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

*GINA BECKMAN, individually and  
on behalf of all others similarly  
situated,*

Plaintiff,

v.

**WAL-MART STORES, INC., et al.,**

Defendants.

Case No. 17-cv-02249-BAS-BLM

**ORDER DENYING MOTION TO  
REMAND**

**[ECF No. 10]**

Presently before the Court is Plaintiff Gina Beckman’s Motion to Remand. (ECF No. 10.) On November 3, 2017, Defendants Wal-Mart Stores, Inc., Espresso Supply, Inc., and Eko Brands, LLC (collectively, “Defendants”) removed this matter to federal court based on diversity jurisdiction under 28 U.S.C. §§ 1331, 1332, 1141(b), and 1441(c). Plaintiff argues that removal was untimely under 28 U.S.C. § 1446(b). (*Id.*)

The Court finds these motions suitable for determination on the papers submitted and without oral argument. *See* Civ. L. R. 7.1(d)(1). For the following reasons, the Court finds removal was timely and **DENIES** Plaintiff’s motion to remand this action to the San Diego Superior Court.

1 **I. BACKGROUND**

2 On June 16, 2017, Plaintiff commenced this action in the San Diego Superior  
3 Court asserting claims for: (1) breach of implied warranty of merchantability; (2)  
4 breach of express warranty; (3) breach of implied warranty of fitness for a particular  
5 purpose; and (4) violation of the Business and Professions Code §§ 17200 *et seq.* and  
6 17500 *et seq.* (ECF No. 10-1 ¶ 3.) Plaintiff named the following defendants: “Wal-  
7 Mart Stores, Inc.” and “Brew & Save.” (*Id.*) On June 20, 2017, Plaintiff personally  
8 served Defendant Wal-Mart Stores, Inc. (“Wal-Mart”) with the initial complaint. (*Id.*  
9 ¶ 4.) Plaintiff also contends that “Defendant Brew & Save was personally served  
10 with the initial complaint . . . on or about July 5, 2017.” (*Id.* ¶ 5.)

11 On August 1, 2017, David A. Lowe, counsel for Espresso Supply, Inc., notified  
12 Plaintiff’s counsel that “Brew & Save had been erroneously sued because it [sic]  
13 Brew & Save is a brand, not a corporate entity.” (ECF No. 10-1 ¶ 6.) Further, Mr.  
14 Lowe provided that “Eko Brands, LLC manufactures the Brew & Save Carafe  
15 Filters,” and “Espresso Supply, Inc. is the parent company of Eko Brands, LLC.”  
16 (*Id.*)

17 In an email to Plaintiff’s counsel on that same day, Mr. Lowe summarized this  
18 telephone conversation, stating once more that “Eko Brands, LLC (wrongly named  
19 in the complaint as Brew & Save)” was the proper entity defendant to this suit. (ECF  
20 No. 10-1 at Ex. 1.) Additionally, Mr. Lowe informed Plaintiff’s counsel that he  
21 would be contacting Wal-Mart to discuss his representation thereof. (*Id.*) About two  
22 weeks later, Mr. Lowe emailed Plaintiff’s counsel and confirmed that he was now  
23 representing Wal-Mart. (*Id.* at Ex. 2.) Mr. Lowe also reiterated the agreement he  
24 had made with Plaintiff’s counsel “to accept service on behalf of the proper named  
25 party, once the amendment was made, in exchange for an agreed upon period of  
26 answer for all Defendants.” (*Id.*)

27 On September 7, 2017, Plaintiff mailed the First Amended Complaint (“FAC”)  
28 to Mr. Lowe. The FAC named the following defendants: “Wal-Mart Stores, Inc.,”

1 “Espresso Supply, Inc.,” “Eko Brands, LLC,” and “Ekobrew.” (*Id.* ¶ 11.) On  
2 September 27, 2017, Mr. Lowe notified Plaintiff’s counsel indicating that he would  
3 not accept service. Specifically, Mr. Lowe stated: “We never indicated that Ekobrew  
4 was an entity or ever acquired,” and suggested that Plaintiff “amend to correct the  
5 complaint, after which [he and his clients were] happy to discuss service on behalf  
6 of properly named entity defendants.” (ECF No. 10-1 at Ex. 6.)

7         Instead of amending and re-serving a second amended complaint as Mr. Lowe  
8 suggested, Plaintiff’s counsel served Defendants personally. The caption still  
9 included “Ekobrew” as a defendant. (*Id.* ¶ 15.) On September 28, 2017, Plaintiff  
10 served Wal-Mart by mail with the FAC. (ECF 10-1 ¶ 14.) On October 4, 2017,  
11 Plaintiff served Eko Brands, LLC (“Eko Brands”) and Espresso Supply, Inc.  
12 (“Espresso Supply”) personally with the FAC. (ECF No. 10-1 ¶ 15.)

