UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-1114-GW-KKx	Date	July 18, 2023
Title	*Julie Barfuss, et al. v. Live Nation Entertainment, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON PLAINTIFFS' MOTION TO REMAND [54]

Attached hereto is the Court's Tentative Ruling on Plaintiff's Motion [54] set for hearing on July 20, 2023 at 8:30 a.m.

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Initials of Preparer JG

Julie Barfuss et al v. Live Nation Entertainment, Inc. et al; Case No. 2:23-cv-01114-GW-(KKx)
Tentative Ruling on Plaintiffs' Motion to Remand

I. Background

Julie Barfuss along with 49 other individuals initiated this action against Live Nation Entertainment, Inc. and Ticketmaster L.L.C. ("Defendants") in the Superior Court of California, County of Los Angeles, on December 5, 2022. Barfuss et al. ("Plaintiffs") filed a First Amended Complaint ("FAC") on December 14, 2022, which joined an additional 206 plaintiffs for a total of 256 plaintiffs. *See generally* FAC, ECF No. 1-1. The FAC alleges Defendants engaged in anticompetitive conduct "to impose higher prices on music concert attendees in the presale, sale, and resale market," specifically in connection with ticket sales for Taylor Swift's "The Era's" Tour. *See* FAC ¶¶ 1-5. The FAC brings six causes of action for: (1) breach of contract; (2) intentional misrepresentation; (3) fraud; (4) fraudulent inducement; (5) antitrust violations (unlawful tying, exclusive dealings, price discrimination, price fixing, group boycotting, and market division scheme); and (6) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.* *See* FAC ¶¶ 295-403. It seeks unspecified damages (including actual damages, punitive damages, and treble damages), injunctive relief, civil penalties, attorneys' fees, and other forms of relief. *See id.*

On February 14, 2023, Defendants removed the action to this Court, asserting that this Court has jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). *See* Notice of Removal, ECF No. 1. On April 6, 2023, Plaintiffs filed a Second Amended Complaint ("SAC"), ECF No. 44, adding additional plaintiffs and naming as defendants Kroenke Sports & Entertainment, LLC and SoFi Technologies, Inc.[1]

Now before the Court is Plaintiffs' Motion to Remand ("Mot."), ECF No. 54. In their motion, Plaintiffs argue Defendants have not demonstrated that the jurisdictional amount in controversy is satisfied. Defendants filed an opposition ("Opp."), ECF No. 61, and Plaintiffs filed a reply ("Reply"), ECF No. 62.

II. Legal Standard

A defendant may remove a civil action filed in state court if the action could have originally been filed in federal court. 28 U.S.C. § 1441. A plaintiff may seek to have a case remanded to the

[1] Defendants assert that to their knowledge, neither of the newly added defendants has been served. Opp. at 3 n.1.

state court from which it was removed if the district court lacks jurisdiction or if there is a defect in the removal procedure. *Id.* § 1447(c). Defects in the removal procedure must be timely raised or will be deemed to be waived. *See N. California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995). However, a district court must remand the case if it appears before final judgment that the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). The burden of establishing federal jurisdiction for purposes of removal is on the party seeking removal.[2] *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004).

CAFA provides that district courts have original jurisdiction over any class action in which: (1) the amount in controversy exceeds five million dollars, (2) any plaintiff class member is a citizen of a state different from any defendant, (3) the primary defendants are not states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief, and (4) the number of plaintiffs in the class is at least 100. 28 U.S.C. §§ 1332(d)(2), (d)(5). CAFA further allows for the removal of "mass actions," provided CAFA's other jurisdictional requirements are met. 28 U.S.C. § 1332(d)(11)(A). A mass action is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims" satisfy the $75,000 amount in controversy requirement. 28 U.S.C. § 1332(d)(11)(B)(i); *see* 28 U.S.C. § 1332(a).

