UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

i.think inc.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 3-08-CV-0163-P
	§	
MINEKEY, INC;	§	
DELIP ANDRA; and	§	ECF
INTERNET UNLIMITED, LLC	§	
	§	
Defendants.	§	

COMPENDIUM OF UNREPORTED CASES IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

1) *Billing Concepts, Inc. v. OCMC, Inc.*, Civil Action No. SA-05-CA-1084 FB (NN), 2006 WL 1677776 (W.D. Tex. June 8, 2006)

2) *Canvas Records, Inc. v. Koch Ent. Dist., LLC*, Civil Action No. H-07-0373, 2007 WL 1239243 (S.D. Tex. Apr. 27, 2007)

3) *Chambers v. Chase Home Fin. LLC*, Civil Action No. 3:06-CV-0695-G, 2006 WL 3086517 (N.D. Tex. Oct. 31, 2006)

4) *IMT, Inc. v. Haynes & Boone, L.L.P.*, No. CIV.A. 3:98-CV-2634, 1999 WL 58838 (N.D. Tex. Feb. 1, 1999)

5) *Pilgrim's Pride Corp. v. Frisco Food Servs., Inc.*, Civil Action No. 2:06-CV-512 (TJW), 2007 WL 508365 (E.D. Tex. Feb. 13, 2007)

6) *Robertson v. W. Heritage Ins. Co.*, CIV.A. No. 3:96-CV-2044-P, 1996 WL 722078 (N.D. Tex. Dec. 5, 1996)

7) *Rogers v. All Am. Life Ins. Co.*, No. Civ.A. 3:97-CV-3084P, 1998 WL 401599 (N.D. Tex. July 9, 1998)

8) *Sims v. AT&T Corp.*, No. Civ.A.3:04-CV-1972-D, 2004 WL 2964983 (N.D. Tex. Dec. 22, 2004)

Dated: February 13, 2008

Respectfully submitted,

PATTON BOGGS LLP

/s/ Talcott J. Franklin

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document was served upon all counsel of record by notice of electronic filing, pursuant to Fed. R. Civ. P. 5(b)(2)(D), today, February 13, 2008.

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HOnly the Westlaw citation is currently available.

United States District Court,
W.D. Texas,
San Antonio Division.
BILLING CONCEPTS, INC., Plaintiff
v.
OCMC, INC., Defendant.
Civil Action No. SA-05-CA-1084 FB (NN).

June 8, 2006.
Ricardo G. Cedillo, Davis, Cedillo & Mendoza, San Antonio, TX, for Plaintiff.

William H. Oliver, Pipkin, Oliver & Bradley, L.L.P., San Antonio, TX, for Defendant.

MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

NANCY STEIN NOWAK, Magistrate Judge.

I. *Introduction*

***1** The matter before the Court is plaintiff's motion to remand, defendant's response, and plaintiff's reply (Docket Entries 6, 13, and 15). This is a case arising from a business relationship between plaintiff Billing Concepts, Inc. and defendant OCMC, Inc., and actions of defendant after the relationship deteriorated. Plaintiff's Original Petition alleges business disparagement and tortious interference with contracts and business relationships. [FN1] Plaintiff requests injunctive relief and an award of monetary damages. [FN2]

FN1. Docket Entry 1, Exhibit B, plaintiff's Original Petition at 6-7, provided as an attachment to defendant's notice of removal.

FN2. *Id.*

Plaintiff moved to remand the case to the 225th Judicial District Court of Bexar County, Texas, where it was originally filed, on the grounds that the case was improvidently removed to federal court. Plaintiff contends that the amount in controversy that is sought by plaintiff is less than $75,000.00. Therefore, a necessary element for diversity jurisdiction is absent and the Court lacks subject matter jurisdiction to hear the case. [FN3]

FN3. Docket Entry 6.

Defendant opposes the motion to remand on the basis that the amount in controversy exceeds the $75,000.00 threshold when plaintiff's claims for actual and punitive damages and the value of the right protected by the proposed injunction relief are considered . [FN4] Defendant further contends that plaintiff's affidavit is ineffective to defeat federal jurisdiction. [FN5]

FN4. Docket Entry 13.

FN5. *Id.*

After having considered the motion, the responsive briefs, and the applicable law in this case, it is my recommendation that the plaintiff's motion to remand the case to state court should be ***GRANTED.***

I have authority to enter this Memorandum and Recommendation under 28 U.S.C. § 636(b) and the District Court's Order referring all pretrial matters in this proceeding to me for disposition by order, or to aid in their disposition by recommendation where my authority as a Magistrate Judge is statutorily constrained. [FN6]

FN6. Docket Entry 3.

II. *Federal Jurisdiction*

This case is not within the removal jurisdiction conferred to district courts under 28 U.S.C. § 1441*et seq.* For the reasons set forth below, the court lacks diversity jurisdiction as required under 28 U.S.C. § 1332(a)(1).

III. *Statement of the Case*

On November 1, 2005, plaintiff filed its original petition against defendant in the 225th Judicial District Court of Bexar County, Texas, Cause Number 2005- CI-17452. [FN7] In the petition, plaintiff requested a temporary restraining order ("TRO") be entered ex parte against defendant. In particular, plaintiff requested the state court (1) order

defendant to provide plaintiff with a written retraction and apology concerning communications specified in Exhibit C attached to the petition, within seventy-two (72) hours of receiving the TRO; (2) order defendant to provide plaintiff with a complete list identifying all companies and individuals to whom defendant sent a copy of Exhibit C, or to whom defendant otherwise conveyed the substance of Exhibit C, within seventy-two (72) hours of receiving the TRO; (3) order the defendant to provide plaintiff with a "hardcopy" of all communications similar to Exhibit C that defendant made, within seventy-two (72) hours of receiving the TRO; (4) enjoin defendant from further disseminating the contents of Exhibit C; and (5) enjoin defendant from further disseminating any false or misleading statement concerning plaintiff and its affiliates. [FN8]

FN7. Docket Entry 1, Exhibit B, plaintiff's Original Petition.

FN8. Docket Entry 1, Exhibit B, plaintiff's Original Petition at 7-8.

***2** On November 1, 2005, the State District Court granted plaintiff's application and issued a temporary restraining order containing all the elements requested by plaintiff. [FN9] As a condition to the TRO becoming effective, plaintiff was required to execute and file a bond or make a cash deposit of five hundred dollars ($500.00) with the Clerk of the State District Court. [FN10] The State District Court issued the TRO without notice to defendant even though plaintiff had contact information for defendant and defendant's counsel due to pending litigation in the United States District Court for the Southern District of Indiana, *OCMC, Inc. v. Billing Concepts, Inc.*, Case No. 1:05-CV-01396-DFH-TAB. [FN11] Upon entry of the TRO, plaintiff's counsel sent a facsimile of the TRO to defendant's counsel. The transmission of the TRO arrived at the offices of defendant's counsel in Indianapolis, Indiana, after 5:00 p.m. on November 1, 2005. Specifically, defendant averred that its counsel did not receive the facsimile until November 2, 2005. [FN12]

FN9. Docket Entry 1, Exhibit B; Docket Entry 5, TRO.

FN10. Docket Entry 5, TRO at 3.

FN11. Docket Entry 2 at ¶ 3.

FN12. Docket Entry 2 at ¶ 4. The Southern District of Indiana Court subsequently dismissed the case in an order entered on May 3, 2006. *See OCMC, Inc. v. Billing Concepts, Inc.*, Case No. 1:05-CV-01396 (Docket Entry 40).

On November 4, 2005, defendant removed the case to this Court asserting diversity jurisdiction pursuant to 28 U.S.C. § 1332. [FN13] In the notice of removal, defendant noted that plaintiff was a multi-million dollar company that had alleged that defendant's actions caused it to lose prospective and existing client contracts, and as a result, plaintiff had sustained damage to its reputation and business relationships. Plaintiff alleged that the damages were ongoing. Defendant further noted that plaintiff had requested unliquidated actual damages, punitive damages, and injunctive relief. Based on plaintiff's request for relief, defendant contended that the amount in controversy exceeded $75,000.00. [FN14]

FN13. Docket Entry 1.

FN14. Docket Entry 1 at ¶ 8.

Contemporaneously with the notice of removal, defendant filed a motion to quash the TRO. [FN15] On November 9, 2005, plaintiff responded with a motion to enforce the TRO, a motion to extend the TRO, and a motion for contempt. [FN16] On the same day, plaintiff filed the instant motion to remand the case back to the 225th Judicial District Court of Bexar County, Texas. [FN17]

FN15. Docket Entry 2.

FN16. Docket Entry 8.

FN17. Docket Entry 6.

On November 14, 2005, I entered a Memorandum and Recommendation in which I recommended that the District Court find that plaintiff had not shown good cause for extension of the TRO and deny the motion to extend. [FN18] I noted that the TRO would expire prior to the time that the District Court could consider the Memorandum and Report, and the parties' objections thereto. Consequently, I recommended that the District Court also deny the motion to quash as moot. On December 9, 2006, the

District Court entered an order accepting the Memorandum and Recommendation such that the defendant's motion to quash the TRO was dismissed as moot, and the plaintif' s motion to extend the TRO was denied. [FN19]

FN18. Docket Entry 11.

FN19. Docket Entry 17.

On December 27, 2005, defendant answered plaintiff's original petition and filed a counterclaim requesting damages for wrongful injunction. [FN20] Plaintiff responded to the counterclaim with a timely motion to dismiss. [FN21] Since it is my recommendation that the motion to remand should be granted on the basis that the case was improvidently removed, defendant's motion to dismiss the counterclaim need not be considered by this Court.

FN20. Docket Entry 18.

FN21. Docket Entry 19.

IV. *Issue Presented*

*3 Was the case improvidently removed to federal court? In particular, does the amount in controversy meet the minimum amount required by statute to satisfy the value element of federal diversity jurisdiction?

V. *Analysis*

The right to remove a case from a state court of competent jurisdiction to a federal court is purely statutory and "entirely dependant on the will of Congress." [FN22] The current version of the removal statute provides in part relevant to this case:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.... [FN23]

FN22.14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3721 at 285-86 (3d ed.1998).

FN23.28 U.S.C. § 1441(a).

Likewise, Congress has statutorily provided for the remand of a case to a state court from which it was improvidently removed. Section 1447(c) of Title 28, United States Code, provides in part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

The overriding principle in matters of removal and remand is that federal courts have no inherent subject matter jurisdiction. Federal Courts are courts of limited jurisdiction by origin and design. [FN24] As a result, there is an initial presumption that federal courts lack subject matter jurisdiction to resolve a particular suit. [FN25] It is well established that the party removing the case has the burden to present facts showing, that federal subject matter jurisdiction exists. [FN26] Whether a case may be removed is a question of federal law to be decided by federal courts [FN27] with the removal statute strictly construed, [FN28] and doubts concerning the propriety of removal construed against removal . [FN29] The jurisdiction of the federal court is determined by the record as it exists at the time the notice of removal is filed. [FN30]

FN24.*Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir.2001).

FN25.*Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994); *In re Hunter*, 66 F.3d 1002, 1005 (9th Cir.1995); *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir.1994).

FN26.*Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir.1995).

FN27.*Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir.1988); *Kansas Pub. Employees Retirement Sys. v. Reimer & Kroger Assoc. Inc.*, 4 F.3d 614, 618 (8th Cir.1993).

FN28.*Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

FN29.*Owens Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377(1978); *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir.1996).

FN30.*Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S.567, 570-71 (2004); *see also FSLIC v. Griffin*, 935 F.2d 691, 695-96 (5th Cir.1991)("The power to remove an action is evaluated at the time of removal.").

In this instant matter, the parties dispute whether the Court has subject matter jurisdiction based on diversity to hear this case. Article III, Sections 1 and 2 of the United States Constitution provides Congress with the authority to vest the federal courts with jurisdiction over controversies between citizens of different states, or between citizens of a state and citizens of a foreign country. [FN31] Congress first authorized diversity jurisdiction in the Judiciary Act of 1789. [FN32]

FN31. 13B Wright, Miller & Cooper, *supra* § 3601 at 334-35 (2d ed.1984).

FN32.*Id.*

The requirements for diversity jurisdiction are now set forth in 28 U.S.C.§ 1332. Section 1332 provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--(1) citizens of different States; ... [FN33]

FN33.28 U.S.C. § 1332(a).

***4** Plaintiff is a Delaware corporation which has its principal place of business located in San Antonio, Texas. Defendant is an Indiana corporation with its principal place of business located in Carmel, Indiana. There is no question that the parties meet the citizenship requirements of section 1332.

The parties dispute that the amount in controversy meets the jurisdictional minimum required by the diversity jurisdiction statute. Plaintiff contends that the complaint on its face does not allege a specific amount of damages, and therefore, defendant must demonstrate by a preponderance of the evidence that the amount in controversy is more than $75,000.00. Plaintiff argues that defendant has failed to provide any evidence to support the removal. Furthermore, plaintiff has offered an affidavit stipulating that it does not seek and expressly waives damages in excess of $75,000.00 exclusive of costs and interest. [FN34]

FN34. Docket Entry 6, Exhibit A.

The well-established rule is that the sum claimed by a plaintiff in his or her original complaint controls for diversity jurisdiction purposes, if the claim has been made in good faith. [FN35] In determining whether the claim meets the minimum amount required for jurisdiction, the court should respect the plaintiff's evaluation of the claim. [FN36] However, a subsequent amendment or stipulation by the plaintiff to seek a lesser amount will not divest the federal court of jurisdiction. [FN37] A corollary to the general rule is that "a plaintiff in state court may prevent removal by committing to accept less than the federal jurisdictional minimum." [FN38]

FN35.*St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

FN36.*Barbers, Hairstyling For Men & Women, Inc. v. Bishop*, 132 F.3d 1203, 1205 (7th Cir.1998) (citing *St. Paul Mercury*, 303 U.S. at 289).

FN37.*St. Paul Mercury*, 303 U.S. at 292.

FN38.*Id.*

The Fifth Circuit has established a framework for resolving disputes concerning the amount in controversy. In Texas and Louisiana, plaintiffs in state court petitions may not specify the numerical value of the damage claim. [FN39] Where the petition does not allege a specific damage amount, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000.00. [FN40] The defendant may make this showing: (1) by demonstrating that it is "facially apparent" from the face of the complaint that the claims are likely above $75,000.00, or (2) by setting forth the facts in controversy that support a finding of the requisite amount. [FN41]

FN39.Tex.R. Civ. P. 47(b); La.Code Civ. P. art. 893.

FN40.*De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir.1993).

FN41.*Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir.1999).

In this case, the original complaint contains claims for business disparagement and tortious interference with contracts and prospective business relationships, and requests injunctive relief and monetary damages. The complaint does not request damages in a specific amount. Nor it is facially apparent that the damages sought or incurred were likely above $75,000.00.

Defendant did not provide any proof to establish that the amount in controversy meets the jurisdictional minimum. In its notice of removal, defendant identifies plaintiff as a multi-million dollar company and notes that plaintiff seeks actual and punitive damages along with injunctive relief. [FN42] Defendant correctly states that the value of injunctive relief "is the value of the right to be protected or the extent of the injury to be prevented." [FN43] Defendant goes on to argue that the value of the injunctive relief sought clearly exceeds $75,000.00, noting the reputational injury as well as the damage to business relationships which plaintiff claimed resulted from defendant's dissemination of false information to plaintiff's customers. However, in this case it is not "facially apparent" that the value of this injury--suffered as a result of a single, one-time communication to plaintiff's customers in which defendant is alleged to have improperly characterized plaintiff's financial situation--is likely to exceed $75,000.

FN42. Docket Entry 1, ¶ 2, at 8.

FN43.*Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir.1983) (citing *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029 (5th Cir.1980) and *Texas Acorn v. Texas Area 5 Health Systems Agency, Inc.*, 559 F.2d 1019 (5th Cir.1977)).

***5** In contrast, plaintiff provided an affidavit of Robert Thomas, Vice President of Customer Accounting for plaintiff. [FN44] Mr. Thomas represents that plaintiff seeks damages in this case not to exceed $75,000.00. Furthermore, in its motion to remand, plaintiff expressly waived damages in excess of $75,000.00 excluding costs and interest. [FN45] Based on the record as a whole, plaintiff's affidavit serves to clarify the amount in controversy at the time of removal and does not attempt to amend the original complaint. [FN46] Indeed, it is strong proof that the amount in controversy is less than $75,000.00.

