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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SAMUEL A. BERRY,)

Plaintiff,)

v.)

AMERICAN EXPRESS PUBLISHING,)

CORPORATION, et al.,)

Defendants.)

SA CV 05-302 AHS (ANx)

ORDER GRANTING PLAINTIFF'S MOTION FOR REMAND

Docketed

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CLSD

I.

PROCEDURAL BACKGROUND

On April 19, 2005, plaintiff Samuel A. Berry ("Berry") filed a motion to remand. On May 2, 2005, defendants American Express Publishing Corporation, American Express Travel Related Services Company, Inc., and American Express Centurion Bank ("defendants") filed opposition. Plaintiff filed a reply thereto on May 9, 2005. By Order dated May 10, 2005, the Court took the matter under submission.

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II.

FACTUAL HISTORY

On March 3, 2005, plaintiff filed a class action complaint, No. 05CC00049 ("Complaint"), in the Superior Court of California, County of Orange, on behalf of himself and others similarly situated. Plaintiff has filed the present suit for injunctive relief to end an allegedly unlawful business practice whereby defendants charge credit card holders for unsolicited magazine subscriptions unless the credit card holders take affirmative actions to the contrary. Plaintiff, who was charged for a subscription to "Travel + Leisure," was able to reverse the charges and cancel the magazine after contacting defendants. Nonetheless, plaintiff contends that defendants' actions violate California Civil Code §§ 1584.5, 1770(a)(14), and 1770(a)(19).

On April 1, 2005, defendants filed a notice of removal under the newly-enacted Class Action Fairness Act of 2005 ("CAFA"). See U.S.C. § 1332(d). Plaintiff opposes removal and has filed a motion for remand on the basis that, notwithstanding the CAFA, defendants still bear the burden to show that the amount in controversy exceeds \$5,000,000, and defendants that do not meet this burden when the complaint contains only claims for injunctive relief and plaintiff affirmatively indicates that "[n]o monetary award in the amount of \$5,000,000.00 or greater is sought that would provide the United States District Court with diversity jurisdiction pursuant to the terms of the Class Action Fairness Act of 2005 . . ." Complaint, p. 17, ¶ 16.

In reply, defendants urge the Court to interpret the CAFA according to its purported legislative intent to confer

1 jurisdiction on federal courts and to shift the burden to plaintiff
2 to show that removal is improper. Defendants further assert that
3 plaintiff has asserted a claim for statutory damages and that the
4 recovery could exceed \$5,000,000. Even if damages are not awarded,
5 defendants contend that the value of the injunctive relief, whether
6 measured from the perspective potential recovery by or value to
7 plaintiff or the cost to defendants, also exceeds the requisite
8 amount in controversy.

9 III.

10 DISCUSSION

11 A. Standard of Review

12 1. Diversity Jurisdiction Prior to Enactment of Class 13 Action Fairness Act

14 Prior to the enactment of the CAFA, a removing defendant
15 bore the burden of proving the existence of jurisdictional facts
16 and there was a "strong presumption" against removal jurisdiction.
17 See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). On a
18 motion to remand, the court would "resolve all contested issues of
19 substantive fact in favor of the plaintiff . . ." See Boyer v.
20 Snap on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert.
21 denied, 498 U.S. 1085 (1991) (internal citations omitted).

22 As with other claims brought under diversity
23 jurisdiction, an amount in controversy exceeding \$75,000 was
24 required to invoke federal jurisdiction. See 28 U.S.C. § 1441(b).
25 In the Court of Appeals for the Ninth Circuit, it was well
26 established that, although joinder was proper for pleading
27 purposes, the value of individual claims could not be aggregated
28 for jurisdictional purposes unless the claims were either joint or

1 common and undivided. Gibson v. Chrysler Corp., 261 F.3d 927, 940
2 (9th Cir. 2001); see also In re Brand Name Prescription Drugs
3 Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997) (in a class
4 action, "[a]t least one named plaintiff must satisfy the
5 jurisdictional minimum.").

6 **2. The Enactment and Purpose of the Class Action and**
7 **Fairness Act**

8 Under the rule of non-aggregation, class action
9 complaints, which by their very nature often included small
10 individual claims, were regularly remanded for failure to meet the
11 amount in controversy requirement for diversity jurisdiction.
12 Because "federal courts are the appropriate forum to decide most
13 interstate class actions because these cases usually involve large
14 amounts of money and many plaintiffs, and have significant
15 implications for interstate commerce and national policy," Congress
16 enacted the CAFA on March 3, 2005, to help minimize the alleged
17 class action abuses in state courts and to ensure that certain
18 class actions could be litigated in the appropriate forum. See
19 Senate Pub. 109-14, p. 27.