When measuring the amount in controversy, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint. *Kenneth Rothschild Tr. v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). The amount-in-controversy requirement excludes only "interest and costs," so attorneys' fees can be included in the calculation. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007). "The ultimate inquiry is what amount is put 'in controversy' by the plaintiff's complaint, not what a defendant will actually owe." *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008); *Rippee v. Boston Mkt. Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005). However, "[c]onclusory allegations as to the amount in controversy are

[2] While normally there is a "strong presumption" against removal jurisdiction (*see, e.g.*, *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)) and doubts as to removability are resolved in favor of remanding the case to state court (*Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003)), "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014).

insufficient."[3] *Matheson*, 319 F.3d at 1090-91. Rather, "a court may consider the contents of the removal petition and 'summary-judgment-type evidence' relevant to the amount in controversy at the time of the removal." *Valdez*, 372 F.3d at 1117. A court may also consider supplemental evidence later proffered by the removing defendant, which was not originally included in the removal notice. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002). "Under this system, a defendant cannot establish removal jurisdiction by mere speculation and conjecture, with unreasonable assumptions." *See Ibarra v. Manheim Inv., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015).

III. Discussion

The only requirement for jurisdiction under CAFA that is in dispute on this motion is the amount in controversy. Because this case was removed as a mass action under CAFA, Defendant bears the burden of showing that the aggregate amount in controversy exceeds $5,000,000. In addition, "jurisdiction shall exist only over those plaintiffs whose claims" satisfy the $75,000 amount in controversy requirement. 28 U.S.C. § 1332(d)(11)(B)(i).

A. Whether Plaintiffs Raise a Facial of Factual Challenge

Plaintiffs do not enumerate their claimed damages in the FAC. When that is the case, "a removing defendant need only allege in its notice of removal that the amount in controversy requirement is met." *Harris v. KM Indus., Inc.*, 980 F.3d 694, 699 (9th Cir. 2020) (citing *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 88-89 (2014)); *see also Dart*, 574 U.S. at 83-84 (a notice of removal requires only a "'short and plain' statement of the grounds for removal" and "need not contain evidentiary submissions" (quoting 28 U.S.C. § 1446(a)). "Thereafter, the plaintiff can contest the amount in controversy by making either a 'facial' or 'factual' attack on the defendant's jurisdictional allegations." *Harris*, 980 F.3d at 699 (citing *Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020)). As explained by the Ninth Circuit in *Salter*:

> "A 'facial' attack accepts the truth of the plaintiff's allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction.'" [*Leite v. Crane Co.*,] 749 F.3d [1117,] 1121 [(9th Cir. 2014)] (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). For a facial attack, the court, accepting the allegations as true and drawing all reasonable inferences in the defendant's favor, "determines whether the allegations are sufficient as a legal matter to invoke the

[3] Additionally, plaintiff may not attempt to avoid CAFA removal by stipulating that the class would seek less than $5 million in damages. *See Std. Fire Ins. Co. v. Knowles,* 568 U.S. 588, 592-93 (2013).

> court's jurisdiction." *Id.* A factual attack, by contrast, "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Id.* When a factual attack is mounted, the responding party "must support her jurisdictional allegations with 'competent proof' . . . under the same evidentiary standard that governs in the summary judgment context." *Id.* (citation omitted).

974 F.3d at 964 (ellipses in original).

Defendants argue that Plaintiffs mount only a facial attack. In support of that contention, they point to Plaintiffs' repeated assertions that Defendants must provide "competent proof" of their jurisdictional allegations. The Court would agree that such assertions, standing alone, amount only to a facial attack. Indeed, the Ninth Circuit addressed a virtually identical challenge in *Salter*. The plaintiff in that case "did not challenge the rationality, or the factual basis, of [the defendant's] assertions," but instead argued "only that [the defendant] 'must support its assertion with competent proof.'" *Salter*, 974 F.3d at 965. The court "concluded that the plaintiff 'challenged the form, not the substance, of [the defendant's] showing' and accordingly had 'mounted only a facial attack, rather than a factual attack.'" *Harris*, 980 F.3d at 700 (quoting *Salter*, 974 at 961, 964) (alteration in original). As in *Salter*, Plaintiffs' contention that Defendants are required to put forth summary-judgment-type evidence to substantiate their jurisdictional allegations amounts to a facial attack.