FN44. Docket Entry 6, Exhibit A.

FN45. In its reply in support of the motion to remand, plaintiff notes that the Bexar County District Court only required $500.00 be deposited with the Clerk to protect defendant from any harm incurred from the TRO. Docket Entry 15 at 6, ¶ 17. Plaintiff argues that the small amount equates to the value that the Bexar County District Court placed on the TRO and the injunctive relief sought by plaintiff.

FN46.*See Halsne v. Liberty Mutual Group*, 40 F.Supp.2d 1087, 1092 (N.D.Iowa 1999) (determining that the stipulation clarified rather than amended the pleadings).

The Fifth Circuit has specifically held that post-removal affidavits may be considered when it is unclear from the complaint that jurisdiction at the time of removal is proper. In *Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia S.A.* (*"ANPAC"*), [FN47] a group of small-scale fishermen brought suit in Texas state court against Dow Chemical Company and its wholly owned Columbia subsidiary seeking damages arising from a pesticide spill. [FN48] Plaintiffs claimed that the spill immediately killed tons of fish that would have been available for harvest and damaged the food chain by killing plant and animal life in the bay, thereby, causing grave economic losses. Plaintiffs also claimed that they had suffered personal injuries including skin rashes from handling the dead fish. [FN49]

FN47.988 F.2d 559 (5th Cir.1993), *abrogated on other grounds, Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir.1998), *rev'd on other grounds*526 U.S.

574 (1999).

FN48.*Id.* at 561.

FN49.*Id.* at 562.

Dow Chemical removed the case to federal court alleging that its subsidiary had been fraudulently joined to defeat diversity jurisdiction and that the amount in controversy exceeded $50,000.00, the jurisdictional minimum at the time. Plaintiffs moved to remand based in part on the contention that the requisite amount was not in controversy. [FN50] Along with their motion to remand, plaintiffs attached an affidavit from their Columbia attorney stating that no individual fisherman had suffered losses greater than $50,000.00. The District Court denied the motion to remand and ultimately dismissed the entire case on *forum non conveniens* grounds.

FN50.*Id.*

In reversing the District Court's denial of the motion to remand, the Fifth Circuit noted that plaintiffs could not deprive a federal court of jurisdiction by changing their damage request. However, since the jurisdiction question was ambiguous, the attorney's affidavit could be considered to clarify the complaint. [FN51]

FN51.*Id.* at 565.

The Fifth Circuit ultimately held that where the complaint does not specify damages and it was not facially apparent that the damages sought or incurred were likely to above the jurisdictional minimum, and plaintiff timely contests removal with an unrebutted affidavit stating that the amount in controversy does not meet the jurisdictional minimum, defendant cannot meet its burden to establish subject matter jurisdiction without competent evidence that the actual amount in controversy exceeds the jurisdictional amount. [FN52]

FN52.*Id.* at 566. *See also De Aquilar v. Boeing Co.*, 11 F.3d 55, 57 (5th Cir.1993); *Farrar v. Wal-Mart Stores, Inc.*, No. SA-04-CA-0775- RF, 2004 WL 2616303 (W.D.Tex. Nov. 16, 2004) (following the analysis of ANPAC and considering plaintiff's affidavit in determining that remand was proper); *Callaway v. BASF Corp.*, 810 F.Supp. 191, 193 (S.D.Tex.1993) (providing plaintiff with the option to stipulate to damages less than the jurisdictional minimum in order to remand); *Halsne*, 40F.Supp.2d at 1092-93 (affidavit clarified pleadings to show amount in controversy did not meet jurisdictional minimum, case remanded).

In the case before this Court, defendant has argued strenuously that the jurisdictional amount is met considering the value of the injunctive relief sought as well as the damage components of any recovery. However, as explained above, it is not apparent that the amount in controversy exceeds $75,000, and defendant failed to provide any evidence to support its arguments and jurisdictional allegations, or challenge plaintiff's affidavit. As the party bearing the burden of proof, defendant must do more than present conclusory arguments in order to defeat the motion to remand. Accordingly, I recommend that the District Court find that defendant has failed to meet its burden of proof to show that plaintiff's claims involve an amount in controversy exceeding $75,000.00, that this Court is without jurisdiction over this dispute, and that remand is proper.

VI. *Recommendation*

6** Based on the foregoing, it is my recommendation that plaintiff's motion to remand be ***GRANTED and that the District Court ***REMAND*** this case to the 225th Judicial District Court of Bexar County, Texas, where it was originally filed.

VII. *Instructions for Service and Notice of Right to Object/Appeal*

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "Filing User" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this Memorandum and Recommendation must be filed within 10 days after being served with a copy of same, unless this time period is modified by the District Court. [FN53]**Such party shall file the objections with the Clerk of the Court, and serve the objections on all other parties and the Magistrate Judge.** A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made

and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court. [FN54] Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Memorandum and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected--to proposed factual findings and legal conclusions accepted by the District Court. [FN55]

FN53.28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b).

FN54.*Thomas v. Arn,* 474 U.S. 140, 149-152 (1985); *Acuña v. Brown & Root, Inc.,* 200 F.3d 335, 340 (5th Cir.2000).

FN55.*Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1428- 29 (5th Cir.1996).

Not Reported in F.Supp.2d, 2006 WL 1677776 (W.D.Tex.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Houston Division.
CANVAS RECORDS, INC., Plaintiff,
v.
KOCH ENTERTAINMENT DISTRIBUTION, LLC, Defendant.
Civil Action No. H-07-0373.

April 27, 2007.

Michael David Sydow, Sydow McDonald et al, Houston, TX, for Plaintiff.

Roger L. McCleary, Beirne Maynard & Parsons, Houston, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

SIM LAKE, United States District Judge.

***1** Pending before the court are Plaintiff Canvas Records, Inc.'s Motion to Remand (Docket Entry No. 7) and Defendant KOCH Entertainment LP's Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue and Rule 12(b)(6) Motion to Dismiss (Docket Entry No. 3). For the reasons stated below, plaintiff's motion to remand will be denied, and defendant's motion to dismiss or transfer will be denied.

I. *Background*

On April 5, 2005, plaintiff, Canvas Records, Inc., entered into a distribution agreement (the "Agreement") with KOCH Entertainment Distribution, LLC ("KOCH"). Among other things, the Agreement granted KOCH the exclusive distribution rights for plaintiff's audio and video products in the United States. [FN1] On April 5, 2005, plaintiff filed suit in Texas state district court for Harris County, alleging that "during the negotiations to enter into [the Agreement] ... KOCH made several material representations which [plaintiff] now believes were intentionally misleading. Based on these intentional misrepresentations, [plaintiff] entered into [the Agreement]." [FN2] Plaintiff alleged causes of action for fraud, fraudulent inducement to enter the Agreement, conversion, and liability under the Texas Theft Liability Act, and sought actual and exemplary damages, injunctive relief "in the form of a court order requiring KOCH to return all [plaintiff's] merchandise in the custody and control of KOCH," and "all other relief, in law and in equity, to which plaintiff may be entitled." [FN3]

FN1. Defendant KOCH Entertainment LP's Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue, Rule 12(b)(6) Motion to Dismiss and, Subject to and Without Waiving the Foregoing, Original Answer and Counterclaim, Docket Entry No. 3, Exhibit 1A, unnumbered page 4.

FN2. Plaintiff's Original Petition, attached to Defendant KOCH Entertainment LP's Notice of Removal, Docket Entry No. 1, Exhibit B, p. 2.

FN3. *Id.* at 2-4.

Defendant, KOCH Entertainment, LP, as successor-in-interest to and on behalf of KOCH, timely removed the action to this court based on diversity jurisdiction. [FN4] Plaintiff now moves the court to remand the action to state court, alleging that the amount in controversy has not been shown to exceed $75,000 exclusive of interest and costs, as required by 28 U.S.C. § 1332(a). [FN5] Defendant seeks "dismissal or, in the alternative, transfer for improper venue to the United States District Court for the Southern District of New York, New York, pursuant to Fed.R.Civ.P. 12(b) (3)." [FN6] Defendant bases its motion on a forum selection clause in the Agreement that states:

FN4. Defendant KOCH Entertainment LP's Notice of Removal, Docket Entry No. 1.

FN5. Plaintiff Canvas Records, Inc.'s Motion to Remand, Docket Entry No. 7, p. 2.

FN6. Defendant KOCH Entertainment LP's Brief in Support of its Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue, Docket Entry No. 4, p. 2.

> This agreement shall be governed exclusively by the laws of the State of New York applicable to contracts made and to be performed entirely in such State. The parties agree to the exclusive jurisdiction of the Southern District Court of New York, New York. [FN7]

FN7. Defendant KOCH Entertainment LP's Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue, Rule 12(b)(6) Motion to Dismiss and, Subject to and Without Waiving the Foregoing, Original Answer and Counterclaim, Docket Entry No. 3, Exhibit 1A, unnumbered page 9, ¶ 18.

II. *Plaintiff's Motion to Remand*

Plaintiff argues that remand is appropriate because no amount is pleaded on the face of its petition, and defendant "has failed to bring forward any evidence that the amount in controversy is greater than $75,000 exclusive of interest and costs." [FN8]

FN8. Plaintiff Canvas Records, Inc.'s Motion to Remand, Docket Entry No. 7, p. 3.

A. Applicable Law

Federal district courts have original jurisdiction over civil actions where the parties are diverse and the amount in controversy exceeds $75,000 exclusive of interest and costs. 28 U.S.C. § 1332. Since the diversity of the parties is not in dispute, [FN9] the sole issue in this case is whether the amount in controversy exceeds $75,000.

FN9. Defendant's Notice of Removal asserts jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332 because plaintiff is a Texas corporation and KOCH is a New York limited liability company. Defendant KOCH Entertainment LP's Notice of Removal, Docket Entry No. 1, p. 2. KOCH Entertainment LP is a limited partnership organized under the laws of the state of Delaware with its principal office in New York. *Id.* at 3.

**2 The party seeking to invoke federal diversity jurisdiction bears the burden of establishing that federal jurisdiction exists. *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir.2003). " '[W]hen the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds' the jurisdictional amount." *Id.* at 638-39 (quoting *De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir.1993)). The Fifth Circuit has set forth two ways to satisfy this burden.

> First, jurisdiction will be proper if "it is facially apparent" from the plaintiffs' complaint that their "claims are likely above [$75,000]." If the value of the claims is not apparent, then the defendants "may support federal jurisdiction by setting forth the facts--[either] in the removal petition [or] by affidavit--that support a finding of the requisite amount."

Id. (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir.1995)). If the defendant meets this burden, the plaintiff must establish to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir.1995).

B. Analysis

1. *Facially Apparent*

Defendant first argues that it is facially apparent that the amount in controversy exceeds $75,000. [FN10] Plaintiff seeks actual and exemplary damages and attorney's fees arising from KOCH's alleged misrepresentations. Defendant argues that plaintiff's claim for exemplary damages puts the amount in controversy above the jurisdictional minimum because Chapter 41 of the Texas Civil Practices and Remedies Code allows for exemplary damages to be awarded up to the greater of two times the amount of actual damages or $200,000 if plaintiff proves its allegations. [FN11]Tex. Civ. Prac. & Rem.Code § 41.008(b)(2). Defendant also argues that plaintiff's claim for attorney's fees under the Texas Theft Liability Act must be considered in determining whether the amount in controversy exceeds $75,000 and stresses that plaintiff failed to file a binding stipulation or affidavit purporting to limit the amount in controversy to $75,000 or less. [FN12]

FN10. Defendant KOCH Entertainment LP's Response in Opposition to Plaintiff's Motion to Remand, Docket Entry No. 15, p. 4.

FN11.*Id.* Defendant also argues that if New

> York law applies to this case, pursuant to the forum selection clause in the Agreement there would be no limit on the amount of exemplary damages that could be awarded. *Id.* at 5.
>
> FN12.*Id.* at 5-6.

In determining whether it is "facially apparent that the claims are likely above [$75,000]," the "proper procedure is to look only at the face of the complaint and ask whether the amount in controversy was likely to exceed [$75,000]." *Allen,* 63 F.3d at 1335-36. In this case plaintiff's petition does not state the extent or the type of injuries plaintiff suffered as a result of KOCH's alleged misrepresentations. The petition merely alleges that KOCH made intentional, material misrepresentations during negotiations to enter into the Agreement and that plaintiff seeks damages for such actions. [FN13] Plaintiff argues that defendant has not met its burden because it has not shown that "it is reasonable to expect a jury to award such damages based on the actual damages available or that any amount would be sustainable in Texas" and has presented no evidence on the amount of attorney's fees likely to be awarded. [FN14]

> FN13. Plaintiff's Original Petition, attached to Defendant KOCH Entertainment LP's Notice of Removal, Docket Entry No. 1, Exhibit B, p. 2.
>
> FN14. Plaintiff's Reply to Defendant KOCH Entertainment LP's Response in Opposition to Plaintiff's Motion to Remand, Docket Entry No. 17, p. 4.

***3** Looking at the petition, it is possible that plaintiff's claim may exceed $75,000. However, this is not the standard the court must use in making this determination. Without any facts to draw from the court cannot conclude, from the face of the petition, that plaintiff's claims will, more likely than not, reach at least $75,000. *See Allen,* 63 F.3d at 1336 (holding that courts should use a "more likely than not" standard rather than a "could well" standard to determine whether it is "facially apparent" that the amount in controversy requirement is met). The court will therefore look to summary-judgment type evidence relevant to the amount in controversy at the time of removal. *Id.*

2. *Evidence Supporting Jurisdiction*

Defendant argues that a preponderance of the evidence establishes that the amount-in-controversy requirement is met. [FN15] Defendant provides the court with the affidavit of Michael Rosenberg, President of KOCH, which states KOCH has 15,284 of plaintiff's compact discs for distribution. [FN16] Of these compact discs, 9,872 of them have a regular wholesale value of $10.78 and 5,412 of them have a regular wholesale value of $9.75. Altogether, the total wholesale value of plaintiff's merchandise in KOCH's possession is $159,187. Rosenberg also states that under the Agreement KOCH is entitled to a 25 percent distribution fee, or $39,796.75. [FN17] Defendant argues that the value of the injunctive relief sought by plaintiff exceeds the $75,000 requirement for diversity jurisdiction . [FN18] Plaintiff argues that this analysis is irrelevant because it is undisputed that plaintiff owns the compact discs and is merely seeking the return of its inventory, and that defendant has shown the actual amount in controversy is $39,796.75. [FN19]

> FN15. Defendant KOCH Entertainment LP's Response in Opposition to Plaintiff's Motion to Remand, Docket Entry No. 15, pp. 6-8.
>
> FN16.*Id.* at Exhibit 1, Rosenberg Affidavit, ¶ 5.
>
> FN17.*Id.*
>
> FN18. Defendant KOCH Entertainment LP's Response in Opposition to Plaintiff's Motion to Remand, Docket Entry No. 15, p. 6.
>
> FN19. Plaintiff's Reply to Defendant KOCH Entertainment LP's Response in Opposition to Plaintiff's Motion to Remand, Docket Entry No. 17, p. 4.

In an action for equitable relief the amount in controversy is "the value of the object of the litigation. To put it another way, the amount in controversy ... is the value of the right to be protected or the extent of the injury to be prevented." *Leininger v. Leininger,* 705 F.2d 727, 729 (5th Cir.1983) (internal citations omitted). The proper measure is the benefit or value to the plaintiff, not the cost to the defendant. *See Webb v. Investacorp, Inc.,* 89 F.3d 252 F.3d 257 n. 1 (5th Cir.1996); *see also Garcia,*

351 F.3d at 639-40. The true "object of the litigation" in this case is the validity of the Agreement, which gives KOCH exclusive distribution rights for plaintiff's audio and video products in the United States. [FN20] The court therefore concludes that it is more likely than not that plaintiff's requests for injunctive relief, economic and exemplary damages, and "all other relief, in law and in equity, to which [it] may be entitled" meet the amount in controversy requirement under 28 U.S.C. § 1332. Accordingly, plaintiff can only show that removal is improper by establishing to a legal certainty that the jurisdictional limit is not met. *De Aguilar*, 47 F.3d at 1412. Plaintiff has not attempted to make this showing. Plaintiff's motion to remand will therefore be denied.