20 As part of the CAFA, Congress inserted additional
21 language into Title 28 United States Code Section 1332(d), and what
22 was formerly Section 1332(d) became Section 1332(e). Among other
23 changes, the amount in controversy for class actions was increased
24 to \$5,000,000. However, courts are now required to "aggregate the
25 claims of the individual class members to determine whether the
26 matter in controversy exceeds the sum or value of \$5,000,000,
27 exclusive of interest and costs." See 28 U.S.C. § 1332(d)(6).

28 //

1 **3. Interpretative Issues Created by the Class Action**
2 **Fairness Act**

3 CAFA substantially alters federal diversity jurisdiction
4 over class actions. Where former diversity jurisdiction statutes
5 did not specifically address the amount in controversy with respect
6 to class actions, Section 1332(d)(2) provides in pertinent part:

7 The district courts shall have original
8 jurisdiction of any civil action in which the
9 matter in controversy exceeds the sum or value
10 of \$5,000,000, exclusive of interest and costs
11 . . . and is a class action . . .

12 Section 1332(d)(6) further states:

13 In any class action, the claims of the
14 individual class members shall be aggregated to
15 determine whether the matter in controversy
16 exceeds the sum or value of \$5,000,000,
17 exclusive of interest of costs.

18 These new additions to the diversity jurisdiction statute
19 create various interpretative issues, such as whether the burden of
20 proof has shifted post-CAFA in favor of federal jurisdiction, and
21 how the amount in controversy should be measured now that
22 aggregation of plaintiffs' claims is required. These two questions
23 are implicated in the matter at hand, and, just as the answers to
24 these questions were not found in the former statutory text, the
25 current amendments do not provide a clear answer. Further, given
26 the recent enactment of the CAFA, the Court finds no cases, binding
27 or otherwise, that speak directly to the questions presented.
28 Thus, the Court faces the difficult task of reconciling previously

1 established, judicially-developed principles of diversity
2 jurisdiction with the purpose and structure of the recent CAFA-
3 amendments to the statute. Although the Court is cognizant that
4 determining legislative "intent" is a process not without the
5 potential for selective interpretation, where the statute does not
6 squarely address the issue, legislative history is an essential
7 tool for statutory interpretation. To this end, Committee Reports
8 are "the authoritative source for finding the Legislature's
9 intent," and may be consulted as one important resource in the
10 quest for faithful statutory interpretation. See Garcia v. United
11 States, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984);
12 accord City of Edmonds v. Washington State Building Code Council,
13 18 F.3d 802, 805 (9th Cir. 1994).

14 Plaintiffs' arguments to the contrary, and, specifically,
15 that resort to legislative history violates Article III, are
16 misplaced. First, a statute cannot address all possible outcomes
17 and situations, and language inevitably contains some imprecision;
18 where the text does not provide a clear answer, a faithful
19 interpretation of the statute necessarily involves more than the
20 text itself. Second, if legislative intent is clearly expressed in
21 Committee Reports and other materials, judicial disregard for the
22 explicit and uncontradicted statements contained therein may result
23 in an interpretation that is wholly inconsistent with the statute
24 that the legislature envisioned. Where the source of legal
25 authority is statutory and not constitutional, such as with the

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1 diversity statute¹, Congress retains the ability to create and
2 direct the law, so long as it is consistent with constitutional
3 principles, and it is particularly important for the Court to
4 follow that directive. Where both plaintiffs' and defendants'
5 interpretations of the burden of proof and the proper method of
6 calculating the amount in controversy are constitutionally
7 permissible, the role of the Court is to faithfully implement the
8 law as intended by the Legislature. In these circumstances, the
9 legislative history is a proper tool of statutory interpretation.

10 **a. Burden of Proof When Removal is Contested**

11 Although the burden of proof is not addressed in either
12 the text of the original or the text of the new statute, the CAFA
13 was clearly enacted with the purpose of expanding federal
14 jurisdiction over class actions. See Sen. Pub. 109-14, p. 8 ("The
15 Framers were concerned that state courts might discriminate against
16 interstate business and commercial activities . . . [b]oth of these
17 concerns - judicial integrity and interstate commerce - are
18 strongly implicated by class actions . . . [thus] class action
19 legislation expanding federal jurisdiction over class actions would
20 fulfill the intentions of the Framers") (internal quotations
21 omitted).

22 To this end, the Committee Report expresses a clear
23 intention to place the burden of removal on the party opposing
24 removal to demonstrate that an interstate class action should be

26 ¹ See Senate Committee Report, B.1. ("these procedural
27 limitations [on diversity jurisdiction] regarding interstate
28 class actions were policy decisions, not constitutional ones . .
[i]t is therefore the prerogative of Congress to modify these
technical requirements as it deems appropriate.").