Plaintiffs respond by claiming that their motion "challenge[s] defendants' assumptions concerning the amounts that each plaintiff places in controversy." Reply at 5. In their motion, Plaintiffs provide an alternate estimate of the amount in controversy which purports to show that each plaintiff's claims would be limited to a maximum of $45,000 "soaking wet." Mot. at 10. To arrive at that number, Plaintiffs assume that each plaintiff suffered a maximum of $3,000 in compensatory damages (based on the resale ticket prices for Taylor Swift's "the Eras" tour), and then add to that sum punitive damages at 9 times actual damages and attorneys' fees at 50%. *See id.*

The problem with Plaintiffs' alternate calculation is that it does not actually contend with the allegations contained in the Notice of Removal. The Notice of Removal analyzes each of the FAC's six causes of action, which – in addition to the relief considered in Plaintiffs' calculation – seek: treble damages, injunctive relief, disgorgement of ill-gotten gains, compensation for deadweight loss to the economy, restitution under the UCL, and a $2,500 civil penalty for each violation under the UCL. *See* Notice of Removal at 7-9 (citing FAC at 43-44). Each of these

forms of relief are included when determining the amount in controversy, *see Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 416 (9th Cir. 2018), and Defendants contend that adding even one of them would satisfy CAFA's requirements. For example, the FAC seeks a $2,500 penalty for *each* violation of the UCL. Assuming that the alleged violations impacted just 5% of Defendants' sales, Defendants calculate that the amount in controversy just as to the UCL penalties would exceed $60 billion. The Notice of Removal also cites similar cases against Defendants, as well as antitrust cases against large corporate defendants with verdicts/settlements in the billions of dollars, to show that the potential liability here far exceeds CAFA's threshold.[4]

Plaintiffs could have challenged the factual or logical premises upon which these calculations were based. To do so, they needed only make "a reasoned argument as to why any assumptions on which [Defendants' allegations] are based are not supported by evidence." *Harris*, 980 F.3d at 700. Plaintiffs, however, failed to do so.[5] Their motion cites the Notice of Removal only one time, and the alternate calculation they put forth deals with only a single claim for compensatory damages (plus punitive damages and attorneys' fees) while ignoring the litany of other requests for relief analyzed by Defendants in the Notice of Removal. Accordingly, Plaintiffs' attack is a facial one. *See Salter*, 974 F.3d at 965 (finding facial challenge where the plaintiff did "not challenge[] any of [the defendant's] essential assumptions or show[] that any one was unreasonable"); *Fierro v. Cap. One, N.A.*, 2022 WL 17486364, at *4 (S.D. Cal. Dec. 6, 2022) (finding that plaintiff's estimate, which did "not address the two items used in Defendant's Notice of Removal" was a facial attack as it failed to "contest[] Defendant's plausible allegation that the amount in controversy exceeds $75,000").

B. Whether Defendants' Allegations Are Sufficient

Having found that Plaintiff' motion to remand raises only a facial attack, the Court now turns to whether the allegations in the Notice of Removal "are sufficient as a legal matter to invoke the court's jurisdiction." *Salter*, 974 F.3d at 965 (quoting *Leite*, 749 F3d at 1121). In doing so,

[4] In the SAC, Plaintiffs removed their requests for civil penalties under the UCL, disgorgement, and compensation for deadweight loss. Plaintiffs concede, however, that the Court's analysis is based on the operative pleading at the time of removal – here, the FAC. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292 (1938) (Where "the plaintiff after removal, . . . by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.").

[5] They did not contest, for instance, the accuracy of Defendants' assertions regarding the amount of revenue attributable to ticketing. Nor did they argue that Defendants' calculations based on those figures were implausible. In other words, Plaintiffs "did not challenge the rationality, or the factual basis, of [Defendants] assertions." *Salter*, 974 F.3d at 965.

the Court accepts all the well-plead allegations in the Notice of Removal as true and construes all reasonable inferences in Defendants' favor. *See id.* With one possible exception, the Court would not find that Defendants' allegations are legally insufficient. That exception pertains to Plaintiffs' request for civil penalties under the UCL, which, as discussed above, Defendants contend could amount to over $60 billion in liability. The problem with including that figure is that under the UCL such penalties are only available in a civil enforcement action brought by the government. *See* Cal. Bus. & Prof. Code § 17206(a); *Am. Bankers Mgmt. Co., Inc. v. Heryford*, 885 F.3d 629, 632 (9th Cir. 2018) ("Although private parties may seek injunctive relief and restitution under the UCL, only a public prosecutor . . . may pursue civil penalties." (citations omitted)). Accordingly, although the parties did not brief the issue, it appears that such penalties are not appropriately considered in determining the amount in controversy.