> FN20. Defendant KOCH Entertainment LP's Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue, Rule 12(b)(6) Motion to Dismiss and, Subject to and Without Waiving the Foregoing, Original Answer and Counterclaim, Docket Entry No. 3, Exhibit 1A, unnumbered page 4.

III. *Defendant's Motion to Dismiss or Transfer*
A. Defendant's 12(b)(3) Motion

***4** Defendant seeks to have this action dismissed or, in the alternative, transferred to the Southern District of New York pursuant to Federal Rule of Civil Procedure 12(b)(3). [FN21] Although the Fifth Circuit has not yet addressed the "enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed.R.Civ.P. 12(b)(1) [or] 12(b)(3)," it has determined that such motions may be brought under 12(b)(3). *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir.2005) (internal quotation omitted).

> FN21. Defendant KOCH Entertainment LP's Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue, Rule 12(b)(6) Motion to Dismiss and, Subject to and Without Waiving the Foregoing, Original Answer and Counterclaim, Docket Entry No. 3.

The forum selection clause in the Agreement states that "[t]he parties agree to the exclusive jurisdiction of the Southern District Court of New York, New York." [FN22] The Southern District of New York is therefore a mandatory, not permissive, venue. *See Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127-28 (5th Cir.1994). In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 1913, 1916, 32 L.Ed.2d 513 (1972), the Supreme Court held that in admiralty cases forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances," by "clearly show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." It is settled law in the Fifth Circuit that a forum selection clause requiring exclusive venue in a state or foreign court triggers application of the *Bremen* test to determine if an action should be dismissed. *Int'l Software Systems, Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114- 15 (5th Cir.1996). It is also well-settled that in diversity cases motions to transfer venue pursuant to a forum selection clause are analyzed under 28 U.S.C. § 1404(a). *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S.Ct. 2239, 2245, 101 L.Ed.2d 22 (1988). *See also Amplicon*, 77 F.3d at 115 (noting that in *Stewart* the Court held that "under federal law the decision whether to *transfer* venue is governed by 28 U.S.C. § 1404(a)" (emphasis in original)). *Stewart* instructs courts to make an "individualized, case-by-case consideration of convenience and fairness" by "weigh[ing] in the balance a number of case-specific factors," including the forum selection clause. *Stewart*, 108 S.Ct. at 2244.

> FN22. *Id.*, Exhibit 1A, unnumbered page 9, ¶ 18.

In *Amplicon*, a case involving a forum selection clause that limited jurisdiction to state court, the Fifth Circuit stated that "[a]lthough we would prefer to apply the same *Stewart* balancing in diversity cases to motions to dismiss and motions to transfer, the other federal courts have decided otherwise and continue to apply *Bremen* to motions to dismiss based on a forum selection clause." *Amplicon*, 77 F.3d at 115. The court noted that some district courts in other circuits have treated a motion to dismiss as a motion to transfer, but distinguished these cases by stating that "these cases, unlike our own, did not involve a forum selection clause that limited the agreed venue to a state court." *Id.*

***5** This case involves the situation the Fifth Circuit took pains to distinguish in *Amplicon*. Several federal district courts have addressed this issue and have held that when transfer to another federal district court is

an option, *Stewart,* not *Bremen,* is the proper analytical guide. *See, e.g., Southeastern Consulting Group, Inc. v. Maximus, Inc.,* 387 F.Supp.2d 681, 683-84 (S.D.Miss.2005); *Speed v. Omega Protein, Inc.,* 246 F.Supp.2d 668, 671 (S.D.Tex.2003); *Dorsey v. N. Life Ins. Co.,* 2004 U.S. Dist. LEXIS 22443 at *35-37 (E.D.La. Nov. 5, 2004); *Lafargue v. Union Pacific R.R.,* 154 F.Supp.2d 1078, 1084-85 (E.D.Tex.2000). [FN23] The court is persuaded that the cited opinions represent the correct view of the law and that the proper procedure to enforce a forum selection clause that provides for suit in another federal court is through § 1404(a) and *Stewart* 's balancing test. [FN24] Because the agreement designates the Southern District of New York as the appropriate venue, § 1404(a) provides the appropriate analysis. Section 1404(a) allows for transfer, not dismissal. Defendant's motion to dismiss pursuant to 12(b)(3) will therefore be denied, and the court will consider whether transfer under § 1404(a) is appropriate.

FN23.*But see Vartec Telecom, Inc. v. BCE Inc.,* 2003 U.S. Dist. LEXIS 18072 (N.D.Tex. Oct. 9, 2003) (applying the *Bremen* test where transfer to a federal forum is available).

FN24. The court notes that the *Bremen* analysis is still used to determine whether the forum selection clause itself is valid. *Elliot v. Carnival Cruise Lines,* 231 F.Supp.2d 555, 559 n. 3 (S.D.Tex.2002). However, plaintiff has not "clearly show[n] that enforcement would be unreasonable or unjust, or that the clause [is] invalid for such reasons as fraud or overreaching." *Bremen,* 92 S.Ct. at 1916. The court therefore concludes that the forum selection clause is valid.

Section 1404(a) provides that

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a). The court must analyze each case on an individual basis and consider several factors, both private and public, none of which are given dispositive weight. *In re Volkswagen AG,* 371 F.3d 201, 203 (5th Cir.2004). The presence of a forum selection clause is "a significant factor that figures centrally in the district court's calculus." *Stewart,* 108 S.Ct. at 2244. The moving party bears the burden of proving by a preponderance of the evidence that a transfer is appropriate in light of the circumstances surrounding the case. *Southeastern Consulting,* 387 F.Supp.2d at 684-85.

In this case defendant has not asserted any reason why the case should be transferred except for the existence of the forum selection clause. Defendant has therefore not met its burden of proof. Although the forum selection clause is a factor in the transfer analysis, it is not alone sufficient to justify transfer. A forum selection clause "should receive neither dispositive consideration ... nor no consideration ..., but rather the consideration for which Congress provided in § 1404(a)." *Stewart,* 108 S.Ct. at 2245. Plaintiff argues that the alleged "misrepresentations involved in the fraud were made and acted on in Harris County, Texas." [FN25] The court therefore concludes that defendant has failed to meet its burden of proof, and transfer is not appropriate.

FN25. Unopposed Motion for Leave to Amend Complaint, Docket Entry No. 9, p. 4.

B. Defendant's 12(b)(6) Motion

Defendant also moves the court to dismiss this action for failure to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Because plaintiff has not asserted sufficient facts to support its allegations of fraud, fraudulent inducement, conversion, and liability under the Texas Theft Liability Act, plaintiff will be ordered to amend its complaint.

IV. *Conclusion and Order*

***6** For the reasons stated above, Plaintiff Canvas Records, Inc.'s Motion to Remand (Docket Entry No. 7) is **DENIED,** Defendant KOCH Entertainment LP's Rule 12(b)(3) Motion to Dismiss or Transfer for Improper Venue (Docket Entry No. 3) is **DENIED,** and Defendant's Rule 12(b)(6) Motion to Dismiss (Docket Entry No. 3) is **DENIED in part and GRANTED in part.** Plaintiff is **ORDERED** to amend its complaint within 20 days from the entry of this Memorandum Opinion and Order to allege the facts supporting all of its causes of action and to satisfy the requirements of Fed.R.Civ.P. 9(b) as to its causes of action for fraud and fraudulent inducement.

(S.D.Tex.)

END OF DOCUMENT

3

United States District Court,
N.D. Texas,
Dallas Division.
Marsha CHAMBERS, Plaintiff,
v.
CHASE HOME FINANCE LLC, Defendant.
Civil Action No. 3:06-CV-0695-G.

Oct. 31, 2006.
Marsha Chambers, Kaufman, TX, pro se.

Wm. Lance Lewis, Gregory M. Sudbury, Quilling, Selander, Cummiskey & Lownds, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

A. JOE FISH, Chief Judge.

***1** The court, on its own motion, herein examines its subject matter jurisdiction in this case. For the reasons stated below, this case is remanded to the state court from which it was removed.

I. *BACKGROUND*

This is a dispute over the sale by the plaintiff of certain real property and the financing by the purchasers of that property. The *pro se* plaintiff Marsha Chambers ("Chambers" or "the plaintiff") previously owned a tract of real property identified as 2808 El Paso Way, Mesquite, Texas. Original Petition ("Petition"), *attached to* Notice of Removal *as* Exhibit C-1. On June 10, 2004, the plaintiff sold the property to Rusty Tate ("Tate") and Charity Williams ("Williams") (collectively, "the buyers") for $118,000. Plaintiff's Response to the Defendant's Motion for Dismissal and Plaintiff's Amended Petition for Establishment of Priority Lien and Injunction Relief to Prevent Sale Without Payment of Plaintiff's First Lien ("Amended Petition") at 1. The sales contract required the buyers to pay, in consideration for the property, $94,400 in cash to Chambers; an additional $23,600 was to be secured through a vendor's lien on the property. *See* Sales Contract, *attached to* Appendix of Documents and Cases and Notice of Documents Given to Agents and the Original Lender ("Plaintiff's Appendix") at 2. Tate and Williams gave Chambers a document titled "Real Estate Promissory Note" evidencing a $25,000 debt. *Id.* A deed of trust was also executed by Tate and Williams securing the $25,000 debt to Chambers. *Id.* To acquire the requisite cash amount, the buyers obtained a $94,400 purchase money loan from New Century Mortgage ("NCM"), which was evidenced by a promissory note and deed of trust to NCM to secure the loan. *See* Adjustable Rate Note and Deed of Trust, *attached to* Defendant Chase Home Finance LLC's Appendix of Support in Response to Plaintiff's Motion for Summary Declaratory Judgment or in the Alternative, Motion to Set for Oral Argument Hearing and/or Trial *as* Exhibits A-1 and A-2.

The crux of the plaintiff's claim involves the alleged subordination of her promissory note. As a requisite for the NCM financing, the buyers and Chambers executed a second note on the property--a $23,600 "Real Estate Lien Note, Second Lien" with Chambers as the beneficiary. Real Estate Lien Note, Second Lien, *attached to* Defendant Chase Home Finance LLC's Appendix in Support of Motion to Dismiss or, Alternatively, Motion for More Definite Statement *as* Exhibit 1. The note, by its terms, was subordinate to a first lien in favor of NCM. *Id.* Chambers adamantly denies that she agreed to the status of a junior lienholder, asserting that the "Real Estate Note, Second Lien" is "fake." Amended Petition at 2. She further contends that her $25,000 promissory note remains in effect, giving her a first priority lien on the real property. *Id.* In her petition, Chambers asks the court to declare that she holds a first priority lien on the property; she also seeks injunctive relief in the form of a court-ordered sale of the property to pay the lien. Petition. Consistent with Texas law, plaintiff's petition does not specify the monetary value of the relief she seeks, *see* Tex.R. Civ. P . 47(b), but the lien that plaintiff wishes the court to enforce has a value of $25,000. Petition.

***2** Chambers filed this case on April 3, 2006 in the 44th Judicial District Court of Dallas County, Texas. Petition. The defendant Chase Home Finance LLC ("Chase" or "the defendant") is the current holder of the note and deed of trust previously acquired by NCM. Defendant Chase Home Finance LLC's Notice of Removal ("Notice of Removal") ¶ 4. Chase removed the case to this court pursuant to 28 U.S.C.

§§ 1441 and 1446 on April 18, 2006. Notice of Removal ¶ 2. Chase alleges that the buyers are in default on their mortgage payments stemming from the NCM note and that the buyers currently owe more than $106,000. *Id.* ¶ 4. Accordingly, the defendant asserts that the amount in controversy exceeds the jurisdictional requirement. *Id.*

II. *ANALYSIS*

Though Chambers has not moved to remand the instant action to state court, the court may *sua sponte* raise the issue of its jurisdiction at any time during the course of litigation. *In re Bass,* 171 F.3d 1016, 1021 (5th Cir.1999) ("Federal courts must be assured of their subject matter jurisdiction at all times and may question it sua sponte at any stage of judicial proceedings").

Title 28 U.S.C. § 1441(a) permits removal of "any civil action brought in a State Court of which the district courts of the United States have original jurisdiction." Under this statute, "[a] defendant may remove a state court action to federal court only if the action could have originally been filed in the federal court." *Aaron v. National Union Fire Insurance Company of Pittsburg, Pennsylvania,* 876 F.2d 1157, 1160 (5th Cir.1989), *cert. denied,*493 U.S. 1074 (1990) (citations omitted). Removal jurisdiction must be strictly construed, however, because it "implicates important federalism concerns." *Frank v. Bear Stearns & Co.,* 128 F.3d 919, 922 (5th Cir.1997); see also *Willy v. Coastal Corporation,* 855 F.2d 1160, 1164 (5th Cir.1988). Furthermore, "any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court." *Cross v. Bankers Multiple Line Insurance Company,* 810 F.Supp. 748, 750 (N.D.Tex.1992); *see also Shamrock Oil & Gas Corporation v. Sheets,* 313 U.S. 100, 108-09 (1941); *Healy v. Ratta,* 292 U.S. 263, 270 (1934). The burden of establishing federal jurisdiction is on the party seeking removal. *Frank,* 128 F.3d at 921-22;*Willy,* 855 F.2d at 1164.

There are two principal bases upon which a district court may exercise removal jurisdiction: (1) the existence of a federal question and (2) complete diversity of citizenship among the parties. *See*28 U.S.C. §§ 1331, 1332. The court can properly exercise jurisdiction on the basis of diversity of citizenship if the parties are of completely diverse citizenship and the case involves an amount in controversy of at least $75,000. *See*28 U.S.C. § 1332(a). [FN1] The defendant asserted only diversity jurisdiction in its notice of removal. [FN2]

FN1.Section 1332 states, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--(1) citizens of different States...." 28 U.S.C. § 1332(a)(1).

FN2. Though the defendant did not assert federal question jurisdiction in its notice of removal, the court, on this *sua sponte* review of subject matter jurisdiction, considered that possibility. Because this case does not present any issues "arising under the Constitution, laws, or treaties of the United States," the court cannot exercise jurisdiction on the basis of a federal question. 28 U.S.C. § 1331.

A. *Amount in Controversy*

***3** To establish jurisdiction when the plaintiff's state court petition does not allege a specific amount of damages, as in the instant case, the removing defendant must prove, by a preponderance of the evidence, that the amount in controversy exceeds $75,000. See *Allen v. R & H Oil & Gas Company,* 63 F.3d 1326, 1335 (5th Cir.1995) (citing *De Aguilar v. Boeing Co.,* 11 F.3d 55, 58 (5th Cir.1993)). A court may determine that removal is proper if it is facially apparent from the state court petition that the claims are likely above $75,000. See *id.* If the amount in controversy is not apparent from the face of the petition, the court may rely on facts asserted in the removal notice or in an affidavit submitted by the removing defendant to support a finding of the requisite amount. See *id.* While post-removal affidavits may be considered in determining the amount in controversy at the time of removal, such affidavits may be considered only if the basis for jurisdiction is ambiguous at the time of removal. *Gebbia v. Wal-Mart Stores, Inc.,* 233 F.3d 880, 883 (5th Cir.2000) (citing *Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia (ANPAC) v. Dow Quimica de Colombia S.A.,* 988 F.2d 559, 565 (5th Cir.1993), *cert. denied,*510 U.S. 1041 (1994), *abrogated on other grounds, Marathon Oil Co. v. A.G. Ruhrgas,* 145 F.3d 211 (5th Cir.1998)). However, if it is facially apparent from the petition that the amount in controversy meets the statutory requirements for

diversity jurisdiction, such post-removal affidavits do not deprive the district court of jurisdiction. *Id.* The jurisdictional facts supporting removal must be judged at the time of the removal. *Allen,* 63 F.3d at 1335.

