

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

John W. Ferron,

Plaintiff,

v.

Case No. 2:07-CV-01133

JUDGE SMITH

Magistrate Judge Kemp

DIRECTV, Inc.,

Defendant.

AMENDED ORDER

This Order vacates the Court's February 1, 2008 Opinion and Order (Doc. 13) in which this Court denied Plaintiff's Motion to Remand and an Award of his Attorney's Fees and Costs (Doc. 8). For the following reasons, this Court vacates its prior Order and **GRANTS** Plaintiff's motion for remand, but Plaintiff's request for costs and attorney's fees is **DENIED**.

DISCUSSION

The factual background and the proper legal standards implicated are set forth fully in the Court's prior order (Doc. 13).

As set forth in the Court's prior Order, for each of Defendant's 33 newspaper ads, there are four paragraphs in the Complaint alleging violations. Each paragraph identifies an alleged particular act and then asserts multiple violations. In total, there are 132 separate acts alleged and 363 violations. The Complaint seeks an award of \$200 per alleged violation, totaling \$72,600 (363 violations multiplied by \$200 per violation). Based upon this amount, combined with the Court's conclusion that Plaintiff would seek at least \$2,400 in attorney's fees if he is

successful in prosecuting this case, the Court found that it was more likely than not that Plaintiff intends to seek damages in excess of \$75,000.

The Court has reconsidered this finding based upon Judge Marbley's recent opinion in *Charvat v. GVN Michigan, Inc.* ___ F.Supp.2d ____, 2008, WL 204617 (S.D. Ohio Jan. 25, 2008). In *Charvat*, the plaintiff alleged that the defendant violated the Telephone Consumer Protection Act ("TCPA") and the Ohio Consumer Sales Practices Act ("OCSPA") based upon ten telephone calls made to the plaintiff by the defendant. *Id.* at *3. The plaintiff alleged that the defendant committed 187 violations during those ten calls, and the plaintiff sought the maximum amount of statutory damages for each individual violation. *Id.* The matter was before the *Charvat* court on the defendant's motion for partial summary judgment. *Id.* In moving for partial summary judgment, the defendant did not dispute the existence of the violations, but instead asserted that the plaintiff could only recover statutory damages once per-call, rather than for every separate violation. *Id.*

In a well-researched opinion, Judge Marbley first noted that "the Ohio Courts are split on this issue." *Id.* at *6 (citations omitted). He then stated that "The majority of Ohio courts allow Plaintiffs to recover for each individual violation of the CSPA if there are separate rule violations caused by separate acts. If the individual violations, however, are all part of one transaction or act resulting in the same injury, then the court will limit the plaintiff's recovery to \$200 per act." *Id.* (internal quotations omitted) (citations omitted). Accordingly, Judge Marbley granted the defendant's partial motion for summary judgment, holding that the maximum possible recovery was for one violation per call. In addition, the *Charvat* court dismissed the case *sua sponte* for lack of jurisdiction because based upon the court's holding, the amount in controversy did not meet the \$75,000 jurisdictional requirement.

This Court agrees with Judge Marbley’s well-reasoned opinion. As applied to the instant case, if each of Defendant’s 33 newspaper ads are interpreted to be “part of one transaction or act resulting in the same injury,” then Plaintiff’s statutory damages recovery would be limited to \$6,600 (33 acts multiplied by \$200 per act). Alternatively, if the Court were to accept Plaintiff’s contention that there were four distinct acts with respect to each of the 33 ads, then the total statutory damages recoverable would be \$26,400 (132 acts multiplied by \$200 per act). Either number falls far short of the \$75,000 threshold for establishing diversity jurisdiction.

Accordingly, Plaintiff’s motion to remand is granted. *See* 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”).

Title 28, United States Code, Section 1447 provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.” The Supreme Court recently adopted the standard for awarding fees under this provision. *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). “Absent unusual circumstances, courts may award attorney’s fees under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.” *Id.* at 141.

In this case, Plaintiff filed a lengthy complaint of some 66 pages and 178 numbered paragraphs. As previously noted, the Complaint contained some 363 citations to statutory provisions and regulations promulgated under the Ohio Consumer Sales Practices Act. There was no question that the parties were diverse. Given the number of potential violations of the OCSPA and the likelihood of significant attorney’s fees in prosecuting this action, Defendant had an objectively reasonable basis for seeking removal. Accordingly, Plaintiff’s request for

attorney's fees under §1447(c) is denied.

IV. CONCLUSION

For all of the foregoing reasons, the Court vacates its February 1, 2008 Opinion and Order (Doc. 13).

Plaintiff's Motion to Remand is **GRANTED**, but Plaintiff's request for costs and attorney's fees is **DENIED** (Doc. 8).

The Clerk shall remove Document 8 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT