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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 IAN MCDONALD,
12 Plaintiff,
13 v.
14 BMW OF NORTH AMERICA, LLC,
15 Defendant.
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Case No.: 3:17-CV-2011-CAB-BLM

**ORDER GRANTING MOTION TO
REMAND AND REMANDING CASE
TO STATE COURT**

[Doc. No. 6]

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18 On July 14, 2017, Plaintiff filed a complaint in state court seeking damages arising
19 out of alleged defects to a 2012 BMW 650I vehicle that Plaintiff purchased in 2011. The
20 complaint asserts violations of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code
21 1794 *et seq.*, breach of express written warranty, breach of the implied warranty of
22 merchantability, fraud, and violation of the Magnuson-Moss Warranty Act. The complaint
23 alleges that Plaintiff suffered damages exceeding \$25,000, alleges that Plaintiff is entitled
24 to civil penalties of two times actual damages [Doc. No. 1-2 at ¶¶ 11-14], and also prays
25 for attorney’s fees and punitive damages [*Id.* at 14-15].

26 Plaintiff served the state court complaint on Defendant BMW of North America,
27 LLC (“BMW”) on July 24, 2017. On September 29, 2017, BMW removed the complaint
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1 to this court on the basis of diversity jurisdiction. Plaintiff now moves to remand on the
2 grounds that BMW's removal was untimely. As the Ninth Circuit has explained:

3 The mechanics and requirements for removal are governed by 28 U.S.C. §
4 1446. Section 1446(b) "identifies two thirty-day periods for removing a case."
5 *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 885 (9th Cir. 2010).
6 "The first thirty-day removal period is triggered if the case stated by the initial
7 pleading is removable on its face." *Id.* (internal quotation marks omitted).
8 "The second thirty-day removal period is triggered if the initial pleading does
9 not indicate that the case is removable, and the defendant receives 'a copy of
10 an amended pleading, motion, order or other paper' from which removability
11 may first be ascertained." *Id.* (quoting § 1446(b)).

12 *Kuxhausen v. BMW Fin. Servs. NA, LLC*, 707 F.3d 1136, 1139 (9th Cir. 2013). In its notice
13 of removal and in opposition to the instant motion, BMW argues that the complaint was
14 not removable on its face because it does not state the purchase price of Plaintiff's vehicle
15 or otherwise state the amount Plaintiff seeks in damages. Thus, BMW contends its removal
16 was timely within the second thirty-day removal period because it occurred the same day
17 that BMW obtained the sales contract for Plaintiff's vehicle showing a purchase price in
18 excess of \$100,000. [Doc. No. 11 at 2.] The Court is not persuaded.

19 In its notice of removal, BMW stated that "Plaintiff did not provide any information
20 regarding amount [sic] in controversy in the Complaint." [Doc. No. 1 at ¶ 4.] This
21 statement is incorrect. The complaint states that Plaintiff's damages exceed \$25,000, and
22 prays for actual damages, statutory penalties of two times actual damages, attorney's fees
23 and punitive damages. In its notice of removal, BMW acknowledges that each of these
24 categories of recovery are properly included in the amount in controversy calculation and
25 in fact calculates the amount in controversy using the vehicle purchase price as the amount
26 of Plaintiff's actual damages and multiplying it by three to arrive at a total amount of
27 monetary damages and penalties sought in the complaint. However, even using the
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1 minimum amount of damages alleged in the complaint—\$25,001¹—the \$75,000 minimum
2 for diversity jurisdiction is satisfied when accounting for civil penalties. Accordingly, this
3 case was removable based on the face of the complaint.

4 *Kuxhausen*, on which BMW relies, does not require a different conclusion. In that
5 class action case, the issue was whether the complaint clearly stated that \$5,000,000 in
6 controversy as required for diversity jurisdiction pursuant to the Class Action Fairness Act
7 (“CAFA”). The Ninth Circuit rejected the defendant’s argument that it was not required
8 to calculate the total amount in controversy by multiplying the value of the putative class
9 members’ individual claims by the number of class members. *Kuxhausen*, 707 F.3d at
10 1140. Nevertheless, the Court ultimately held that “because nothing in *Kuxhausen*’s
11 complaint ‘indicate[d] that the amount demanded by *each putative class member*
12 *exceed[ed]*’ an amount sufficient to yield a total amount in controversy for the class
13 exceeding \$5,000,000, the complaint “fell short of triggering the removal clock under
14 Section 1446(b).” *Id.* at 1141 (*emphasis* in original). In other words, when the amount in
15 controversy cannot be calculated based on numbers in the complaint, the removal clock is
16 no triggered simply because the defendant could guess the damage amount or figure it out
17 through its own investigation.

18 BMW, however, would not have needed to engage in guesswork or investigation to
19 ascertain that this case was removable based on the allegations in the complaint.
20 Knowledge of the purchase price of Plaintiff’s vehicle may have helped BMW determine
21 the total amount at stake, but it was not necessary to determine that more than \$75,000 is
22 in controversy. Just as BMW multiplied the purchase price by three to argue in the notice
23 of removal that Plaintiff is seeking a minimum of \$314,164.50, it could have multiplied
24 \$25,001 (the minimum amount of damages alleged in the complaint) by three to determine
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27 ¹ The complaint stated that Plaintiff’s damages *exceed* \$25,000. [Doc. No. 1-2 at ¶ 11.] Notably, the
28 complaint also attached a complaint from a prior class action that Plaintiff contends tolled the statute of
limitations for his claim. That complaint alleged that the amount in controversy for each of the Plaintiffs’
individual claims exceeded \$50,000. [Doc. 1-2 at 71.]

1 that Plaintiff seeks, at a minimum, in excess of \$75,000, not including attorney's fees or
2 punitive damages. Performing this calculation would not have required any extrapolations,
3 subjective knowledge, or evidence outside of the complaint, and multiplying these figures
4 that were stated in the complaint was part of BMW's duty to ascertain removability.
5 *Kuxhausen*, 707 F.3d at 1140 (holding that the removal statute "requires a defendant to
6 apply a reasonable amount of intelligence in ascertaining removability. Multiplying
7 figures clearly stated in a complaint is an aspect of that duty.") (internal citation and
8 quotation marks omitted). Accordingly, unlike in *Kuxhausen*, the complaint triggered the
9 removal clock under Section 1446(b). Because BMW did not remove within thirty days
10 of being served with the complaint, its removal was untimely.

11 In light of the foregoing, it is hereby **ORDERED** that Plaintiff's motion to remand
12 is **GRANTED**. This case is **REMANDED** to San Diego County Superior Court.

13 It is **SO ORDERED**.

14 Dated: November 28, 2017



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16 Hon. Cathy Ann Bencivengo
United States District Judge