Applying the "facially apparent" standard, the court begins by "look[ing] only at the face of the complaint and ask[ing] whether the amount in controversy [is] likely to exceed [$75,000]." *Id.* at 1336. Chambers' state court petition did not specify an amount of damages; in fact, she does not seek direct monetary relief of any kind. Rather, she requests a declaration that her $25,000 lien takes priority over Chase's lien and an injunction requiring a judicial sale of the property to satisfy the lien. While the value of Chambers' declaratory and injunctive relief is unclear, it is not "facially apparent" from her petition that the amount in controversy exceeds $75,000. See *id.*

Accordingly, the court turns to the notice of removal, which sets forth facts to support a finding that the amount in controversy is satisfied. See *id.* Chase alleges that the amount in controversy requirement is satisfied because it is owed more than $106,000 from the buyers on its lien. Notice of Removal ¶ 4. Furthermore, Chase alleges that Chambers, by seeking declaratory relief on the priority of her lien, is preventing Chase from foreclosing on the property. *Id.* Therefore, "[b]ased on the amount owed on [Chase]'s note and the value of the Property, the amount in controversy in this matter exceeds the federal jurisdictional minimum of $75,000." *Id.*

***4** In an action for declaratory and injunctive relief, the amount in controversy is "the value of the right to be protected or the extent of the injury to be prevented." *Hartford Insurance Group v. Lou-Con Inc.,* 293 F.3d 908, 910 (5th Cir.2002); accord *St. Paul Reinsurance Company, Ltd. v. Greenberg,* 134 F.3d 1250, 1252-53 (5th Cir.1998). The court makes the amount in controversy determination from the perspective of the plaintiff; the proper measure is the benefit or value to the plaintiff, not the cost to the defendant. See *Webb v. Investacorp, Inc.,* 89 F.3d 252, 257 n. 1 (5thCir.1996); see also *Garcia v. Koch Oil Company of Texas Inc.,* 351 F.3d 636, 639-40 (5th Cir.2003).

Under this guidance, the value of the declaratory and injunctive relief to Chambers is $25,000--the value of her promissory note. In her original petition, Chambers also asked for all other relief to which she may be entitled, but she did not allege any other causes of action. Though she later amended her complaint to add additional claims, the court must determine its jurisdiction as of the time of removal. *Allen,* 63 F.3d at 1335. The later claims are irrelevant as to the question of whether removal was proper. *Kilduff v. First Health Benefits Administrators Corporation,* No. 3:06-CV-0221-G, 2006 WL 1932348, at *2 n. 2 (N.D.Tex. Jul. 10, 2006) (Fish, C.J.) (citing *Hook v. Morrison Milling Company,* 38 F.3d 776, 780 (5th Cir.1994) (citing *Anderson v. Electronic Data Systems Corporation,* 11 F.3d 1311, 1316 n. 8 (5th Cir.), *cert. denied,*513 U.S. 808 (1994)). [FN3]

> FN3. Even if it is assumed, *arguendo,* that the loss to the defendant could satisfy the amount in controversy requirement, the defendant still fails to meet its burden. The harm to the defendant stemming form the pendency of the instant action is not necessarily equivalent to the value of the property or the amount owed to it by the buyers. Rather, the harm to the defendant is the loss suffered by the delay in its ability to foreclose on the property. Information regarding this discrete harm has not been furnished to the court.

Based upon the relevant facts at the time of removal, the "value of the right to be protected" from Chambers' viewpoint is $25,000. See *Hartford,* 293 F.3d at 910. Under the Fifth Circuit's standards for removal cases, the minimum amount in controversy for the exercise of subject matter jurisdiction has not been met. The court does not have subject matter jurisdiction over this action, and it must accordingly be remanded to state court, pursuant to 28 U .S.C. § 1447(c), for lack of subject matter jurisdiction.

B. *Diversity of Citizenship*

Though the parties in this case meet the diversity of citizenship requirement of 28 U.S.C. § 1332, both the requisite amount in controversy and complete diversity are essential to confer federal jurisdiction over this claim. In the absence of a sufficient amount in controversy, further analysis of the diversity of citizenship element is unneccessary.

III. *CONCLUSION*

All doubts are resolved against removal. See *Cross,* 810 F.Supp. at 750. Chase has failed to establish that

the amount in controversy exceeds $75,000. This case is **REMANDED***sua sponte* for lack of subject matter jurisdiction to the **44th Judicial District Court of Dallas County, Texas.** The clerk shall mail a certified copy of this memorandum opinion and order to the district clerk of Dallas County, Texas. 28 U.S.C. § 1447(c).

***5** SO ORDERED.

Not Reported in F.Supp.2d, 2006 WL 3086517 (N.D.Tex.)

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court, N.D. Texas, Dallas Division.
IMT, INC., et al., Plaintiffs,
v.
HAYNES AND BOONE, L.L.P., et al., Defendants.
No. CIV.A. 3:98-CV-2634-.

Feb. 1, 1999.

MEMORANDUM OPINION AND ORDER

FITZWATER, District J.

***1** This removed action, alleging legal malpractice in connection with a continuation-in-part of a patent application, does not present issues of federal patent law that support this court's subject matter jurisdiction. Accordingly, the motion to remand of plaintiffs IMT, Inc. and MTI, Inc. (collectively, "IMT") is granted, and this case is remanded to county court. [FN1]

> FN1. The court need not reach defendants' motion to stay.

I

Defendants filed a patent application on behalf of IMT. The application listed Hubert Flamant and Dr. Johannes Spijkerman as the inventors. In response to the application, IMT received a patent.

Dr. Ivan Darius ("Dr.Darius") later conceived and reduced to practice for IMT a technology that had the same purpose as the patent, but that was markedly different from the technology described in the application. This technology-- invented solely by Dr. Darius--allegedly had no claims in common with that which was the subject matter of the application.

Defendants prosecuted a patent application for Dr. Darius' technology. Rather than filing an original patent application, they filed an application for a continuation-in-part of the earlier one. IMT alleges that this was error. IMT maintains that although it received a patent in response to the application, it has been unable to complete licensing agreements because the filing of the continuation-in-part makes it easily subject to challenge for enforceability and validity. IMT alleges that the questions raised about enforceability and validity by defendants' alleged error have made the patent unmarketable.

IMT sued defendants in county court, alleging legal malpractice on the basis that defendants erroneously filed the patent application as a continuation-in-part, rather than as an original application. Defendants removed the case to this court. IMT moves to remand, arguing that the case does not arise under the patent laws of the United States, within the meaning of 28 U.S.C. § 1338(a), [FN2] because it does not depend on the resolution of a substantial question of federal patent law. Defendants argue that the case raises substantial questions of patent law, and that the court has jurisdiction because a decision in the case involves answering federal patent law questions.

> FN2.28 U.S.C. § 1338(a):
> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

II

A defendant may not remove a case to federal court unless the case could have been filed here originally. 28 U.S.C. § 1441; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Where, as here, there is no diversity of citizenship, the removing party has the burden of proving there is federal question jurisdiction. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d362, 365 (5th Cir.1995). Plaintiffs' well-pleaded complaint governs the federal question jurisdictional determination. *Caterpillar*, 482 U.S. at 392. If, on its face, plaintiffs' state court petition contains no issue of federal law, there is no federal question jurisdiction. *Cedillo v. Valcar Enters. & Darling Del. Co.*, 773 F.Supp. 932, 934 (N.D.Tex.1991) (Fitzwater, J.) (quoting *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1160-61 (5th Cir.1989)). As the masters of their complaint, plaintiffs may avoid a federal question by exclusive

reliance on state law. *Caterpillar*, 482 U.S. at 392. A federal claim does not exist simply because facts are available in the complaint to suggest such a claim. *See Gemcraft Homes, Inc. v. Sumurdy*, 688 F.Supp. 289, 292 (E.D.Tex.1988).

***2** Preemptive force, however, may convert an ordinary state law complaint to a federal complaint. *Caterpillar*, 482 U.S. at 393. Sometimes the preemptive force of a statute is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Once an area of state law has been completely preempted, any claim purportedly based on that state law is considered a federal claim and therefore arises under federal law. *Caterpillar*, 482 U.S. at 393. Section 1338(a) grants exclusive jurisdiction to the federal district courts in cases arising under the patent laws.

III

A

The Supreme Court has established a two-part test to decide which cases "arise under" federal patent law:

> [Jurisdiction extends] only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808-09 (1988). Where, as here, federal patent law does not create the malpractice cause of action, the court maintains jurisdiction only if the second prong of the *Christianson* test is met. "Under the second source of jurisdiction, a case arises under federal law 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law.' " *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1325 (Fed.Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 10, 1998) (No. 98-969) (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983)). A cause of action arises under federal patent law when it involves the validity, scope, or infringement of a patent. *Kaufman Malchman & Kirby, P.C. v. Hasbro, Inc.*, 897 F.Supp. 719, 721 (S.D.N.Y.1995). When patent law issues are merely implicated incidentally in a cause of action, federal courts do not have jurisdiction pursuant to 28 U.S.C. § 1338(a). *Id.*

B

To prevail in this legal malpractice case, IMT must prove the existence of a duty, the breach of that duty by defendants, and damages arising from that breach of duty. *See Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir.1995). Defendants acknowledge that "[t]he entire foundation of Plaintiffs' claim is that the alleged apparent invalidity or unenforceability of the patent makes Plaintiffs unable to license it." Ds. Resp. at 7. Defendants also state that "[a] finding that, under the federal patent laws, the [continuation-in-part] designation does not render the patent invalid or unenforceable ... will prevent Plaintiffs from recovering the damages they seek." *Id.* Defendants essentially argue that the validity and enforceability of the patent will become an issue in this case. IMT has stipulated, however, that the patent is both valid and enforceable. Ps. Rep. Br. at 2. Further, IMT does not make a claim of infringement, nor does IMT contend that a provision of patent law need be interpreted or construed. Ps. Mot. at 9. Instead, IMT contends that federal patent law is only peripherally implicated. *Id.* IMT essentially argues that defendants breached their professional duty by applying for a continuation-in-part patent instead of an original patent.

***3** Construing the federal removal statute strictly and resolving doubts in favor of remand, *Commonwealth Film Processing, Inc. v. Moss & Rocovich*, 778 F.Supp. 283, 286 (W.D.Va.1991) ("Federal courts must construe the federal removal statute strictly, and resolve doubts in favor of remanding cases to state courts."), the court holds that removal was improper because no federal question jurisdiction exists. *See Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir.1996) ("Whether the [defendant attorney] in [the underlying case] misread or disregarded federal law in such an unreasonable way so as to constitute legal malpractice ... is ultimately a question of state law."); *Commonwealth*, 778 F.Supp. at 285-86 ("Breach of the reasonable professional standard of care is a common law cause of action in tort; that the advice was rendered on a matter governed by federal law does not provide this Court jurisdiction to hear the underlying malpractice complaint."); *New Orleans Sheet Metal Workers' Local 11 Health & Welfare Fund v. ABC Ins. Co.*, 1990 WL 103118 at *1 (E.D.La.1990) (remanding legal malpractice action based on Employee Retirement Income Security Act

of 1974, and stating "it is the opinion of this Court that this action relates solely to the relationship between an attorney and his client, the obligations, responsibilities and standards of conduct imposed on an attorney by state law, and the correlative liability that arises when his conduct falls below this standard."). IMT's action focuses on defendants' conduct as patent attorneys, not on the validity or enforceability of the patent. Further, because IMT has stipulated to the validity and enforceability of the patent, IMT asserts that the validity or enforceability is not important, and instead seeks relief for the stigma on the patent's marketability arising from the allegedly improperly filed patent application. Such relief does not depend on a resolution of patent law, and patent law is not a necessary element of this cause of action. *See* Christianson, 486 U.S. at 808-09;*see also* Commonwealth, 778 F.Supp. at 286 (noting that construction of federal patent laws was not essential element of underlying state law legal malpractice claim at issue). Nor does such relief require a construction of federal law. *See* Hunter, 153 F.3d at 1325. The *Commonwealth* court stated:

> While [plaintiff] claims ... that defendants did not demonstrate adequate knowledge of patent law or associate an attorney with such knowledge, federal patent law did not create the malpractice cause of action nor is it an essential element of the plaintiff's well-pleaded complaint. The crux of [plaintiff's] claim is that defendants' advice was not given with "that degree of skill, care, and knowledge required of a reasonably prudent attorney ." The court that decides this issue need not construe patent law, it need only establish the appropriate standard of care to which defendants should be held and then determine if the defendants met it.

4Commonwealth*, 778 F.Supp. at 285 (citation omitted). Nor does this action involve the validity, scope, or infringement of the patent. *See* Kaufman, 897 F.Supp. at 721. Federal patent issues are implicated only incidentally in this legal malpractice case. Accordingly, this court lacks federal question jurisdiction. *See id.* (noting that federal courts lack jurisdiction under 28 U.S.C. § 1338(a) when patent issues are implicated only incidentally in a cause of action).

* * *

The court therefore holds that it lacks subject matter jurisdiction and, pursuant to 28 U.S.C. § 1447(c), remands this case to County Court No. 2 of Dallas County, Texas. The clerk of court shall effect the remand in accordance with the usual procedure.

SO ORDERED.

Not Reported in F.Supp.2d, 1999 WL 58838 (N.D.Tex.)

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HOnly the Westlaw citation is currently available.

United States District Court,
E.D. Texas,
Marshall Division.
PILGRIM'S PRIDE CORP., Plaintiff,
v.
FRISCO FOOD SERVICES, INC., et al.,
Defendants.
Civil Action No. 2:06-CV-512 (TJW).

Feb. 13, 2007.
John P. Melko, Stephen L. Moll, Gardere Wynne Sewell, Houston, TX, Joe Dodson Clayton, Parker Clayton, Tyler, TX, for Plaintiff.

Karl D. Burrer, Thomas Andrew Howley, Haynes & Boone, Houston, TX, for Defendants.

MEMORANDUM OPINION AND ORDER

T. JOHN WARD, United States District Judge.

***1** Before the Court is the plaintiff's motion to remand (# 6). The plaintiff seeks to remand this breach of contract and declaratory judgment action to state court asserting that this Court lacks subject matter jurisdiction. After carefully considering the parties' written submissions, the Court GRANTS the motion and orders that this case be remanded to the Camp County District Court for the State of Texas for the reasons set forth below.

I. Background

Pilgrim's Pride Corporation ("Pilgrim's Pride") is a Delaware corporation with its principal place of business in Camp County, Texas. Defendants Frisco Food Services, Inc. ("Frisco"), Sunset Food Service, L.L.C. ("Sunset"), National Foodco Corporation ("NFC"), National Produce, Inc. ("NPI"), and Parrco Foods, Inc. ("Parrco") are all Kentucky corporations with their principal place of businesses in Kentucky. Pilgrim's Pride contends that it entered into a series of contracts with the defendants through their principal, Mr. Ray Francisco.

On July 14, 2006, Pilgrim's Pride filed suit in the Camp County District Court against the defendants for breach of contract and declaratory judgment. The plaintiff contends that over the last several years, the defendants breached their obligations under each of the contracts they entered with the plaintiff. Specifically, the plaintiff contends that the defendants failed to diligently use their efforts and resources to solicit, procure, or otherwise service the contracts, and, therefore, the defendants materially breached each contract. The plaintiff requests the following relief: 1) actual and consequential damages, 2) declaratory judgment excusing Pilgrim's Pride from all present and future obligations, 3) pre-judgment and post-judgment interest, 4) attorney's fees, 5) costs and expenses, and 6) any other relief entitled to.