1 remanded to state court. The Committee Report states that "[i]t is
2 the Committee's intention with regard to each of these exceptions
3 that the party opposing federal jurisdiction shall have the burden
4 of demonstrating the applicability of an exemption." S. Rep. 109-
5 14, p. 44; see also Sen. Rep. 109-14, p. 43 ("the named plaintiffs
6 should bear the burden of demonstrating that a case should be
7 remanded to state court . . .").

8 Although plaintiff argues that the failure to incorporate
9 this directive on the burden of proof into the statute evinces an
10 explicit intent to maintain the status quo, this contention cannot
11 be squared with the uncontradicted statements contained in the
12 Committee Report. Although the lack of any burden-shifting
13 provisions may be an opaque means of preserving the status quo, as
14 defendants suggest, it is equally possible that it was due to
15 legislative oversight, the inability of the Legislature to foresee,
16 or for statutes to address all circumstances.

17 Alternatively, and more plausibly, the failure to address
18 the burden of proof in the statute reflects the Legislature's
19 expectation that the clear statements in the Senate Report would be
20 sufficient to shift the burden of proof. The Court notes, with
21 some irony, that the original diversity statute does not contain
22 any reference to the burden of proof. Plaintiff fails to explain
23 how the failure to incorporate the burden of proof in Section
24 1332(d) should be assigned more or less meaning than the failure to
25 incorporate any burden of proof into the original text. In these
26 circumstances, the Court finds that the failure to explicitly
27 legislate changes on the burden of proof in interstate class
28 actions has little interpretative value.

1 Finally, in determining that the burden of proof has
2 indeed shifted to the party seeking remand, the Court observes that
3 this interpretation is also consistent with the tradition of
4 placing the burden on the moving party.

5 **b. Valuation of the Amount in Controversy**

6 Unlike the burden of proof, the amended statute
7 explicitly addresses the amount in controversy requirement for
8 class actions; however, notwithstanding this amendment, like its
9 predecessor, the amended statute does not detail the appropriate
10 means of valuing the amount in controversy. Valuation of the
11 amount of controversy is particularly difficult where the plaintiff
12 seeks non-monetary relief.

13 Prior to the CAFA, the Ninth Circuit held that, where an
14 individual plaintiff seeks injunctive relief, the amount in
15 controversy may be determined from the perspective of either the
16 value to the plaintiff or the value to defendant. See In re Ford
17 Motor Co./Citibank (So. Dakota) N.A., 264 F.3d 952, 958 (9th Cir.
18 2001). However, because of the non-aggregation rules formerly
19 applicable to all claims, including class actions², the Ninth
20 Circuit did not permit the value of injunctive relief sought in a
21 class action to be determined by examination of its potential
22 aggregate cost to the defendant. See Kanter v. Warner-Lambert Co.,
23 265 F.3d 853, 859 (9th Cir. 2001); Snow v. Ford Motor Co., 561 F.2d

24
25 ² Aggregation of plaintiffs' claims prior to the CAFA was
26 permitted only in limited circumstances. See Morrison v.
27 Allstate Indem. Co., 228 F.3d 1255, 1262 (11th Cir.
28 2000) (aggregation permitted pre-CAFA only where plaintiffs suing
to enforce single title or right in which they had a common and
undivided interest). Section 1332(d)(6) now allows the
aggregation of class members' claims without limitation.

1 787, 789 (9th Cir. 1977) (holding that "if plaintiff cannot
2 aggregate to fulfill the jurisdictional requirement of § 1332, then
3 neither can a defendant who invokes the removal provisions under §
4 1441."). The amount in controversy depended on the nature and
5 value of each class member's separate claim. See id.

6 Given the explicit statutory change allowing
7 aggregation of claims in class actions, it appears as though the
8 justifications previously advanced for considering only the value
9 to individual plaintiffs in a class action are no longer relevant.
10 Since plaintiffs can now aggregate their claims to invoke diversity
11 jurisdiction, finding the amount of controversy from the aggregate
12 cost to defendants does not circumvent any non-aggregation
13 principles and is consistent with the principle that only cases
14 that could have been originally brought in federal court may be
15 removed. Accordingly, the Court concludes that the amount in
16 controversy may be satisfied either from the view of the aggregate
17 value to the class members or defendants.

