

**FILED**

MAY 22 2018

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY *[Signature]* DEPUTY

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LEO LUNA, an individual,  v. BMW OF NORTH AMERICA, LLC, a business entity form unknown, and DOES 1-30, inclusive,  	Plaintiff,       Defendant.
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Case No.: 3:17-cv-02067-BEN-KSC

**ORDER:**

**(1) DENYING MOTION TO  
REMAND, and**

**(2) GRANTING MOTION TO  
DISMISS THE FOURTH CAUSE OF  
ACTION**

[Doc. Nos. 5-6]

Before the Court is Plaintiff Leo Luna’s (“Luna”) Motion to Remand (Doc. No. 5) and Motion to Dismiss the Fourth Cause of Action (Doc. No. 6). The motions are fully briefed and judged appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7.1. Having considered the moving and opposing papers, and for the reasons stated below, the Court hereby **DENIES** Luna’s Motion to Remand and **GRANTS** the Motion to Dismiss the Fourth Cause of Action.

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1 **BACKGROUND**

2 On January 7, 2017, Luna purchased a used 2013 BMW 328i sedan (“Vehicle”)  
3 with 28,636 miles on it. (Doc. No. 5-1 at 2.) After experiencing numerous issues with  
4 the vehicle, Luna filed suit in the San Diego Superior Court on September 5, 2017. (Doc.  
5 No. 1 at 1.) The Complaint alleges six causes of action: (1) *Violation of Song-Beverly*  
6 *Consumer Warranty Act – Failure to Repair Defect(s) within Reasonable Number of*  
7 *Attempts* (Civil Code § 1793.2(d)); (2) *Violation of Song-Beverly Consumer Warranty*  
8 *Act – Failure to Commence Repairs or Repair Defect(s) within 30 Days* (Civil Code §  
9 1793.2(b)); (3) *Breach of Express Warranty pursuant to 15 U.S.C. § 2310(d)* (Civil Code  
10 § 1794); (4) *Violation of Magnuson-Moss Warranty Act*; (5) *Violation of Consumer Legal*  
11 *Remedies Act – Failure to Disclose Misrepresentation, Unfair and Deceptive Acts and*  
12 *Practices* (Civil Code § 1770(a)); (6) *Breach of Express and Implied Warranty, Civil*  
13 *Code § 1790, et seq., The Song-Beverly Consumer Warranty Act* (*Id.* at 5-11.) The  
14 Complaint seeks damages, rescission of the purchase contract and restitution of all  
15 monies expended, incidental and consequential damages, punitive damages, equitable  
16 relief, prejudgment interest, and reasonable attorneys’ fees and costs. (Doc. No. 1-3, ¶  
17 45.)

18 On October 16, 2017, BMW of North America, LLC (“BMW”) removed the case  
19 based on federal question and diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and  
20 1441(a). (Doc. No. 1 at 2-8.) Luna filed a Motion to Remand to State Court together  
21 with a Motion to Dismiss Count Four of the Complaint (*the only federal law claim*) on  
22 October 23, 2017. (Doc. Nos. 5-6.) BMW filed oppositions to both Motions on  
23 November 16, 2017, to which Luna replied on November 22, 2017. (Doc. Nos. 8-11.)

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1 **LEGAL STANDARD**

2 **I. Remand Under 28 U.S.C. §§ 1447(c) and 1367(c)(3)**

3 A defendant in state court may remove a civil action to federal court so long as that  
4 case could originally have been filed in federal court. 28 U.S.C. § 1441(a); *City of Chi. v.*  
5 *Int'l Coll. Of Surgeons*, 522 U.S. 156, 163 (1997). Thus, removal of a state action may  
6 be based on either diversity or federal question jurisdiction. *City of Chi.*, 522 U.S. at 163;  
7 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Removal jurisdiction is based  
8 entirely on federal statutory authority. *See* 28 U.S.C. § 1441 *et seq.* These removal  
9 statutes are strictly construed, and removal jurisdiction is to be rejected in favor of  
10 remand to the state court if there are doubts as to the right of removal. *Nev. v. Bank of*  
11 *Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012). The defendant seeking removal of an  
12 action from state court bears the burden of establishing grounds for federal jurisdiction,  
13 by a preponderance of the evidence. *Geographic Expeditions, Inc. v. Estate of Lhotka*,  
14 599 F.3d 1102, 1106-07 (9th Cir. 2010). The district court must remand the case “[i]f at  
15 any time before final judgment it appears that the district court lacks subject matter  
16 jurisdiction.” 28 U.S.C. § 1447(c); *see also Smith v. Mylan, Inc.*, 761 F.3d 1042, 1044  
17 (9th Cir. 2014); *Bruns v. NCUA*, 122 F.3d 1251, 1257 (9th Cir. 1997) (holding that  
18 remand for lack of subject matter jurisdiction “is mandatory, not discretionary”).<sup>1</sup>