On August 18, 2006, three of the defendants, Frisco, Sunset, and NFC ("Debtors"), filed for bankruptcy in the Western District of Kentucky ("Kentucky Bankruptcy Court"). On August 23, 2006, the defendants filed a Notice of Removal based upon 1) 28 U.S.C. § 1452 (bankruptcy removal), and 2) 28 U.S.C. §§ 1441 and 1332 (diversity removal). The case was referred to the U.S. Bankruptcy Court for the Eastern District of Texas, Marshall Division ("Texas Bankruptcy Court"). On August 25, 2006, the Debtors filed an adversary proceeding in the Kentucky Bankruptcy Court against Pilgrim's Pride seeking damages for tortious interference with business relations, unjust enrichment, and breach of contract. Meanwhile, on August 30, 2006, the defendants in the Texas Bankruptcy Court filed their Answer and Counterclaim seeking to enforce their agreements with Pilgrim's Pride. The defendants sought payment of commissions and liquidated damages in the amount of three years's worth of commissions. On September 21, 2006, the Texas Bankruptcy Court issued an order granting the defendants' motion to transfer this case to the Kentucky Bankruptcy Court. On October 16, 2006, the Kentucky Bankruptcy Court dismissed the underlying bankruptcies as well as the adversary proceeding filed on August 25, 2006. On October 18, 2006, the Kentucky Bankruptcy Court transferred the case back to the Texas Bankruptcy Court. On November 30, 2006, the Texas Bankruptcy Court referred the case to this Court. The Texas Bankruptcy Court noted that elimination of bankruptcy jurisdiction would normally warrant a remand, however, the defendants also allege removal of the

case under 28 U.S.C. § 1332 due to diversity of citizenship. As a result, this Court must now decide if it has jurisdiction to hear this case or if remand is warranted.

II. Analysis

A. Subject Matter Jurisdiction

***2** Federal courts have subject matter jurisdiction over cases involving a question of federal law or when there is diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interests and costs. 28 U.S.C. §§ 1331, 1332. In general, claims against multiple defendants can only be aggregated for the purpose of meeting the jurisdictional requirement if the defendants are jointly liable to the plaintiff. *Jewell v. Grain Dealers Mut. Ins. Co.*, 290 F.2d 11, 13 (5th Cir.1961). Here, neither party disputes that this case involves contract issues governed by state law nor do they dispute that there is complete diversity of citizenship. In addition, the plaintiff has made no claim that the defendants are jointly liable on a single obligation. Therefore, the only issue is whether the amount in controversy exceeds $75,000 as to each defendant.

The removing party bears the burden of establishing that federal jurisdiction exists and that removal was proper. *Ray Mart, Inc. v. Stock Building Supply of Texas, L.P.*, 435 F.Supp.2d 578, 585 (E.D.Tex.2006) (citations omitted); *see St. Paul Reinsurance Co., Ltd. v. Greenburg*, 134 F.3d 1250, 1253 (5th Cir.2003). The state court petition is normally used to determine the amount in controversy. *See St. Paul Reinsurance Co.*, 134 F.3d at 1253. The plaintiff, however, is prohibited from pleading for specific amounts in cases of unliquidated damages under Texas Law. *See*Tex.R. Civ. P. 47. When a complaint does not allege a specific amount of damages, the removing party must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. *See White v. FCI USA, Inc.*, 319 F.3d 672, 675 (5th Cir.2003). This requirement is met if 1) it is facially apparent from the face of the petition that the claims exceed $75,000, or 2) the removing party produces "summary judgment-type evidence" to support a finding that the claims exceed $75,000. *Id.; Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir.2002) (citations omitted). Any ambiguities are resolved against removal because the removal statute is strictly construed in favor of remand. *Ray Mart*, 435 F.Supp.2d at 585 (citations omitted).

1. "Facially Apparent"

The defendants contend that it is "facially apparent" that the amount in controversy exceeds $75,000 for each defendant because the plaintiff's original petition states that the defendants have accepted over $10 million in commissions since 1986. The defendants argue that this averages to $500,000 per year over the 20 years the parties have done business. The defendants further argue that the jurisdictional requirement is met by adding up all the relief (actual and consequential damages, declaratory relief, interest, attorneys' fees and costs) sought by the plaintiff. The plaintiff, on the other hand, contends that averaging the total commissions paid over the time that the parties have done business does not represent the unearned commissions that it seeks to recover. The Court agrees with the plaintiff. The plaintiff's original petition simply states that it is seeking to recover the commissions paid over the last several years. There is no indication in the complaint as to how these commissions were distributed among the various defendants. There is also no indication as to the amount of attorneys' fees, costs, or interest. Accordingly, it is not "facially apparent" that the amount in controversy exceeds $75,000 for each defendant.

2. "Summary Judgment-Type Evidence"

a. Damages

***3** The defendants offer, as part of their "summary judgment-type evidence," the affidavit of Mr. Francisco stating that, from 2003 to 2005, Frisco received commissions in excess of $100,000, Sunset received commissions in excess of $1,000,000, and NFC received commissions in excess of $750,000. The plaintiff does not dispute these assertions, but points out that the defendants have not come forward with any evidence regarding the commissions paid to Parrco or NPI. In fact, the parties do not dispute that no commissions have ever been paid to Parrco or NPI. The plaintiff contends that it is only seeking declaratory relief against them. At this point, the defendants have proven by a preponderance of the evidence that the amount in controversy exceeds $75,000 as to Frisco, Sunset, and NFC.

b. Declaratory Relief

The Court now turns to the values of declaratory relief as to Parrco and NPI. In an action for declaratory or injunctive relief, the amount in controversy is "the value of the right to be protected or the extent of the injury to be prevented." *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir.1983). In the Fifth Circuit, the value of declaratory or injunctive relief is made from the perspective of the plaintiff; it is the benefit or value to the plaintiff, not the cost to the defendant. *See Garcia v. Koch Oil Co. of Texas, Inc.*, 351 F.3d 636 (5th Cir.2003); *Trapasso v. Prudential Property and Cas. Ins. Co.*, 220 F.Supp.2d 628, 632-33 (E.D.Tex.2002). Texas law also authorizes recovery of attorneys' fees in actions for declaratory relief. *See*Tex. Civ. Prac. & Rem.Code Ann. 37.009. When a statute allows for payment of attorneys' fees, they are considered part of the amount in controversy for jurisdictional purposes. *Foret v. Southern Farm Bureau Life Ins. Co.*, 918 F.3d 534, 537 (5th Cir.1990).

(1) Parrco

The plaintiff is seeking declaratory judgment terminating the parties' contracts and releasing them from any future obligations. The plaintiff contends that the value of this declaratory relief is minimal because no commissions were ever paid to Parrco. [FN1] The plaintiff also contends that the cost of obtaining the declaratory relief (i.e., legal fees) would not exceed $75,000.

> FN1. In the defendants' Rule 12(b)(6) Motion to Dismiss filed with the Texas Bankruptcy Court, the defendants stated that Parrco was an administratively dissolved entity that has never performed brokerage services and never received commissions from Pilgrim's Pride.

The defendants argue that the value to the plaintiff is the value of not having to pay liquidated damages, which amounts to three years' worth of commissions. The defendants argue that the three years' worth of commissions should be at least $2 million based on Mr. Francisco's affidavit. The defendants also contend that the plaintiff's counsel, in its bankruptcy practice, typically charges in excess of $500 per hour for partners' work. [FN2] The defendants also point out that three partners are working on this case for the plaintiff, and that the plaintiff has employed local counsel.

> FN2. The defendants have produced a bill from one of the plaintiff's counsel, in an unrelated case, showing that he billed over $18,000 for a removal proceeding with no hearing and minimal briefing.

The plaintiff disagrees with the defendants' calculation of Parrco's potential liquidated damages because Mr. Francisco's affidavit states that the $2 million in commissions were only paid to Frisco, Sunset, and NFC. The plaintiff argues that Parrco's liquidated damages should be zero because no commissions have ever been paid to Parrco. The plaintiff also argues that attorneys' fees for declaratory relief would not exceed $75,000, and that a bill by the plaintiff's counsel in an unrelated case should not be used as indication of what attorneys' fees will be in this case.

***4** At this early stage of the suit and based on the limited amount of evidence available, the Court agrees with the plaintiff and values the declaratory relief against Parrco as minimal. Furthermore, the defendants failed to meet their burden of showing that attorneys' fees associated with obtaining declaratory relief against Parrco will exceed $75,000. Assuming that the defendants' hourly rate for the plaintiff's counsel is accurate, the defendants have not shown how many hours will actually be devoted to this case by the partners nor have they shown how attorneys' fees will be divided as to each defendant. Accordingly, this Court cannot find that the value of declaratory relief against Parrco combined with attorneys' fees for obtaining that declaratory relief will exceed $75,000 and resolves this issue in favor of remand.

(2) NPI

The plaintiff also seeks a declaration that it has no contractual obligations to NPI. The parties do not dispute that NPI has never received commissions from Pilgrim's Pride nor was it ever a party to the contracts at issue in this case. The plaintiff contends that NPI was joined in this suit because it was formerly affiliated with Mr. Francisco who signed the contracts.

The defendants argue that Pilgrim's Pride is not

entitled to declaratory relief because NPI was never a party to the contracts. The defendants, therefore, contend that NPI was fraudulently joined as a party to the lawsuit solely for the purpose of defeating diversity jurisdiction.

It is unnecessary for this Court to address the merits of the defendants' fraudulent joinder claim at this time. The defendants have not met their burden of establishing diversity jurisdiction as to Parrco. This alone requires the case to be remanded to state court.

B. Supplemental Jurisdiction

The defendants also contend that this Court has supplemental jurisdiction as to the plaintiff's declaratory judgment action against Parrco pursuant to 28U.S.C. § 1367(a). 28 U.S.C. § 1367(b), however, divests district courts of supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure." The defendants argue that Parrco was not named as a party pursuant to Rules 14, 19, 20, or 24, and, therefore, Section 1367(b) is inapplicable. The plaintiff, on the other hand, argues that Parrco was properly named as a defendant in this case under Rule 20. The Court agrees with the plaintiff and concludes that it does not have supplemental jurisdiction over Parrco in this case.

III. Conclusion

The defendants have not proven by a preponderance of the evidence that diversity jurisdiction exists for each defendant. Accordingly, the Court GRANTS the plaintiff's motion to remand. It is ORDERED that this case be remanded to the Camp County District Court for the State of Texas.

Not Reported in F.Supp.2d, 2007 WL 508365 (E.D.Tex.)

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6

United States District Court, N.D. Texas, Dallas Division.
Steve ROBERTSON and Milo Segner, Jr., as Receiver for Bob Hearn d/b/a Bob Hearn Transport, Plaintiffs,
v.
WESTERN HERITAGE INSURANCE COMPANY, Frontier Adjusters, Inc. and Kevin Smith Insurance Agency, Defendants.
CIV.A. No. 3:96-CV-2044-P.

Dec. 5, 1996.

MEMORANDUM OPINION AND ORDER

SOLIS, District Judge.

***1** Now before the Court are:
1. Plaintiffs' Motion to Remand, filed August 6, 1996; and
2. Defendant's Response in Opposition to Motion to Remand, filed August 26, 1996.

Having thoroughly reviewed all of the filings in this matter, the Court finds, for the reasons stated herein, that Plaintiffs' Motion is well founded and that this case should be remanded to the state court for final determination.

BACKGROUND

On or about August 17, 1995, Steve Robertson ("Robertson") was allegedly injured in an automobile accident when his vehicle was struck by another vehicle operated by Jerry Jones ("Jones"), an alleged employee of Bob Hearn ("Hearn") d/b/a Bob Hearn Transport. Western Heritage Insurance Company ("WHIC" or "Defendant") denied coverage of Robertson's claim under an insurance policy issued by WHIC to Hearn. Robertson then sued Jones and Hearn in the 193rd Judicial District, Dallas County, Texas (Cause No. 95-13552); and, on February 26, 1996, a default judgment for $895,700.00 was entered against Hearn in favor of Robertson.

On April 1, 1996, Robertson and Milo Segner ("Segner"), purporting to be Hearn's receiver, filed a state-court suit in the 298th Judicial District, Dallas County, Texas (Cause No. 96-03269), against WHIC, Frontier Adjusters, Inc. ("Frontier"), and Kevin Smith Insurance Agency ("Smith"). This suit alleges the following: 1) a cause of action by Robertson against WHIC to enforce the insurance policy and to recover the applicable limits of such insurance as well as attorney fees for enforcing the agreement; 2) a cause of action by Segner against WHIC for negligent failure to settle the claims brought by Robertson against Hearn; 3) a cause of action by Segner against Frontier for negligently conducting its investigation of the claims; 4) a claim by Segner against Smith for negligence in failing to obtain a policy which provided coverage for the event in question; 5) a claim by Segner that WHIC has breached the Texas Insurance Code and has violated the Texas Business and Commerce Code; and 6) a claim by Segner that the defendants have violated Texas' Deceptive Trade Practices Act.

On April 8, 1996, WHIC filed an action in the United States District Court for the Northern District of Texas, Fort Worth Division (496-CV-250-Y), seeking, among other things, damages against Robertson for interference with contractual relations and a declaratory judgment that WHIC has no coverage for damages allegedly suffered by Robertson in the automobile accident with Jones or for Robertson's tort suits arising therefrom. [FN1]

> FN1. The tort suits arising from Robertson's accident with Jones (collectively, the "Underlying Actions") are *Steve Robertson v. Jerry Jones and Bob Hearn d/b/a Bob Hearn Transport,* Cause No. 95-13552, 193rd Judicial District Court, Dallas County, Texas, and *Steve Robertson v. Jerry Jones,* Cause No. 96-12338, 14th Judicial District, Dallas County, Texas.

Robertson filed an answer and counterclaim in this action, on April 30, 1996, seeking a declaration that the WHIC policy provides coverage and seeking to recover for the judgment. Hearn and Jones failed to answer, however, and Judge Means entered a default judgment on June 21, 1996. The Default Judgment states that WHIC has no duty to defend Jones or Hearn in the Underlying Actions or to pay any

judgment or settlement arising out of the claims set forth in the Underlying Actions.

***2** Upon receiving the Default Judgment, WHIC moved to abate Robertson's and Segner's state court action (i.e., Cause No. 96-03269). The state court indicated, however, that it could not hear the abatement issue until the thirty-day period for removal ran. WHIC then removed this state-court action to this Court. A motion to transfer the case to the Fort Worth Division was simultaneously filed since, according to WHIC, "the Fort Worth court has all the issues before it that are embraced in this action, and because the Fort Worth court has already ruled." (Def.'s Resp. Opp'n Mot. Remand at 4.) Defendant, WHIC, further claims that removal was necessary because:

> it had become apparent that the state court would not be in a position to promptly rule, ... Robertson, Hearn and Segner [were] actively trying to frustrate [Judge Means'] June 20, 1996 judgment and to re-litigate issues already determined in that case, and [removal was necessary] in order to facilitate the proper administration of justice and [to] avoid inconsistent orders in the state and federal court.

Id. at 7.

ANALYSIS

A defendant may remove a state court action to federal court only if the action could have been brought originally in the federal court. *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1160 (5th Cir. 1989)(citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391-92 (1987); 28 U.S.C. § 1441(a)), *cert. denied*,493 U.S. 1074 (1990). Hence, where there is no diversity jurisdiction, as in the present case, [FN2] a federal question must be present in order for removal to be proper. *Id.* (citing *Caterpillar Inc.*, 482 U.S. at 392). Under the well-pleaded complaint rule, "the plaintiff's properly pleaded complaint governs the jurisdictional determination, and if, on its face, such a complaint contains no issue of federal law, then there is no federal question jurisdiction." *Id.* at 1160- 61 (citing *Caterpillar Inc.*, 482 U.S. at 392;*Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983)); *see also Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995) ("A defendant ... must show that a federal right is 'an element, and an essential one, of the plaintiff's cause of action.'" (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 111 (1936))). "The fact that a federal defense may be raised to the plaintiff's action--even if both sides concede that the only real question at issue is created by a federal defense--will not suffice to create federal question jurisdiction." *Aaron*, 876 F.2d at 1161 (citing *FranchiseTax Bd.*, 463 U.S. at 12;*Powers v. South Cent. United Food & Commercial Workers Unions and Employers Health & Welfare Trust*, 719 F.2d 760, 764 (5th Cir. 1983)). The general rule, therefore, is that a federal defense to a state law claim does not create removal jurisdiction. *Id.*

> FN2. In its Notice of Removal, Defendant, WHIC, alleges that Robertson and Hearn fraudulently joined the non-diverse defendants in order to defeat diversity jurisdiction. Yet, Defendant never actually alleges diversity jurisdiction as a basis for removal, (*see* Def.'s Notice Removal at 3-4); and in Defendant's Response in Opposition to Motion to Remand, Defendant does not mention diversity as a grounds for removal or even raise the prior allegation of fraudulent joinder contained in the Notice of Removal. Consequently, the Court is not certain whether Defendant is even arguing that diversity jurisdiction exists because any non-diverse defendants were fraudulently joined. Regardless, the Court finds that Defendant has not proved fraudulent joinder and thus diversity jurisdiction does not exist for purposes of removal. That is, Defendant has made absolutely no attempt to show that there is no possibility that Plaintiffs would be able to establish a cause of action against any in-state defendant in state court. *See Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815-17 (5th Cir.) (discussing defendant's burden where jurisdiction is alleged on the basis of fraudulent joinder), *cert. denied*,510 U.S. 868 (1993); *American Brahmental Ass'n v. American Simmental Ass'n*, 443 F. Supp. 163, 165-66 (W.D. Tex. 1977)("such claims must be asserted with particularity and be supported by clear and convincing evidence.").