13         On November 3, 2017 Defendants filed their Notice of Removal pursuant to  
14 28 U.S.C. §§ 1331, 1332, 1141(b) and 1441(c). (ECF No. 1.) On December 4, 2017,  
15 Plaintiff filed a Motion to Remand and Request for an Award of Costs and Attorneys’  
16 Fees. (ECF No. 10.)

## 17 18 **II. LEGAL STANDARD**

19         “[A]ny civil action brought in a State court of which the district courts of the  
20 United States have original jurisdiction, may be removed by the defendant or the  
21 defendants, to the district court of the United States.” 28 U.S.C. § 1441(a). A party  
22 must remove an action within thirty days and section 1446(b) provides when that  
23 thirty-day limitation begins to run. 28 U.S.C. § 1446(b).

24         Additionally, when a party removes a case under the Class Action Fairness Act  
25 (“CAFA”), there is an alternative thirty-day window for which the time limit begins  
26 to run once a defendant first ascertains that a case is removable. *See Roth v. CHA*  
27 *Hollywood Med. Ctr., L.P.*, 720 F.3d 1121, 1126 (9th Cir. 2006).

28

1           **A.     Removal of Civil Actions Under 28 U.S.C. § 1446(b)**

2           In order for removal to be timely under section 1446(b)(1), “the notice of  
3 removal of a civil action or proceeding shall be filed within thirty days after the  
4 receipt by the defendant, through service or otherwise, of a copy of the initial  
5 pleading setting forth the claim for relief upon which such action or proceeding is  
6 based.” § 1446(b)(1). The “thirty-day removal period is triggered ‘if the case stated  
7 by the initial pleading is removable on its face.’” *Carvalho v. Equifax Info. Servs,*  
8 *LLC*, 629 F.3d 876, 885 (9th Cir. 2010) (quoting *Harris v. Banker Life & Cas. Co.*,  
9 425 F.3d 689, 694 (9th Cir. 2005)).

10           In a multi-defendant suit where parties are served at different times, the last  
11 served defendant timely removes a case if the notice of removal is filed thirty days  
12 after service, regardless of when the other parties were effectively served.

13 § 1446(b)(2)(B).

14  
15           **B.     Removal of Class Actions Under the CAFA**

16           CAFA states that any district court has original jurisdiction of an action if “the  
17 amount in controversy exceeds the sum or value of \$5,000,000 . . . and in which the  
18 aggregate number of proposed plaintiffs is 100 or greater, and any member of the  
19 plaintiff class is a citizen of a state different from any defendant.” *Lowdermilk v.*  
20 *U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 997 (9th Cir. 2007); *see* 28 U.S.C. § 1332(d).

21           Removal of these class actions is governed by section 1446. 28 U.S.C. §  
22 1453(b). However, removal under CAFA allows for a reading of sections 1441 and  
23 1446 together, and “permit[s] a defendant to remove outside the two thirty-day  
24 periods on the basis of its own information . . . provided that neither of the two thirty-  
25 day periods under § 1446(b)(1) and (b)(3) has been triggered.” *Roth*, 720 F.3d at  
26 1126. Therefore, a defendant may remove a class action at any point during the  
27 pendency of litigation in state court, so long as removal is initiated within thirty days  
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1 of when the defendant is put on notice that a case has become removable. *See Roth*,  
2 720 F.3d at 1123; *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 691 (9th Cir. 2006).

### 3 4 **III. ANALYSIS**

#### 5 **A. Defendants' Timely Removal Under Section 1446(b)(1)**

6 Plaintiff moves to remand this action to state court and alleges that Defendants  
7 failed to satisfy the timing requirements under section 1446(b). (ECF No. 10 at 6:15-  
8 16.) Plaintiff contends that the initial complaint sent exclusively to Wal-Mart on  
9 June 20, 2017 triggered the thirty-day time limit under section 1446(b)(1). (ECF No.  
10 10 at 7:14-22.) Alternatively, Plaintiff argues that the time limit was triggered when  
11 its counsel mailed the FAC to Mr. Lowe on September 7, 2017. (ECF No. 10 at 6:23-  
12 27.) Defendant argues that service was not effective on either of the dates contended  
13 by Plaintiff, and rather, that proper service occurred on October 4, 2017 when the last  
14 defendants, Eko Brands and Espresso Supply, were served. (ECF No. 12 at 6:1-3.)  
15 The Court agrees with Defendants.

16 A defendant is limited to removing a case within thirty days of receiving an  
17 initial pleading if it is removable on its face. § 1446(b)(1). Each defendant in a  
18 multi-party proceeding has the opportunity to remove an action once it has been  
19 properly served. § 1446(b)(2)(B),(C); *see also Delfino v. Reiswig, et al.*, 630 F.3d  
20 952, 956 (9th Cir. 2011) (upholding recent trends in case law favoring the later-  
21 served defendant rule).