19 **II. Voluntary Dismissal Under Rule 41(a)(2)**

20 Federal Rule of Civil Procedure 41(a)(2) allows a plaintiff, with the approval of the  
21 court, to dismiss an action with prejudice at any time. The rule provides that: “an action  
22 may be dismissed at the plaintiff’s request ... by court order, on terms that the court  
23 considers proper.” Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal under Rule  
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26 <sup>1</sup> An order remanding a case based on a lack of subject matter jurisdiction is not  
27 appealable. 28 U.S.C. § 1447(d); *Carlsbad Tech, Inc. v. HIF Bio, Inc.*, 556 U.S. 635,  
638-39 (2009).

1 41(a)(2) “is addressed to the district court’s sound discretion and the court’s order will  
2 not be disturbed unless the court has abused its discretion.” *Stevedoring Servs. of Am. v.*  
3 *Armilla Int’l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (citing *Sams v. Beech Aircraft Corp.*  
4 625 F.2d 273, 277 (9th Cir. 1980)). Dismissal without prejudice is proper “so long as the  
5 defendant will not be prejudiced ... or unfairly affected by dismissal.” (*Id.*) (internal  
6 citations omitted).

7 When ruling on a motion to dismiss without prejudice, the district court must  
8 determine whether the defendant will suffer some legal prejudice as a result of the  
9 dismissal. *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) (citing  
10 *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994)). Although case law does  
11 not articulate a precise definition of “legal prejudice,” the cases focus on the rights and  
12 defenses available to a defendant in future litigation. (*Id.*) (citing 5 James W. Moore’s  
13 Federal Practice ¶ 41.05[1] nn. 51-53).

#### 14 DISCUSSION

15 The Court is confronted with two motions, a Motion to Remand to State Court and  
16 a Motion to Dismiss the Fourth Cause of Action. “Generally, jurisdiction is a preliminary  
17 matter that should be resolved before all others.” *Leeson v. Merck & Co., Inc.*, 2006 WL  
18 3230047, \*2 (E.D. Cal. Jan. 27, 2006); *see also Villarreal v. Chrysler Corp.*, 1996 WL  
19 116832, at \*1 (N.D. Cal. Mar. 12, 1996) (“Judicial economy will best be served by  
20 addressing the remand issue [before a party’s motion to dismiss] because a determination  
21 on this issue will facilitate litigation in the appropriate forum.”). Moreover, “Post-  
22 removal amendments to the pleadings cannot affect whether a case is removable because  
23 the propriety of removal is determined solely on the basis of the pleadings filed in state  
24 court.” *Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006) (citations  
25 omitted). Therefore, the Court will address the Motion to Remand first.

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1 **I. Motion to Remand**

2 Luna moves to remand this action to state court arguing BMW failed to meet the  
3 requirements for federal question and diversity jurisdiction. (Doc. No. 5 at 1.) BMW  
4 opposes remand and contends the Court possesses subject matter jurisdiction under both  
5 sections. (Doc. No. 9 at 2.)

6 **A. Federal Question Jurisdiction**

7 Determination of federal question jurisdiction “is governed by the well-pleaded  
8 complaint rule, which provides that federal jurisdiction exists only when a federal  
9 question is presented on the face of plaintiffs properly pleaded complaint.” *Cal. v.*  
10 *United States*, 215 F.3d 1005, 1014 (9th Cir. 2000).

11 Luna’s fourth cause of action asserts a claim under federal law, the Magnuson-  
12 Moss Warranty Act (“MMWA”), 15 U.S.C. § 2310(d). Under § 2310(d)(1)(B), “a  
13 consumer who is damaged by the failure of a supplier, warrantor, or service contractor to  
14 comply with any obligation under this chapter, or under a written warranty, implied  
15 warranty, or service contract, may bring suit for damages and other legal and equitable  
16 relief in an appropriate district court. However, before subject matter jurisdiction is  
17 invoked, the amount in controversy must be shown to be at least \$50,000.<sup>2</sup> 15 U.S.C. §  
18 2310(d)(3)(B).