In its Notice of Removal, Defendant alleges that this Court has original jurisdiction under the provisions of 28 U.S.C. §§ 1331, 1367, and 1651. As its basis for Section 1331 and 1367 jurisdiction, WHIC alleges that "the declaratory judgment in the state court matter will require the interpretation of a judgment rendered by the United States District Court." (Def.'s Notice Removal at 4.) As the legal standard described

above suggests, however, the fact that the state court will have to address the federal judgment in determining the declaratory judgment action before it, does not create federal question jurisdiction and, consequently, a basis for removal.

***3** An examination of the face of Plaintiffs' state pleadings indicates that all of Plaintiffs' causes of action are based upon Texas common law and civil statutes. Hence, the complaint contains no issue of federal law. Further, it is clear that the federal judgment will only arise as a res judicata defense to Plaintiffs' state law declaratory judgment action. [FN3] Accordingly, there is no federal question jurisdiction; and as diversity is lacking, there is no basis for removal under 28 U.S.C. § 1441. [FN4]

> FN3. Res judicata is typically used as a defense. *See generally* Tex. R. Civ. P. 94 (describing res judicata as an affirmative defense); Fed. R. Civ. P. 8(c) (same).

> FN4. Defendant cites Section 1367 in its Notice of Removal as a basis for original federal jurisdiction. However, since the Court has determined that there is no federal question, Section 1367 cannot be used to carry along the supplemental state claims.

The Court recognizes that there is an exception to the above rule in which a case may be removed on the basis of federal question jurisdiction where the case involves the assertion of a federal res judicata defense by the defendant. However, the Court does not believe that this exception applies in the context of the present case.

There is case law which holds that where a plaintiff files state claims after a federal judgment has been entered against him on essentially the same claims, a district court may invoke the artful pleading doctrine [FN5] as a basis for federal jurisdiction. *See, e.g., Ultramar America, Ltd. v. Dwelle,* 900 F.2d 1412, 1415 (9th Cir. 1990)(discussing this basis for removal, i.e., "*Moitie*" removal). However, the existence of a prior final federal court judgment sufficient to render a later state court proceeding barred by res judicata, is not the only force driving this sort of removal. The source of the original federal court's subject-matter jurisdiction may be crucial. *See id.*

> FN5. An artfully pleaded claim really arises under federal law and thus must be recharacterized as a federal claim despite the fact that it purports to rely solely on state law. *Ultramar America, Ltd. v. Dwelle,* 900 F.2d 1412, 1415 (9th Cir. 1990).

The Ninth Circuit Court of Appeals, in the case of *Ultramar America, Ltd. v. Dwelle,* has taken the position that "recharacterization of purported state-law claims into federal claims [is] essential before removal [can] occur" and that "recharacterization is only possible when the prior federal judgment resolved questions of federal law." *Id.* According to the Ninth Circuit, this is so for the following reason:

> When the prior federal judgment sounded in federal law, new purported state claims can be recharacterized as the old federal claims in disguise. But when the prior federal judgment was based on state law, new purported state claims can be "recharacterized" only as the old state claims from the first suit. In such a situation, there is not a federal claim in sight, and removal is impermissible even though res judicata probably bars the suit.

Id. at 1416. Accordingly, the Ninth Circuit held in *Ultramar America* that "when the prior federal judgment was grounded in state law, the state claims contained in a subsequent action filed in state court cannot be recharacterized as federal for the purposes of removal." *Id.* at 1417; *see also In re Agent Orange Prod. Liab. Lit.,* 996 F.2d 1425, 1431 (2d Cir. 1993), *cert. denied,* 510 U.S. 1140 (1994); *Doe v. Allied-Signal, Inc.,* 985 F.2d 908, 911-12 (7th Cir. 1993)(citing *Ultramar America* with approval).

In the present case, Judge Means' default judgment was based on diversity jurisdiction and was grounded in state law. Thus, according to *Ultramar America,* there is no federal basis for removal. Defendant, in its Response in Opposition to Motion to Remand, concedes this point and states that it does not base its right to remove on this type of removal. (*See* Df.'s Resp. Opp'n Mot. Remand at 13.) Further, the Defendant does not refer the Court to any cases, from the Fifth Circuit or otherwise, that suggest that this basis for removal should apply in the present situation (i.e., where the prior federal judgment was based on diversity jurisdiction and was grounded in state law). Accordingly, the Court finds that the state-court action cannot be recharacterized as federal in this instance for purposes of removal. [FN6] *See Carpenter,* 44 F.3d at 365 (stating that the removing

defendant bears the burden of establishing federal jurisdiction over the state-court suit).

> FN6. This Court's own research suggests that the Fifth Circuit Court of Appeals has not yet addressed this specific issue; the recent case of *Carpenter v. Wichita Falls Indep. Sch. Dist.* lends support, however, to this Court's current position. *See* Carpenter, 44 F.3d at 370 (holding that "*Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgement *on a question of federal law*" (emphasis added)).

***4** For the foregoing reasons, the Court concludes that there is absolutely no basis for removal under 28 U.S.C. § 1441.

Apparently recognizing that there is no basis for removal under Section 1441, Defendant emphasizes that "it bases its right to remove on 28 U.S.C. § 1651," (Df.s' Resp. Opp'n Mot. Remand at 13), and cites the cases of "*City of Yonkers, Agent Orange,* and *Quinn-L*" as its "jurisprudential basis for removal." *Id.* at 12. Defendant contends that under the All Writs Act, 28 U.S.C. § 1651, a federal court may remove an otherwise unremovable state court action to prevent parties from frustrating its previously issued orders. Defendant does not, however, refer the Court to any Fifth Circuit cases that stand for the proposition that the All Writs Act can be used for such a purpose. [FN7] Instead, Defendant cites two Second Circuit Court of Appeals decisions for this proposition; yet, neither of these cases compel removal in this instance.

> FN7. Defendant refers the Court to *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir. 1992), and its discussion of ancillary jurisdiction; but *Quinn-L* does not stand for the proposition that a federal court can remove a case from state court based on its ancillary jurisdiction where the state-court suit could not have been originally filed in federal court.

Defendant relies on *In re Agent Orange Prod. Liab. Lit.*, 996 F.2d 1425 (2d Cir. 1993), and *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*,489 U.S. 1077 (1989), to support its contention that this Court can use the All Writs Act to remove the present state-court case so as to prevent the state court from frustrating Judge Means' prior order. However, both of these cases dealt with exceptional circumstances that are not present in the case before this Court. While *Agent Orange* does state that a district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case, it also states that "the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable." *In re Agent Orange Prod.Liab. Lit.*, 996 F.2d at 1431. It is clear that the court of appeals in *Agent Orange* only permitted the district court to remove under the All Writs Act because of the unique "exceptional circumstances" involved:

> The district court *was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings;* it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.

Id. (emphasis added).

Similarly, *Yonkers Racing Corp.* entailed "exceptional circumstances" that are not present in the case before this Court. The exceptional circumstances warranting removal under the All Writs Act in *Yonkers Racing Corp.* were, among other things, the following: 1) the need to vindicate the constitutional rights of those in Yonkers who had been denied fair housing; 2) the possibility that the City of Yonkers could be subjected to inconsistent orders; 3) the potential frustration of a court-ordered consent decree regarding the placement of public housing in non-minority areas; and 4) the probability that the consent decree would be inadequately defended in state court by a reluctant City of Yonkers. *See Yonkers Racing Corp.*, 858 F.2d at 863-65.

***5** Such circumstances as those described above do not exist in this case. First, constitutional rights are not implicated. Second, an inconsistent order in this case would not create a conflict in which the same party is required to do something by one court but is prohibited from taking that same action by another court. Third, there is no court-ordered consent decree compelling the vindication of constitutional rights

that needs protection; there is merely a default judgment regarding Defendant's coverage obligations under an insurance contract. Fourth, it is certain in this instance that Defendant will vigorously defend the federal court judgment.

It is evident that neither of the above cases stands for the proposition that Defendant would have this Court adopt, i.e., that the All Writs Act can be used to remove a state-court action whenever a defendant has a res judicata defense because of a prior federal court order. These cases require truly exceptional circumstances, and there are none present here.

Finally, even if the Court believed that under the law of this circuit it could use the All Writs Act to remove this case, an issue which the Court does not address, it would not choose to exercise its discretion to do so. *See In re United States in Matter of Order Authorizing Use of a Pen Register*, 538 F.2d 956, 961 (2d Cir. 1976)("[The All Writs] Act, even if found to be applicable, is entirely permissive in nature; it in no way mandates a particular result or the entry of a particular order."), *rev'd on other grounds sub nom. United States v. New York Tel. Co.*, 434 U.S. 159 (1977). There is no reason to think that the state court cannot adequately resolve the res judicata issue. *See Allied-Signal, Inc.*, 985 F.2d at 912 ("As a matter of policy, state courts are fully capable of invoking *res judicata* to protect federal judgments if the second case is really an attempt to regenerate dead claims."). [FN8] Further, since removal deprives the state court of an action properly before it, removal raises significant federalism concerns which caution against removal. *See Carpenter*, 44 F.3d at 365-66 (citing *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 (1986)).

> FN8. If Judge Means believes that the state court is incapable of protecting his order, *he* can always enjoin prosecution of the state-court proceeding under the relitigation exception to the Anti-Injunction Act. *See*28 U.S.C. § 2283 (allowing a federal court to enjoin an ongoing state-court proceeding "where necessary ... to protect or effectuate its judgments"); *see Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518 (1986)(allowing the injunction where the state court has itself not yet ruled on the res judicata issue).

For the foregoing reasons, the Court concludes that this case is not removable under the All Writs Act.

As a final matter, Plaintiffs have asked for their costs and expenses in having to prosecute their Motion for Remand (presumably pursuant to 28 U.S.C. § 1447(c)). Since the Court finds no impropriety in WHIC's removal, the Court will not award attorney's fees against Defendant. The Court will, however, order WHIC to pay the costs of the proceedings. *See Miranti v. Lee*, 3 F.3d 925, 928-29 (5th Cir. 1993).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Remand is GRANTED; and this case is REMANDED to the state court pursuant to 28 U.S.C. § 1447(c). Further, Defendant, WHIC, is ORDERED to pay Plaintiffs the costs of the proceedings.

***6** SO ORDERED.

Not Reported in F.Supp., 1996 WL 722078 (N.D.Tex.)

END OF DOCUMENT

7

United States District Court, N.D. Texas.
Gracie Lugene ROGERS, Karen and Michael Grisham, and Carolyn and Larry West,
Plaintiffs,
v.
ALL AMERICAN LIFE INSURANCE COMPANY, Uslife Insurance Services Corporation and Bobby Keith Parker, Defendants.
No. Civ.A. 3:97-CV-3084P.

July 9, 1998.

MEMORANDUM OPINION AND ORDER

SOLIS, J.

***1** Presently before the Court are:
(1) Plaintiffs' Motion to Remand and Brief in Support, filed January 16, 1998;
(2) Defendants' Response to Plaintiffs' Motion to Remand, filed February 9, 1998;
(3) Plaintiffs' Reply Brief in Support of Motion to Remand, filed February 24, 1998; and
(4) Plaintiffs' Supplemental Authority in Support of Motion to Remand, filed March 19, 1998

For the reasons set forth below, the Court is of the opinion that Plaintiffs' Motion to Remand should be GRANTED.

BACKGROUND

Plaintiff's Original Petition was filed in state court on November 4, 1996. The Original Petition contained a single Plaintiff, Gracie Lugene Rogers ("Rogers"), and a single Defendant, Bobby Keith Parker ("Parker"), both Texas residents. The Original Petition contained allegations that misrepresentations were being made as to the nature, terms, quantities, qualities, and financial performance of deferred compensation plans sold by Defendant. (Plaintiffs' First Amended Original Petition, at 2). Plaintiff filed a First Amended Original Petition and Jury Demand on November 14, 1996. This petition added as Defendants for the first time All American Insurance Company ("All American"), an Illinois corporation with its principal place of business in Illinois, and USLife Insurance Company ("USLife"), a Texas corporation with its principal place of business in Texas. *Id.* at 1-2. Following this, Plaintiffs filed their Second Amended Original Petition and Jury Demand on November 17, 1997. This petition added for the first time additional named Plaintiffs and class claims. The second amended original petition did not change the causes of action; the allegations of insurance misrepresentations and fraud remained the same. *Id.* at 2-3.

The Defendants filed a notice of removal on December 17, 1997, based on diversity of citizenship pursuant to 28 U.S.C. § 1332, alleging fraudulent joinder of Defendants USLife and Parker. Plaintiffs filed a Motion to Remand and Brief in Support on January 16, 1998, claiming that Defendants' Notice of Removal was untimely filed.

DISCUSSION

A. LEGAL STANDARD

All doubts must be settled in favor of remand on a motion to remand a case that has been removed to federal court. *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 694 (5th Cir.1995)(*citing B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir.1981). When dealing with removal under 28 U.S.C. § 1446(b), courts should construe the removal statute strictly. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). The burden is on the defendant to prove federal jurisdiction exists over the state court suit. *Wichita Falls Independent School Dist.*, 44 F.3d 362, 365 (5th Cir.1995). In making its determination, courts need to resolve all disputed factual and legal questions in favor of the non-removing party. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992).

B. THE REMOVAL STATUTE

***2** The procedure for removing a case to federal court is set out in 28 U.S.C. § 1446. The Court in the instant case looks to § 1446(b) because Plaintiffs allege that the notice of removal filed by the defendants was untimely made and the case is thus subject to remand. The removal statute states (in pertinent part):

The notice of removal of a civil action or proceeding shall be filed within thirty days after

> the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*28 U.S.C. § 1446(b) (emphasis added).

Plaintiffs argue that because Defendants' removal of this action to federal court was untimely, this Court should remand the action to state court. Plaintiffs allege that Defendants' notice of removal was filed more than one year after the initial petition was filed. As stated above, the timeliness of removal is governed by 28 U.S.C. § 1446(b).

It is undisputed that the parties named in Rogers' initial pleadings were not completely diverse. (Initial Complaint of Gracie Lugene Rogers v. Bobby Keith Parker, at 1). Therefore, the Court needs to determine at what point, if at all, Defendants' received an "amended pleading, motion, order or other paper from which it [could] first be ascertained that the case [was] one which [had] become removable." 28 U.S.C. § 1446(b). It is only after this inquiry that the Court can determine whether a timely notice of removal was filed by the Defendants.

Section 1446(b) provides that if a case is not initially removable, then notice of removal "may be filed within thirty days ..." of defendant ascertaining from some new pleading or motion that the case is now removable. 28 U.S.C. § 1446(b). Here, Plaintiff's Original Petition was not removable because no diversity of citizenship existed at the time of filing. Plaintiffs contend that if the case was ever removable, it became so, on November 15, 1996 with the filing of Plaintiff's First Amended Complaint which added for the first time Defendants All American and USLife. (Plaintiffs' Motion to Remand, at 5). Defendant All American is an Illinois corporation with its principal place of business in Illinois. Defendant USLife is a Texas corporation with its principal place of business in Texas. Therefore, even if Defendants had filed notice of removal within 30 days of the filing of Plaintiff's First Amended Petition, complete diversity of citizenship did not exist at that time. (Plaintiff's First Amended Original Petition, at 1-2).

