then proceed to
24 file virtually identical class action complaints in various state courts.”). Even though there
25 is no indication that Plaintiff’s counsel envisions pursuing relief against HP and the other
26 Defendants in other states, the broader point here is that the SimpleSave hard drives
27 were marketed and sold *nationwide*, Plaintiff alleges nothing wrongful about their
28 marketing and sale that is peculiar to California, and there is no reason to believe that the

1 Defendants aren't vulnerable to suit on very similar grounds beyond California. That isn't
2 characteristic of a local dispute. See *Kearns v. Ford Motor Co.*, No. CV 05-5644, 2005
3 WL 3967998 (C.D. Cal. Nov. 21, 2005) (controversy not local when defendant "faces
4 nationwide exposure" on theories similar to those alleged in class action complaint filed in
5 state court).

6 Remanding this case would enable precisely the kind of situation CAFA was
7 enacted to prevent, namely, the litigation of a class action of national significance in a
8 state-by-state manner. The Senate Judiciary Committee's Report on CAFA speaks
9 directly to this.

10 [I]f the defendants engaged in conduct that could be alleged
11 to have injured consumers throughout the country or broadly
12 throughout several states, the case would not qualify for [the
13 local controversy] exception, even if it were brought only as a
14 single-state class action In other words, this provision
looks at where the principal injuries were suffered by everyone
who was affected by the alleged conduct — not just where the
proposed class members were injured.

15 *Kearns* at *12 (quoting S.Rep. No. 109-14 at 40–41.) Faced with *Brook* and *Kearns* and
16 the legislative history of CAFA, Plaintiff really has no argument here. Indeed, Plaintiff's
17 opposition brief only attempts to develop § 1332(d)(4)(A)(II), which requires that at least
18 one defendant be a citizen of the state in which the complaint is filed, and that *that*
19 defendant's conduct forms a basis for the claims asserted and the relief sought. It
20 ignores altogether § 1332(d)(4)(A)(III), which is the crack in Plaintiff's argument that the
21 local controversy exception applies here. The principal injuries resulting from the alleged
22 conduct are not in any meaningful way limited to California.

23 HP's removal of this case pursuant to 28 U.S.C. § 1332(d)(2) was legitimate, and
24 the Court finds no basis for remand pursuant to 28 U.S.C. § 1332(d)(4)(A).

25 **IV. Timeliness of Removal**

26 The Court addresses, finally, Plaintiff's argument that HP's removal of this case
27 was untimely under 28 U.S.C. § 1446(b) because it should have been removed within 30
28 days after the filing of the original complaint. That argument is borderline frivolous. The
fact is that Plaintiff's original and first amended complaint defined the putative class as

1 California residents who bought a SimpleSave hard drive from a California Costco.
2 (Compl. ¶ 6; FAC ¶ 27.) So limited, HP would have been unable to argue that the
3 amount in controversy was greater than \$5 million to trigger original jurisdiction under §
4 1332(d)(2). But the second amended complaint broadened the class substantially, to
5 include *all* California residents who bought a SimpleSave in California, and with this
6 expansion the amount in controversy changed. Plaintiff's only response to this is that the
7 original complaint specified that the SimpleSave hard drives "are sold by retailers within
8 San Diego County and throughout the State of California," but that is background
9 information about the SimpleSaves and HP that has nothing to do with the scope of the
10 lawsuit. (Compl. ¶ 19.) Contrary to Plaintiff's argument, "[a]dding the actual stores who
11 sold the SimpleSave" *does* "enlarge the amount in controversy beyond what was stated
12 in the original complaint." (Mot. at 7–8.) This addition expands the number of claims
13 dramatically, from Costco buyers to all California buyers, and as the number of claims
14 increases the amount in controversy does too.

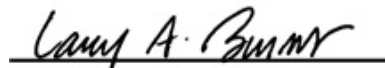
15 **V. Conclusion**

16 Plaintiff's motion to remand is **DENIED**. The Court finds it has original jurisdiction
17 over this case pursuant to 28 U.S.C. § 1332(d), and it further finds that the local
18 controversy exception to jurisdiction articulated in 28 U.S.C. § 1332(d)(4)(A) does not
19 apply. The alleged wrong in this case — that a product manufactured and marketed by
20 HP, and sold by Staples, Costco and other retailers, did not function as advertised — is
21 not local to California in any meaningful sense.

22 The Court will calendar oral argument on the pending motions to dismiss and
23 strike for Monday, June 20 at 11:15 a.m. Plaintiff's opposition will be due two weeks
24 before that date. HP's reply will be due one week before that date.

25 **IT IS SO ORDERED.**

26 DATED: May 10, 2011

27 

28 **HONORABLE LARRY ALAN BURNS**
United States District Judge