19 In drafting the MMWA, Congress, while providing a substantive right of action to  
20 consumers, did not specify the appropriate measure and type of damages that are  
21 available. This has led a number of courts, including the Ninth Circuit, to turn to the  
22 applicable state law to determine what remedies are available under the Act. *See Kelly v.*  
23 *Fleetwood Enters., Inc.*, 377 F.3d 1034, 1039 (9th Cir. 2004) (“State law generally guides  
24 courts in determining whether punitive damages are available as a remedy for breach of  
25 warranty under the [Magnuson-Moss Warranty] Act.”). Based on the allegations and  
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27 <sup>2</sup> The Act’s amount in controversy excludes interests and costs. (*Id.*)

1 facts presented, the Song-Beverly Consumer Warranty Act (“Song-Beverly Act”), Cal.  
2 Civ. Code § 1790 *et seq.*, also known as California’s “lemon law,” is the appropriate state  
3 law.

4 The Song-Beverly Act authorizes civil penalties of up to two times the amount of  
5 actual damages for violations. Cal. Civ. Code § 1794(c). While these civil penalties are  
6 not punitive damages *per se*, California courts have, on numerous occasions, analogized  
7 the two because both are intended to punish and deter defendants rather than compensate  
8 plaintiffs. *See, e.g., Suman v. Super. Ct.*, 39 Cal. App. 4th 1309 (1995). This Court  
9 similarly believes that the Song-Beverly Act’s civil penalties are akin to punitive  
10 damages and ought to be treated the same for the purposes of this analysis.

11 In an amount in controversy inquiry for diversity purposes, punitive damages,  
12 where authorized, are counted toward the requirement. *See Bell v. Preferred Life*  
13 *Assurance Soc’y*, 320 U.S. 238 (1943) (“Where both actual and punitive damages are  
14 recoverable under a complaint each must be considered to the extent claimed in  
15 determining jurisdictional amount.”); *see also Brady v. Mercedes Benz USA, Inc.*, 243  
16 F.Supp.2d 1004, 1009 (N.D. Cal. 2002) (holding that Song-Beverly Act’s civil penalties  
17 should be included in the amount in controversy requirement for diversity jurisdiction).  
18 Moreover, there is nothing in the text of the Magnuson-Moss Act that would indicate that  
19 the amount in controversy for that statute is assessed any differently than the diversity  
20 jurisdiction requirement found in title 28 U.S.C. § 1332. Thus, when the civil damages  
21 authorized by the Song-Beverly Act are combined with the actual damages alleged, the  
22 composite sum satisfies the Magnuson-Moss Act jurisdictional requirement.

### 23 1. *Actual Damages Under Song-Beverly*

24 In an action brought pursuant to the Song-Beverly Act, a plaintiff may recover “in  
25 an amount equal to the actual price paid or payable by the buyer,” reduced by “that  
26 amount directly attributable to use by the buyer.” Cal. Civ. Code § 1793.2(d)(2)(B)-(C).  
27 The actual price paid or payable includes paid finance charges. *Mitchell v. Blue Bird*

1 *Body Co.*, 80 Cal. App. 4th 32, 37-38 (2000). Moreover, the amount directly attributable  
2 to use by the buyer “shall be determined by multiplying the actual price of the new motor  
3 vehicle paid or payable by the buyer ... by a fraction having as its denominator 120,000  
4 and its numerator, the number of miles traveled by the new motor vehicle prior to the  
5 time the buyer first delivered the vehicle ... for correction of the problem that gave rise to  
6 the nonconformity.” Cal. Civ. Code § 1793.2(d)(2)(C).