18 **B. Merits of Plaintiff's Motion to Remand**

19 Assuming that the burden under the CAFA is on plaintiff
20 to show that the amount in controversy is less than \$5,000,000 in
21 the aggregate, plaintiff meets this burden. First, plaintiff does
22 not claim monetary damages. Plaintiff's three claims are
23 explicitly for injunctive relief and plaintiff further states that
24 he has no adequate remedies available at law. See, e.g., Complaint
25 p. 5 ¶ 3, and p. 28 ¶ 62. Although plaintiff also states in the
26 general prayer for relief that he also seeks statutory damages
27 (Complaint, p. 40 ¶ 4), plaintiff specifically states that he and
28 the class do not seek to recover more than \$5,000,000. The Court

1 has no reason to assume that plaintiff has misstated the value of
2 the claim to defeat jurisdiction. Given plaintiff's
3 representations to the Court, it would appear that defendants would
4 be in a strong position to estop plaintiffs from asserting a harm
5 and recovering damages in excess of \$5,000,000. Plaintiff has met
6 his burden to show that he and the class members will not recover
7 more than \$5,000,000 in damages.

8 The value of the injunctive relief also does not exceed
9 the jurisdictional minimum. Whether taken from the perspective of
10 the plaintiff class members or the defendants, the monetary value
11 of the claims in this matter "are so uncertain that the court
12 cannot reasonably determine whether the amount of money placed in
13 controversy by the present suit exceeds [the requisite amount in
14 controversy]." Morrison v. Allstate Indem. Co., 228 F.3d at 1269
15 (11th Cir. 2000).

16 From the class members' perspective, the value of the
17 injunctive relief appears nominal. Currently, some class members
18 receive a magazine subscription that has a market value equal to
19 the price that they are charged. For those class members who do
20 not want the subscription, it appears possible to reverse the
21 charges. Thus, the value of an injunction to the class members
22 would be the value of not being bothered by unsolicited magazine
23 subscriptions, an intangible, highly speculative benefit.

24 Likewise, the cost to defendants if forced to cease this
25 practice is wholly speculative. The cost to defendants of the
26 injunction is not the gross value of the magazine subscription but
27 rather it is either the cost of compliance or lost net benefit.
28 See In re Brand Name Prescription Drugs Antitrust Litig. 123 F.3d

1 599, 609 (7th Cir. 1997). Here, the cost to defendants would be
2 the cost of ceasing the practice; however, it is not clear what
3 costs would be incurred by prohibiting unsolicited magazine
4 subscription offers. Indeed, ceasing this practice might actually
5 result in savings to defendants as a result of fewer mailings, less
6 postage and reduced promotional materials.

7 Even if one considers the value of the practice as the
8 "cost" to defendants of complying with an injunction, defendants'
9 valuation of the lawsuit as the price of subscriptions multiplied
10 by the number of subscribers is not accurate. First, publishing a
11 magazine and mailing it to subscriber entails costs. The value to
12 defendants of lost subscription is the lost profit from one less
13 magazine subscriber, of which there is no evidence before the
14 Court. Second, it is not clear, nor does it seem necessarily
15 likely that the subscriptions to the various magazines at issue
16 would drop substantially if defendants were barred from making
17 unsolicited subscriptions. Finally, profits from magazine
18 subscriptions depend on a variety of factors, from the price of
19 advertising to the number and demographics of subscribers. There
20 is no indication how these factors would be altered and how
21 defendants' profits would change if the plaintiff class were to
22 prevail. Although the Court is aware that the burden is on
23 plaintiffs to demonstrate that the amount in controversy does not
24 exceed \$5,000,000, the claims in this dispute are so difficult to
25 value that any monetary valuation could only be wholly speculative.
26 Accordingly, the Court finds that the amount in controversy, from
27 either the perspective of the class members or the defendants, is
28 less than the requisite \$5,000,000.

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3 IV.

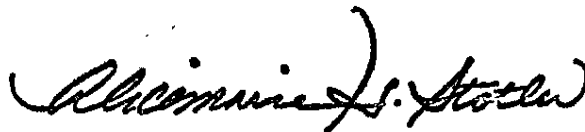
4 CONCLUSION

5 For the reasons stated above, plaintiff's motion for
6 remand is granted and the matter is ordered remanded. Accordingly,
7 the Court vacates the scheduling conference and the hearing on
8 defendants' petition to compel arbitration and to stay action
9 pending arbitration or, in the alternative, dismiss action, both
10 set for July 25, 2005.

11 IT IS SO ORDERED.

12 IT IS FURTHER ORDERED that the Clerk shall serve a copy
13 of this Order on counsel for all parties in this action.

14 DATED: June 15, 2005.

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17 ALICEMARIE H. STOTLER
18 UNITED STATES DISTRICT JUDGE
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