***3** In contrast, Defendants argue that removal became apparent on November 15, 1997 with the filing of Plaintiffs' Second Amended Original Petition. This petition added additional named Plaintiffs, Karen and Michael Grisham and Carolyn and Larry West, as well as class claims against Defendants All American and USLife. Defendants' Notice of Removal alleged that Defendants USLife and Bobby Keith Parker, both Texas residents, were fraudulently joined as to the added claims and other named Plaintiffs. This notice of removal came more than one year from the time Plaintiff's Original Petition was filed.

Plaintiffs contend that even if this case became removable, § 1446(b) places a one year bar on the removal of a case from state to federal court based on diversity jurisdiction conferred by 28 U.S .C. § 1332. Given that the originally filed action was not initially removable, the Court needs to look to the second paragraph of 28 U.S .C. 1446(b) which states that a case may not be removed on the basis of diversity jurisdiction more than one year after commencement of the action. 28 U.S.C. § 1446(b). According to Texas Rule of Civil Procedure 22 and Federal Rule of Civil Procedure 3, an action commences when the initial complaint is filed. Fed.R.Civ.P. 3; Tex.R.Civ. P. 22. For the purposes of § 1446(b), therefore, the action commenced on November 4, 1996 with the filing of Plaintiff's Original Petition in state court.

A number of district courts in this circuit have recognized the one year limitation to removal based on diversity jurisdiction. *See Luevano v. Dow Corning Corp.*, 895 F.Supp. 135, 136 (W.D.Tex.1994); *Auto Transporters Gacela, S.A. v. Border Freight Distrib. and Warehouse, Inc.*, 792 F.Supp. 1471, 1472 (S.D.Tex.1994). In addition, the legislative history of the 1988 Amendment reveals that Congress amended the diversity statute, including the amendment to § 1446(b) adding the one year limit to removal based on diversity jurisdiction, in order to decrease the number of cases heard in federal court. H.R.Rep. No. 889, 100th Congress, 2d

Sess. 72, reprinted in 1988 *U.S.Code Cong. And Admin. News,* 5982, 6032. *See also* Cofer v. Horsehead Rech. & Dev. Co., 805 F.Supp. 541, 543 (E.D.Tenn.1991)(quoting the House report discussing the 1988 Amendment to the diversity statute). [FN1] Since Defendants' Notice of Removal came more than one year after the Original Petition was filed, Plaintiffs urges this Court to hold that Defendant's waived their right to remove the case. In reading the plain language of § 1446(b), the commentary to § 1446(b), and the applicable case law, the Court finds that removal of a case from state to federal court based on diversity jurisdiction may not be accomplished more than one year beyond the filing of the initial complaint.

> FN1. David D. Siegel, in his 'Commentary on 1988 Revision,' following U.S.C.A. Section 1446(b), refers to this as a "one year cap on removal" of diversity cases, and writes that the "provision might allow a plaintiff to resist removal to a federal district court by keeping his or her case in a nondiverse posture for more than one year." *Cofer v. Horsehead Rech. & Dev. Co.,* 805 F.Supp. 541, 543 (E.D.Tenn.1991)(quoting the House report).

C. WHETHER ONE YEAR PROVISION IS SUBJECT TO EQUITABLE CONSIDERATIONS

Defendants argue that the one year limitation to removal based on § 1332 diversity jurisdiction is subject to equitable considerations. (Defendants' Response to Plaintiffs' Motion to Remand, at 4-5). Defendants urge that in *Barnes v. Westinghouse Electric Corp.,* the Fifth Circuit opened the door to a plaintiff being equitably estopped from asserting the one year bar to removal based on diversity jurisdiction. *See* Barnes v. Westinghouse Electric Corp., 962 F.2d 513 (5th Cir.1992).

***4** In *Barnes,* the Court decided that § 1446(b) was a procedural provision rather than a jurisdictional provision and thus subject to waiver. *Id.* at 515. Specifically, the 5th Circuit stated that the failure to seek remand pursuant to § 1447(c) within 30 days of defendant's notice of removal constitutes waiver of their right to seek remand. *Id.* In so concluding, the Court in *Barnes* stated "[w]e have noted the word 'procedural' in section 1447(c) refers to 'any defect that does not go to the question of whether the case originally could have been brought in federal district court ...' " *Id.* at 515. (*quoting* Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1544 (5th Cir.1991)). Therefore, § 1446(b)'s time limitation for removal is not jurisdictional, it is "merely modal and formal and may be waived." Nolan v. Boeing Co., 919 F.2d 1058, 1063 n. 6 (5th Cir.1990). Given the procedural stature of § 1446(b), Defendants ask the Court to apply equitable considerations to the untimely filing of the notice of removal.

Plaintiffs argue that the *Barnes* decision dealt specifically with the issue of a plaintiff's waiver to seek remand because of non-compliance with § 1447(c). (Plaintiffs' Reply Brief In Support of Motion to Remand, at 7). Plaintiffs recognize that the *Barnes* Court held § 1446(b)'s provisions to be procedural and not jurisdictional, but state that their Motion to Remand was timely filed under § 1447(c) and thus they have not waived their right to assert § 1446(b)'s one year limit to removal. *Id.* Plaintiffs also direct the Court to additional cases that determined § 1446(b) is not subject to any equitable considerations. *See* Burns v. Windsor Ins. Co.,31 F.3d 1092, 1097 (11th Cir.1994)(stating that Congress, in its commentary to the 1988 Amendment to the diversity statute, recognized and accepted that in some circumstances a plaintiff will intentionally try to avoid federal jurisdiction.); Royer v. Harris Well Serv., 741 F.Supp. 1247, 1248 (M.D.La.1990)(stating that Congress did not make any explicit exceptions to the one year limitation found in § 1446(b).); *Russaw v. Voyager Life Ins. Co.,* 921 F.Supp. at 724-25; Brock v. Syntex Laboratories, Inc., 791 F.Supp. 721, 722 (E.D.Tenn.1992).

The Court finds that Plaintiffs timely filed their Motion to Remand according to § 1447(c), and, therefore, they did not waive their right to assert the one year limitation found in § 1446(b). With respect to Defendants request, the Court is unwilling to extend the holding in *Barnes* to the facts of this case since *Barnes* dealt specifically with waiver in asserting the time limitation of § 1446(b). In considering the arguments made by both parties and the applicable law, the Court concludes that the statute does not subject the one year limitation to equitable considerations when removal is made outside the one year period, is based on diversity jurisdiction, and where the plaintiff timely files a motion to remand pursuant to § 1447(c).

D. FRAUDULENT JOINDER

***5** Even if the Court were to find that equitable considerations should apply to estop Plaintiffs from asserting the one year provision, Defendants' have not met their burden of establishing subject matter jurisdiction. As noted above, Defendants' basis for removing the action was that some Defendants were fraudulently joined.

The burden of proving fraudulent joinder rests on the defendant, and the burden is a heavy one. *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir.1992); *Laughlin v. Prudential Insurance Co. .*, 882 F.2d 187, 190 (5th Cir.1989); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir.1981). The removing party has the burden of proof in alleging and proving that the non-diverse party's joinder is a "sham" or "fraudulent". *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 818 (5th Cir.1993); *Pesch v. First City Bank of Dallas*, 637 F.Supp. 1530, 1537-38 (N.D.Tex.1996). The fraudulent joinder of a non-diverse defendant must be proven by clear and convincing evidence. *Grassi v. Ciba-Geisy, Ltd.*, 894 F.2d 181, 186 (5th Cir.1990). In ruling on this issue, all factual allegations in the plaintiff's state court pleadings are evaluated in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff. *Cavallini v. State Farm Mutual Auto Insurance*, 44 F.3d 256, 259 (5th Cir.1995). To satisfy her burden of proving fraudulent joinder, a defendant must show: (1) there is no possibility that plaintiffs will be able to establish a cause of action against the in-state defendant; or (2) there is outright fraud in the plaintiff's pleading of jurisdictional facts. *LeJeune v. Shell Oil Co.*, 950 F.2d at 271. In evaluating a claim of fraudulent joinder, the Court need not decide whether the plaintiff will actually or even probably prevail on the merits, but looks only for a possibility that he may do so. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d at 42.

Defendants allege that Parker and USLife, both citizens of Texas, have been fraudulently joined. (Defendants' Response to Plaintiffs' Motion to Remand, at 11-23). As there has been no allegation by Defendants of fraud in the Plaintiffs' pleading of jurisdictional facts, the Court looks to see if Defendants have proven that there is absolutely no possibility that the Plaintiffs may recover in state court on their claims against local Defendants Parker and USLife.

1. DEFENDANT BOBBY KEITH PARKER

Plaintiffs' claim that Defendant Parker is an agent of All American and USLife, and sold retirement programs or education plans to Plaintiffs. (Plaintiffs' Second Petition ¶ 21). Plaintiffs assert that Parker made sales of insurance policies for the Defendant companies, and that he owed a duty of care in the marketing and sale of the insurance products. *Id.* Further, Plaintiffs allege that Parker failed in the exercise of this duty and "falsely represented the nature, terms, quantities, qualities, benefits, advantages, premium obligations, interest crediting rates, sales commissions, administrative costs, ownership, retirement benefits, educational savings benefits, other investment income, federal income tax risks, and financial performance of the insurance products sold to the Plaintiffs." *Id.* at 2. Plaintiffs contend that they relied upon these misrepresentations to their detriment. In their Motion to Remand, Plaintiffs claim that the causes of action asserted against Parker allege all of the necessary elements under Texas law. (See Plaintiffs' Motion to Remand, at 14).

***6** Defendants argue that Parker is fraudulently joined as to 99% of the class. (Defendants' Response to Plaintiffs' Motion for Remand, at 20). Defendants state that 99% of the putative class did not purchase an insurance policy from Parker. *Id.* Approximately 154,568 life insurance policies have been issued by All American since 1988, and Parker has sold 758 policies since 1988. *Id.* Defendants argue that when class claims are involved, the court should look at the claims of all of the members of the putative class, not just the named plaintiffs, for purposes of the inquiry into fraudulent joinder. For purposes of diversity jurisdiction, however, the citizenship of the parties is determined by the named plaintiffs and named defendants to the suit. [FN2]*Quebe v. Ford Motor Co.*, 908 F.Supp. 446, 449 (W.D.Tex.1995) (citing *Calagaz v. Calhoon*, 309 F.2d 248, 253 (5th Cir.1962)). In the absence of authority to the contrary, the named plaintiffs and defendants should also be the focus of the fraudulent joinder inquiry. *Rochelle v. Ford Motor Co.*, 1996 WL 673163,*3 (N.D.Tex.1996); *Dorsey v. The Manufacturers Life Ins. Co.*, 1997 WL 703354,*6 (E.D.La.1997); *Dollar v. General Motors Corp.*, 814 F.Supp.538, 542 n. 2 (E.D.Tex.1993)(the court rejected the view that a key factor in determining whether plaintiffs have fraudulently joined a defendant in a class action is whether plaintiffs intend to seek classwide relief from that defendant);

FN2. The presence of a Texas party on both sides of the case will remove diversity of citizenship as a possible means of conferring subject matter jurisdiction because complete diversity does not exist as to the named parties of the case. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1064 (5th Cir.1995).

Focusing on the named Plaintiffs for the purposes of the fraudulent joinder inquiry, the Court is of the opinion that the named Plaintiffs do have possible claims against Defendant Parker. As stated above, Plaintiffs allege that Parker "falsely represented the nature, terms, quantities, qualities, benefits, advantages, premium obligations, interest crediting rates, sales commissions, administrative costs, ownership, retirement benefits, educational savings benefits, other investment income, federal income tax risks, and financial performance of the insurance products sold to the Plaintiffs." (Plaintiff's First Amended Original Petition, at 2). Despite Defendants claim that 99% of the potential class members do not have a claim against Parker, Defendants admit that the non-diverse Plaintiffs have possible claims against Defendant Parker. (Defendants' Response to Plaintiffs' Motion to Remand, at 22-23). [FN3] Accordingly, the Court agrees with the Plaintiffs that the petition does contain allegations which possibly support a claim against Defendant Parker, and, therefore, does not find that Parker is fraudulently joined.

FN3. The Court notes that Defendant Parker was an original party to this action. Defendants' fail to explain how Defendant Parker, who was originally a proper paty to this action, can somehow become fraudulently joined once additional claims are filed when the original claims against him remain. While Defendants may, for good reason, believe that Plaintiffs' intentionally delayed in filing their class claims, the issue should have been addressed and litigated in state court when Plaintiff sought to amend the complaint.

2. DEFENDANT USLIFE

As stated above, Defendants argue that USLife is fraudulently joined. Defendants' allegation of fraudulent joinder rests on the premise that USLife merely contracts with All American to perform administrative duties, and that there is no cause of action stated by the Plaintiffs that will lie. (See Defendant's Response to Plaintiffs' Motion to Remand, at 17). In Plaintiffs' First Amended Original Complaint, the following causes of action are alleged against Defendant USLife: (1) fraud in misrepresenting "the nature, terms, quantities, qualities, benefits, advantages, premium obligations, interest credit rates, administrative costs, sales commissions, ownership, retirement benefits, educational savings benefits, other investment income, federal income tax risks, and financial performance of the life insurance products sold; (2) breach of contract by USLife; (3) negligence of all Defendants in breaching a duty in exercising ordinary care in selling, marketing, and distributing their life insurance products; (4) Negligence per se of Defendant Uslife; (5) negligent misrepresentation of all defendants; (6) malicious conduct of all defendants; and (7) vicarious liability of USLife for the action and representations of their agent Bobby Keith Parker. (See Plaintiff's First Amended Original Petition, at 3-6).

*7 Defendants argue that USLife performed strictly administrative duties for All American. (Defendants' Response to Plaintiffs' Motion for Remand, at 14-15, and Affidavit of Norma Larance). Defendants also assert that because USLife did not participate in the marketing or sale of the policies, Plaintiffs have no possible cause of action against them. *Id.* at 14. In addition, Defendants allege that USLife is not vicariously liable for the actions of Defendant Parker. *Id.* at 19.

Even though USLife only contracted with All American to perform administrative duties, the Court is of the opinion that there is enough involvement by USLife so that Plaintiffs can possibly establish a cause of action. Plaintiffs allege that Defendant USLife is the "alter ego" of Defendant All American. (Plaintiffs' Second Amended Original Petition, at 2). The "alter ego" theory is established by showing a blending of identities, or a blurring of the lines of distinction, both formal and substantive, between the two corporations. *Hideca Petroleum Corp. v. Tampimex Oil Int'l, Ltd.*, 740 S.W.2d 838, 843 (Tex.App.--Hous. [1st Dist.] 1987, n.w .h.). Here, Plaintiffs assert that both All American and USLife oversaw and evaluated the performance of Parker in selling and distributing the policies (Plaintiffs' Reply Brief in Support of Motion to Remand, Exhibit "E" and "F"), USLife serviced the policies that were

purchased by Plaintiffs (*Id.,* Exhibit "G"), and All American and USLife share the same address, phone number and agent for service of process in Texas (*Id.,* Exhibits "C," "D" and "F"). After a review of the Plaintiffs petition and looking at the alleged facts in the light most favorable to Plaintiffs, the Court concludes that there is enough information pled in order to determine that Plaintiffs have a possible cause of action against Defendant USLife. Therefore, Plaintiffs meet the standard for refuting an allegation of fraudulent joinder.

CONCLUSION

Having considered the arguments of the parties and the applicable law, the Court is of the opinion that Plaintiff's Motion to Remand shall be GRANTED. Accordingly, the action is hereby remanded to the 191 st District Court of Dallas County, Texas. Plaintiffs' Motion for Costs and Attorney's Fees Associated with Defendants Improvident Removal shall be DENIED.

So Ordered.

Not Reported in F.Supp., 1998 WL 401599 (N.D.Tex.)

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United States District Court,
N.D. Texas, Dallas Division.
Mark SIMS, individually and on behalf of all others similarly situated,
Plaintiff,
v.
AT & T CORP., Defendant.
No. Civ.A.3:04-CV-1972-D.

Dec. 22, 2004.

Stephen L. Hubbard, Hubbard & Biederman, Dallas, TX, for Plaintiff.

Carl C. Scherz, Locke Liddell & Sapp, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

FITZWATER, J.