7 Here, the sales contract attached to the Motion to Remand indicates Luna  
8 purchased a used 2013 BMW 328i Sedan for a total price of \$23,549.26. (Doc. No. 5-3  
9 at 1-3.) This included a \$5,916.46 down payment, financing \$16,795.62 (*term of 60*  
10 *months*) and \$837.18 in finance charges over the course of the loan.<sup>3</sup> (*Id.*) According to  
11 BMW’s repair records, Luna first took the vehicle in for repairs on August 31, 2017.  
12 (*See* Doc. No. 1-5 at 2.) At that time, the vehicle’s mileage was 35,410 miles. (*Id.*)  
13 However, since Luna purchased the vehicle with 28,636 miles on it, he was only  
14 responsible for 6,774 of those miles. Thus, the amount directly attributable to use by  
15 Luna is \$1,294.52. Therefore, after Luna’s mileage use setoff is deducted from the total  
16 sale price, the amount of actual damages Luna potentially could collect is \$21,637.56.<sup>4</sup>

## 17 2. Civil Penalties Under Song-Beverly

18 A buyer who establishes a willful violation of the Song-Beverly Act may recover a  
19 civil penalty of “two times the amount of actual damages.” Cal. Civ. Code § 1794(c).  
20 Here, Luna stood to potentially recover \$21,637.56 in damages. As such, Luna may be  
21 entitled to an additional \$43,275.12 in civil penalties. Combining Luna’s potential  
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23 <sup>3</sup> The amount of finance charges actually paid is likely considerably less than \$837.18,  
24 given that the final payment under the sales contract is due on January 21, 2022. For  
25 purposes of calculating the amount in controversy, the court will adopt an estimate of  
26 \$220 (*finance charges incurred for nine payments beginning February 21, 2017*) for a  
total purchase price of \$22,932.08.

27 <sup>4</sup> \$22,932.08 (*total purchase price*) - \$1,294.52 (*Luna’s mileage use setoff*) = \$21,637.56  
(*adjusted total purchase price*).

1 damages and civil penalty results in a sum of \$64,912.68, exceeding the \$50,000  
2 threshold required to assert an MMWA claim.

3 Accordingly, the Court has federal question jurisdiction over the MMWA claim  
4 and supplemental jurisdiction over the remaining state law claims under Title 28 U.S.C. §  
5 1367. Because the court concludes that the requirements for federal question jurisdiction  
6 are met, it need not address whether it has diversity jurisdiction as well.

7 Therefore, removal was proper and the Motion to Remand is hereby **DENIED**.

8 **II. Motion to Dismiss**

9 Luna moves to dismiss his only federal law claim (*cause of action four*) without  
10 prejudice, for violation of the MMWA<sup>5</sup> under Fed. R. Civ. P. 41(a)(2). (Doc. No. 6 at 3.)  
11 Specifically, “Luna requests an amendment to dismiss the fourth cause of action without  
12 prejudice *only if* the court finds that plaintiff’s \$20,000 vehicle meets the \$50,000 amount  
13 in controversy threshold, under the MMWA.” (Doc. No. 11 at 2.)

14 Normally, the Court looks to see if granting dismissal would result in any legal  
15 prejudice to BMW. However, BMW has not presented any evidence indicating it will  
16 suffer legal prejudice if the motion is granted. In fact, BMW does not oppose the motion  
17 to dismiss, “If Luna wants to dismiss his Magnuson-Moss cause of action without  
18 prejudice, BMW NA will not stand in his way.” (Doc. No. 8 at 3.) Moreover, as  
19 discussed *supra*, the Court found the \$50,000 jurisdictional requirement satisfied and  
20 federal question jurisdiction proper over the MMWA claim.

21 The Court is also cognizant that under 28 U.S.C. § 1331, federal courts have  
22 jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the  
23 United States.” 28 U.S.C. 1331. [W]hen a defendant removes a case to federal court  
24 based on the presence of a federal claim an amendment eliminating the original basis for  
25 federal jurisdiction generally does not defeat jurisdiction.” *Rockwell Intern. Corp. v.*

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27 <sup>5</sup> Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 and 2310.



1 *United States*, 549 U.S. 457, 474 n.6 (2007) (citations omitted). Thus, despite Luna's  
2 tactical decision to seek dismissal of the MMWA claim, it will not divest this Court of  
3 jurisdiction, as it was determined at the time of removal.

4 Accordingly, the Court **GRANTS** the Motion to Dismiss cause of action four  
5 without prejudice.

6 **CONCLUSION**

7 The Motion to Remand is **DENIED** and the Motion to Dismiss is **GRANTED**.  
8 **IT IS SO ORDERED.**

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10 DATED: 5/21/18

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13 **Hon. Roger T. Benitez**  
14 United States District Court  
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