22 Here, Mr. Lowe's acceptance of service was contingent upon Plaintiff naming  
23 the correct parties as defendants. (ECF No. 10 ¶ 9.) A defendant may make  
24 acceptance of service of a complaint conditional on plaintiff satisfying a prerequisite  
25 condition. *See Patriot Rail Corp. v. Sierra R. Co.*, No. 2:09-cv-0009 TLN AC, 2013  
26 WL 3745231, at \*6 (E.D. Cal. July 15, 2013) (conditioning counsel's acceptance of  
27 service of counterclaims upon defendant's agreement to allow an amended  
28

1 complaint). If that condition is not satisfied, service of process is ineffective, and the  
2 thirty-day time limit does not begin to run. (*Id.*)

3 Plaintiff's counsel did not name the correct defendants because she included  
4 the nonexistent legal entity "Ekobrew." (ECF No. 12 at 6:22-23.) Although Plaintiff  
5 listed three of the correct defendants, Mr. Lowe was not authorized by Defendants to  
6 accept service because an incorrect defendant was named. Moreover, Mr. Lowe was  
7 not obligated to accept service on behalf of a legally nonexistent entity. Thus, service  
8 was ineffective on September 7, 2017. *See* Fed. R. Civ. P. 12(b)(5).

9 Plaintiff's counsel proceeded to serve Defendant Wal-Mart personally on  
10 September 28, 2017 and Defendants Eko Brands and Espresso Supply on October 4,  
11 2017. Because each defendant has the opportunity to remove an action once it has  
12 been properly served, the final defendants served on October 4, 2013 had until  
13 November 3, 2017 to remove. *See* § 1446(b). Espresso Supply, Eko Brands, and  
14 Wal-Mart filed their notice of removal on November 3, 2017. (ECF No. 10 at 6:3-  
15 8.) Thus, removal was timely under section 1446(b)(1). *See* § 1446(b).

### 17 **B. Defendants' Timely Removal Under the CAFA**

18 Even if the thirty-day time limit began to run before October 4, 2017,  
19 Defendants timely removed the case under CAFA.

20 Removal under CAFA is similarly governed by section 1446(b), though the  
21 procedure for timely removal is not absolute. Effectively, CAFA provides that the  
22 thirty-day removal period may start at a later point: when removability is first  
23 ascertained. A plaintiff should not be able to delay or prevent removal by failing to  
24 include information necessary to ascertain removability under CAFA. *Roth*, 720  
25 F.3d at 691. Thus, under the CAFA, a defendant who has not lost the right to remove  
26 may still do so if the removal is filed within thirty days after the defendant ascertains  
27 that the case is removable by means of its own research or outside sources. *See id.*  
28 at 1123; *Abrego*, 443 F.3d at 691; *see also* § 1453.

1 Here, neither party disputes that the first two elements of CAFA are met  
2 because the allegations in the initial complaint established minimal diversity and that  
3 the class of plaintiffs would exceed one hundred. (ECF No. 10 at 13:2-4.) Rather,  
4 Defendants contend that the third element, the amount in controversy, was not  
5 determinable on the face of the FAC, and Plaintiff disagrees. (ECF No. 12 at 4:10-  
6 5:25.)

7 The Court agrees with Defendants that the FAC did not clearly state the  
8 amount in controversy. Upon first receiving the FAC, Eko Brands, Espresso Supply,  
9 and Wal-Mart had to conduct their own inquiry into whether the amount in  
10 controversy exceeded \$5,000,000 before seeking removal. (ECF No. 12 at 4:17-19.)  
11 Defendants assessed the sales volume of the disputed product and internally assessed  
12 the possible amount in controversy by using their own records. (*Id.* at 4:9-13.)  
13 Although these inquiries take time, Defendants state that they sped up the process  
14 and took a cautionary approach, filing their Notice of Removal within the statutorily  
15 allocated thirty days from service on Eko Brands and Espresso Supply. (*Id.* at 1:20-  
16 23.) Accordingly, the Court finds Defendants' removal was timely under both  
17 section 1446(b) and CAFA.

### 18 19 **C. Plaintiff's Request for an Award of Costs and Attorneys' Fees**

20 Plaintiff's request for attorneys' fees is denied because Defendants timely  
21 removed the case. Even if the Court granted the remand, Defendants had an  
22 objectively reasonable basis for removing this matter. *See* § 1447(c); *Dall v.*  
23 *Albertson's Inc.*, No. 08-55955, 2009 WL 3326427, at \*1 (9th Cir. Oct. 16, 2009)  
24 (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)).


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**III. CONCLUSION**

The Court **DENIES** Plaintiff's Motion to Remand. Accordingly, the Court denies Plaintiff's Request for an Award of Costs and Attorneys' Fees.

**IT IS SO ORDERED.**

**DATED: February 26, 2018**

  
**Hon. Cynthia Bashant**  
**United States District Judge**