***1** The instant motion to remand presents the questions whether the court has diversity jurisdiction based on the amount in controversy and whether it has federal question jurisdiction. Concluding that it lacks jurisdiction on either basis, the court grants the motion and remands this case to county court.

I.

This is a removed putative class action brought by plaintiff Mark Sims ("Sims") against defendant AT & T Corp. ("AT & T") asserting claims for breach of contract, violation of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), Tex. Bus. & Com.Code Ann. §§ 17.41-17.826 (Vernon 2002 & Supp.2004-05), and negligence. Sims also seeks a declaratory judgment for remedial and injunctive relief related to his substantive claims. He asserts that he and other class members are entitled to this relief because AT & T charged them for long distance telephone service that they had previously canceled. AT & T provided long distance telephone service to Sims until he switched to another carrier. Sims alleges that AT & T billed him for service after he canceled it and charged him late fees when he did not pay. He also asserts that AT & T notified him that payment was required to prevent further collection action.

Sims sued AT & T in county court, contending that AT & T acknowledged that it had mistakenly billed 200,000 to 300,000 customers and as many as 800,000 non-AT & T customers since January 1, 2004. The putative class is comprised of persons whose billing addresses are located in Texas and who, during the four years before Sims filed suit, canceled AT & T long distance service but were billed for service provided after the date of cancellation. Sims does not pray for a specific amount of damages in his county court petition. A billing statement for service from June 9, 2004 to July 8, 2004 indicates that AT & T billed Sims for $39.42. [FN1] Sims also seeks judgment declaring, *inter alia,* that AT & T must audit all bills sent to class members and make appropriate adjustments. Pet. ¶ 36.

> FN1. Sims does not allege that he paid the bill or that the delinquent account has actually impacted his credit report.

AT & T removed this action based on diversity and federal question jurisdiction. Sims moves to remand. [FN2]

> FN2. AT & T filed its response to Sims' motion on October 25, 2004. The following day, AT & T filed a motion for leave to file a supplemental appendix, which contains a declaration of Craig Farber ("Farber"), Director in AT & T's Consumer Product Marketing Management Area. Sims urges the court to deny leave and disregard AT & T's supplemental appendix, asserting that the court may not consider post-removal affidavits unless the basis for jurisdiction is ambiguous at the time of removal. The court concludes, however, that it can consider Farber's post-removal declaration because the jurisdictional amount is ambiguous on the face of the county court petition and the declaration helps clarify jurisdictional facts that existed at the time of removal. *See St. Paul Reinsurance Co. v. Greenberg,* 134 F.3d 1250, 1254 n. 18 (5th Cir.1998). Accordingly, the court has considered AT &

T's supplemental appendix in deciding the motion to remand.

II

AT & T contends that federal question jurisdiction exists because the breach of contract claims of some potential class members are preempted by the Federal Communications Act of 1934, 47 U.S.C. § 151*et seq.* ("FCA"). [FN3]

FN3. Before August 1, 2001 the rates AT & T charged were governed by tariffs filed with the Federal Communications Commission. Sims has defined the class to include all persons who, since August 5, 2000 (i.e., four years before he filed suit), canceled long distance service but were billed by AT & T for service provided after cancellation.

Ordinarily, the term federal preemption refers to ordinary preemption, which is a federal defense to the plaintiff's suit and may arise either by express statutory term or by a direct conflict between the operation of federal and state law. Being a defense, it does not appear on the face of a well-pleaded complaint, and, thus, does not authorize removal to a federal court. By way of contrast, complete preemption is jurisdictional in nature rather than an affirmative defense to a claim under state law. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense.

2Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir.2000) (quoting *Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 500 (5th Cir.1999)). In cases where complete preemption exists, any complaint that comes within the scope of the federal cause of action created by the federal statute necessarily arises under federal law for purposes of removal based on federal question jurisdiction. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23-24, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

Complete preemption is a narrow exception.... To establish complete preemption, [AT & T] must show that (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removable. Few federal statutes can meet such an exacting standard.

Johnson, 214 F.3d at 632 (citations, quotation marks, and some brackets omitted).

AT & T has not demonstrated that the FCA completely preempts the breach of contract claims of potential class members. Moreover, it cites *Bastien v. AT & T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir.2000), to argue that state-law causes of action related to rates under filed tariffs are preempted by the FCA. *Bastien* is inapposite because it involved state-law claims that were preempted under 47 U.S.C. § 332(c)(3)(A), which applies only to *mobile* telephone services. Section 332 is not relevant to Sims' claims or to the possible claims of other potential class members. AT & T has not demonstrated that any class member's claim is completely preempted. Accordingly, the court concludes that AT & T has failed to establish that removal was proper based on federal question jurisdiction.

III

The court now considers whether AT & T has established that the court has diversity jurisdiction.

A

AT & T has the burden of demonstrating that this court has jurisdiction and that removal was proper. *See Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir.2002). The court determines whether jurisdiction exists by examining the claims in the county court petition "as they existed at the time of removal." *Id.* "Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand." *Id.* (citing *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir.2000)). It is undisputed that the parties are diverse citizens. The question is whether the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. *See*28 U.S.C. § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different States[.]").

***3** "[U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288, 58

S.Ct. 586, 82 L.Ed. 845 (1938) (footnotes omitted).

> [W]here ... the petition does not include a specific monetary demand, [the defendant] must establish by a preponderance of the evidence that the amount in controversy exceeds $75,000. This requirement is met if (1) it is apparent from the face of the petition that the claims are likely to exceed $75,000, or, alternatively, (2) the defendant sets forth "summary judgment type evidence" of facts in controversy that support a finding of the requisite amount.

Wise v. CB Richard Ellis, Inc., No. 3:03-CV-1597-D, slip op. at 2 (N.D.Tex. Dec. 9, 2003) (Fitzwater, J.) (quoting *Manguno,* 276 F.3d at 723(citations omitted)). AT & T maintains that the threshold is exceeded based on Sims' combined allegations for declaratory and injunctive relief, attorney's fees, punitive damages, and class action expenses.

B

AT & T first argues that the minimum jurisdictional amount is met because the pecuniary consequence of the declaratory and injunctive relief that Sims seeks exceeds $75,000. [FN4] It correctly asserts that "[t]he amount in controversy, in an action for declaratory or injunctive relief, is the value of the right to be protected or the extent of the injury to be prevented." D. Br. at 4 (quoting *St. Paul Reinsurance Co. v. Greenberg,* 134 F.3d 1250, 1252-53 (5th Cir.1998)). But it then follows the wrong analytical path by maintaining, based on *Duderwicz v. Sweetwater Savings Ass'n,* 595 F.2d 1008 (5th Cir.1979), and other decisions, that this value can be measured by the pecuniary consequence *to AT & T.* AT & T urges that if the court determines that it must audit all bills sent to Sims and other class members during the four years that preceded the lawsuit, it would incur costs estimated to exceed $75,000. [FN5] AT & T also posits that the cost of adjusting credit reports would add to the expenses it would incur. And it maintains that, even if a class is not certified and Sims alone prevails, the cost of complying with his claims for declaratory and injunctive relief would not change.

> FN4. Sims requests the following remedial and injunctive relief based on his declaratory judgment action:
> A. An order prohibiting AT & T from continuing to bill him and other Class Members or to pursue collection efforts against them;
> B. An order requiring AT & T to audit all bills sent to Plaintiff and Class Members and to make appropriate adjustments removing the unauthorized charge(s), any penalties, and interest;
> C. An order requiring AT & T to correct any unfavorable credit reports made in connection with the unauthorized charges to Plaintiff and Class Members; and
> D. An order requiring AT & T to refund monies to Class Members who paid for unauthorized charges.
> Pet. ¶ 36(A)-(D).
>
> FN5. AT & T maintains that there are more than 1.3 million persons with billing telephone numbers located in Texas who currently subscribe to its service. D. Supp.App. 3. It asserts that it would cost $85.00 per file to perform the audit that Sims requests. *Id.* at 4.

The correct perspective for measuring the amount in controversy is "[t]he value *to the plaintiff* of the right to be enforced or protected." *Alfonso v.Hillsborough County Aviation Auth.,* 308 F.2d 724, 727 (5th Cir.1962) (emphasis added); *see also Vraney v. County of Pinellas,* 250 F.2d 617, 618 (5th Cir.1958) (per curiam). AT & T's reliance on *Duderwicz* to argue against a "plaintiff-viewpoint" approach--thereby allowing the court to exercise jurisdiction because AT & T's cost of compliance with a requested order meets the jurisdictional requirement--is misplaced. *See Garcia v. Koch Oil Co. of Tex.,* 351 F.3d 636, 640 n. 4 (5th Cir.2003) ("Contrary to the defendants' view, *Duderwicz* did not signal our acceptance of the 'either-party viewpoint'.... The Court of Appeals for the Eleventh Circuit, which is also bound by *Duderwicz,* reads this case as we do and similarly concludes that it does not signal an 'abandonment of the plaintiff-viewpoint rule' by the Fifth Circuit." (citation omitted)). Accordingly, AT & T cannot establish that the amount in controversy requirement is satisfied based on the pecuniary consequence of its compliance with the requested declaratory and injunctive relief.

C

*4 AT & T next maintains that attorney's fees, punitive damages, and class action expenses exceed $75,000. It contends that the minimum jurisdictional requirement is satisfied regardless whether the putative class is ultimately certified. Although no class has been certified, the court will treat the suit as a class action for the purpose of determining whether

it has jurisdiction. *See* Smith v. GTE Corp., 236 F.3d 1292, 1304 n. 12 (11th Cir.2001); *In re Abbott Labs.*, 51 F.3d 524, 525 n. 1 (5th Cir.1995); *Eagle v. Am. Tel. & Tel. Co.*, 769 F.2d 541, 545 n. 1 (9th Cir.1985).

1

AT & T asserts that the attorney's fees recovered under the DTPA must be aggregated and attributed to Sims, as the representative party, to determine the amount in controversy. Attorney's fees may properly be considered to determine the amount in controversy because the DTPA provides for their recovery. *See*Tex. Bus. & Com.Code Ann. § 17.50(d) (Vernon 2002); *Manguno*, 276 F.3d at 723. AT & T's contention, however, contravenes the standard approach to distribute attorney's fees *pro rata* to all class members, both named and unnamed, when determining the amount in controversy. *See* Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 n. 5 (5th Cir.2001) (holding, *inter alia,* that, under Texas law, attorney's fees should not be attributed to named class representative for jurisdictional purposes). AT & T relies on *Martin v. Ford Motor Co.*, 1995 WL 1554361 (S.D.Tex. Aug.15, 1995) (Kent, J.), in which the court held that it should aggregate attorney's fees awarded under the DTPA and attribute them to the class representative when calculating the amount in controversy. *Id.* at *7. This court respectfully disagrees with *Martin,* which may not even reflect that judge's current thinking on the issue. *See* Johnson v. DirecTV, Inc., 63 F.Supp.2d 768, 770(S.D.Tex.1999) (Kent, J.) (holding that court was "not convinced that the attorneys' fees associated with prosecuting a class action lawsuit under Texas law may properly be attributed to the named class representative for jurisdictional purposes"). Moreover, attributing aggregated attorney's fees to the named representative for jurisdictional purposes is contrary to Texas law generally. *See* Coghlan, 240 F.3d at 455 n. 5;*Gooding v. Allstate Ins. Co.*, 2000 WL 626856, at *2 (N.D.Tex. May 12, 2000) (Lynn, J.); *Quebe v. Ford Motor Co.*, 908 F.Supp. 446, 452 (W.D.Tex.1995). AT & T has not shown that, once attorney's fees are distributed *pro rata* to all class members, the minimum jurisdictional amount is satisfied.

2

AT & T next relies on the amount of punitive damages. Sims does not dispute that punitive damages are properly considered in determining the amount in controversy. Nevertheless, it is not facially apparent that Sims' claim of mistaken billing for approximately $40 involves punitive damages that, together with an award of reasonable attorney's fees, will exceed the minimum jurisdictional requirement. Nor has AT & T demonstrated by a preponderance of the evidence that Sims' claim for punitive damages exceeds the minimum jurisdictional amount. It instead cites several cases in which Texas juries have awarded punitive damages in excess of $75,000 for fraud-based claims. These cases, however, are not comparable because each one--none of which was a class action--involved claims with substantial actual damage awards. Moreover, punitive damages are not aggregated to meet the minimum jurisdictional requirement. *See* H & D Tire & Auto.-Hardware Inc. v. Pitney Bowes Inc., 250 F.3d 302, 304 (5th Cir.2001) (per curiam) (on rehearing) ("Yet damages of individual class members cannot be aggregated across a class. That is the law of the Fifth Circuit, even as regards punitive damages."). AT & T has thus failed to show that the punitive damages awarded to any single plaintiff will even approach, much less meet, the minimum jurisdictional amount. [FN6]

> FN6. This conclusion is valid even if attorney's fees and punitive damages are considered together.

3

***5** AT & T also posits that the cost of providing notice to class members can be aggregated to reach the minimum jurisdictional amount. It contends that the provision of 28 U.S.C. § 1332 that requires satisfaction of the jurisdictional amount "exclusive of ... costs" refers only to costs taxable under 28 U.S.C. § 1920. AT & T thus reasons that, because the cost of class action notice is not among the taxable costs listed in § 1920, it is not excepted from, and is therefore included in, the amount in controversy.

The court is not persuaded that the aggregate cost of class notice should be included when determining the amount in controversy. In the context of declaratory and injunctive relief, the Fifth Circuit, when valuing the amount in controversy, has differentiated between the true object of the litigation and litigation tools employed to obtain the ultimate relief. *See, e.g., Garcia*, 351 F.3d at 640-41. This distinction is also appropriate here. *See*14B Charles A. Wright et al., *Federal Practice & Procedure* § 3702, at 77-78 (1998) (noting without restriction to injunctive or declaratory relief that "the amount in controversy for

jurisdiction purposes is measured by the direct pecuniary value of the right that the plaintiff seeks to enforce or protect or the value of the object that is the subject matter of the suit," and observing that in most claims for damages, amount plaintiff seeks to recover is equal to amount defendant seeks to preserve). Class notice is not a form of relief that Sims seeks to obtain through this lawsuit. It is merely a litigation tool to obtain the relief actually sought. *See S. States Police Benevolent Ass'n v. Second Chance Body Armor, Inc.*, 336 F.Supp.2d 731, 737 (W.D.Mich.2004) ("[T]he notice does not constitute the ultimate relief to the class members, but is merely a means by which the actual relief sought ... can be obtained."). Accordingly, AT & T cannot satisfy the minimum jurisdictional amount based on the cost of providing notice to class members.

D

Sims alleges that he was mistakenly billed for less than $40. Although he does not allege that he paid the bill, he now seeks unspecified monetary damages and declaratory and injunctive relief. It is not facially apparent that Sims' claims for economic damages, attorney's fees, and punitive damages-- individually or considered together--involve in excess of $75,000. Although satisfaction of the jurisdictional amount is not facially apparent, the court could have exercised diversity jurisdiction had AT & T submitted proof that demonstrated by a preponderance of the evidence that Sims' claims exceeded the jurisdictional amount. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir.1993). The conclusory statements contained in AT & T's appendix are inadequate to meet this burden. Accordingly, the court concludes that it does not have subject matter jurisdiction under § 1332.

IV

Sims requests an award of attorney's fees pursuant to 28 U.S.C. § 1447(c) in seeking to procure the remand of this case to county court. "The decision to award fees is a matter of discretion." *Fathergill v. Rouleau*, 2003 WL 21467570, at *2 (N.D.Tex. June 23, 2003) (Fitzwater, J.) (citations omitted). The court holds that Sims is entitled to recover his attorney's fees and costs incurred in obtaining remand of this case, which was improvidently removed. The award is limited to the "fees and costs incurred in federal court that would not have been incurred had the case remained in state court." *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir.1997). He may apply for an award no later than 30 days from the date this memorandum opinion and order is filed if the parties cannot agree on the amount.

* * *

***6** Sims' October 5, 2004 motion is granted. The court holds that it lacks subject matter jurisdiction and, pursuant to 28 U.S.C. § 1447(c), remands this case to County Court at Law No. 4 of Dallas County, Texas. The clerk shall effect the remand according to the usual procedure.

SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 2964983 (N.D.Tex.)

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