Nonetheless, even excluding the UCL penalties from the calculus, Defendants sufficiently allege that the amount in controversy exceeds the requirements of CAFA. For example, Defendants assert that Live Nation's reported revenue from ticketing was $2.238 billion in 2022. Opp. at 14-15. In calculating the scope of potential disgorgement, Defendants assume that 5% of such revenue arose from anticompetitive conduct (a low estimate, they claim, given the breadth of Plaintiffs' allegations). Taking those allegations as true, the amount in controversy just as to Plaintiffs' disgorgement request amounts to over $100 million – more than sufficient under CAFA.

Plaintiffs contend, however, that Defendants' allegations ignore the provisions of CAFA specific to mass actions. CAFA provides that in a mass action, "jurisdiction shall exist only over those plaintiffs whose claims in a mass action" satisfy the $75,000 amount in controversy requirement. 28 U.S.C. § 1332(d)(11)(B)(i). As Plaintiffs read the statute, a federal district court may exercise jurisdiction over a mass action only when the defendant can show that *each* of *at least* 100 plaintiffs[6] satisfies the $75,000 amount in controversy requirement (with the remainder of the claims being remanded to state court). By extension, the minimum amount in controversy required to maintain a mass action would be not $5 million, but $7.5 million. Plaintiffs acknowledge that neither the Supreme Court nor the Ninth Circuit has specifically endorsed this view, but contend that their reading is supported by the structure of the statute and by *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014), and *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006).

[6] A mass action is one involving "monetary relief claims of 100 or more persons." *Id.*

This Court need not decide whether Plaintiffs' construction of the statute is correct because under any construction, Defendants' allegations suffice. At the time of removal, this case involved 256 plaintiffs. Assuming each of those Plaintiffs must individually meet the $75,000 amount in controversy requirement to remain in this action at this stage, Defendants would need to allege an amount in controversy of at least $19,200,002.60 (*i.e*, $75,000.01 x 256 plaintiffs). As just noted, Defendants' allegations sufficiently show that Plaintiffs' disgorgement claim alone places over $100 million in controversy – to say nothing of Plaintiffs' other requests for treble damages, injunctive relief, and so forth.[7] Defendants cite cases in which courts have calculated the amount in controversy for individual plaintiffs by dividing the aggregate amount in controversy by the number of plaintiffs. *See Aana v. Pioneer Hi-Bred Intern., Inc.*, 2012 WL 3542503, at *2 (D. Haw. July 24, 2012); *Sylvester v. Menu Foods, Inc.*, 2007 WL 4291024 at *6 (D. Haw. Dec. 5, 2007). Plaintiffs do not argue that these cases are inapposite or supply any contrary authority. Instead, they again rely on the Supreme Court's decision in *Hood*. But contrary to Plaintiffs' assertions, nothing in that case (which addressed whether unnamed individuals could count towards the 100-person requirement for a mass action) suggests that the Court may not determine the amount in controversy for a named plaintiff as a share of the aggregate amount in controversy.

In short, construing all reasonable inferences in Defendants' favor, the Notice of Removal sufficiently alleges that the amount in controversy satisfies the requirements under CAFA, no matter how that statute is interpreted. Accordingly, Defendants have met their burden of showing that removal is proper.

IV. Conclusion

Based on the foregoing discussion, the Court would **DENY** Plaintiffs' Motion to Remand.

[7] As Defendants note, given the scope of the allegations in the FAC and the size of Defendants' businesses, the issuance of an injunction which altered Defendants' business practices in even a small way could potentially entail an enormous cost to Defendants.