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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE GEORGE H. WU, U.S. DISTRICT JUDGE

JULIE BARFUSS, et al,

Plaintiff,

vs.

Case No. CV 23-1114

LIVE NATION ENTERTAINMENT, INC.,

Defendants.

REPORTER'S TRANSCRIPT OF
MOTION TO REMAND HEARING
THURSDAY, JULY 20, 2023
8:30 A.M.
LOS ANGELES, CALIFORNIA

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APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

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1 **LOS ANGELES, CALIFORNIA; THURSDAY, MAY 4, 2023**

2 **8:30 A.M.**

3 **--oOo--**

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5
6 THE COURT: Let me call the matter of *Barfuss versus*
7 *Live Nation Entertainment.*

8 On the phone, we have?

9 THE COURTROOM DEPUTY: I think it's just the public.

10 THE COURT: They just want to listen?

11 THE COURTROOM DEPUTY: I guess so.

12 MS. KINDER: Jennifer Kinder.

13 THE COURT: Thank you. And in court, we have?

14 MR. GENGA: John Genga, Genga and Associates.

15 MR. O'MARA: Good morning, Your Honor. Tim O'Mara
16 and Sam Jeffrey for the defendants.

17 THE COURT: All right. If some persons are present
18 on the line, this is a matter of public hearing, so it's fine.

19 We're here on the motion for remand.

20 I issued a tentative on this. I presume both sides have
21 seen it?

22 MR. GENGA: We have, Your Honor.

23 MR. O'MARA: Yes, Your Honor.

24 THE COURT: Does somebody want to argue something?

25 MR. GENGA: Yes, Your Honor. May I remove my mask?

1 THE COURT: Sure.

2 MR. GENGA: So I did have an opportunity to review
3 the tentative at some length, I appreciate the work the Court
4 has done on this case, but we will start from there because
5 there are a number of matters I would like to address.

6 I would like to talk about what our motion does and what
7 it doesn't do.

8 Our motion does not contend that the removal notice is
9 inadequate to get us here.

10 That was the issue in *Dark Cherokee*, and the *Dark*
11 *Cherokee* Court says all of the removal notice has to do is
12 issue a short and plain statement of the claim, if the
13 plaintiff has not done so himself, and that the allegations of
14 jurisdiction are taken as true, unless they are challenged.

15 And that is when Section 1446 of 28, United States Code
16 kicks in and the defendant has to put forth evidence
17 establishing by a preponderance that jurisdiction exists.

18 Now, the Court in --

19 THE COURT: Let me stop you. To put it in a
20 nutshell, what aspect are you raising in particular to show
21 that there is not subject matter jurisdiction?

22 What is the defect, what is the absence, what is the
23 thing that is missing?

24 MR. GENGA: Well, I think what is missing is there
25 is no evidence from the defendant that either the \$5 million

1 aggregate jurisdictional minimum is met or that the \$75,000 per
2 plaintiff jurisdictional minimum is met as required by
3 subsection (c)(11)(B)(2) or whatever that odd section is in the
4 removal statute.

5 You know, the issue here -- so where we get to, Your
6 Honor, we're comparing whether it's a facial challenge or it's
7 a factual challenge to jurisdiction.

8 I contend that we have made a factual challenge because
9 there was allegations in the removal notice that well, of
10 course, the jurisdictional minimum is met, let's look at these
11 other cases.

12 Let's look at *Oberstein*, let's look at *Heckman* that are
13 both before the Court, and you are comparing apples and oranges
14 there, Your Honor. You are comparing a class action to mass
15 action.

16 Really here, the mass action provisions, there is not a
17 lot of law on this.

18 What law there is, the Courts have expressed some
19 concern about the fact that the statute is not that clear.

20 But the one Court that has expressed what you do in the
21 case of determining whether the jurisdictional minimum is met
22 for each of at least 100 plaintiffs is the *Hood* case in the
23 Supreme Court, where the Court says, look, what is a Court to
24 do to determine whether the jurisdictional minimum is met with
25 respect to a bunch of unnamed plaintiffs?

1 How are we to determine that each of those people
2 satisfies the \$75,000 minimum?

3 This is clearly implying that any plaintiff who is to be
4 before this Court has to satisfy the jurisdictional minimum.

5 Now, what the Court, I think, here has done in deeming
6 this a facial challenge rather than a factual challenge has
7 said, look, we don't need the preponderance standard at this
8 point, because it's not a factual challenge.

9 Well, I don't agree with that, Your Honor, because I
10 think we have challenged it sufficiently, just as the plaintiff
11 in *Harris* had challenged the basis for assumptions in the
12 numbers.

13 Now, I admit I did not challenge every single allegation
14 upon which jurisdiction they are claiming jurisdiction is
15 based.

16 I did not challenge specifically the allegation
17 regarding, for example, the cost to comply with injunctive
18 relief, that could be something for discovery.

19 What we don't have here, and I think, you know, the
20 record could have been made better by me, and I think the
21 record could have been made better by defendants, but the Court
22 can make an excellent record here if its inclined to otherwise
23 deny the motion to at least require discovery into the question
24 of, well, disgorgement of profits, is that going to get us past
25 the jurisdictional minimum?

1 Is the cost to comply with an injunction going to get us
2 past the jurisdictional minimum?

3 I have computer experts who can look at that issue and
4 see whether the steps that Ticket Master took with respect to
5 its computer systems and the software --

6 THE COURT: Let me stop you. Doesn't the first
7 amended complaint at this point in time, you know, it seeks the
8 \$2,500 penalty --

9 MR. GENGA: It purports to, yes, it does.

10 THE COURT: -- for UCLs.

11 If one were just to take a conservative viewpoint as to
12 how many of the transactions that are engaged in would fall
13 within that, one would come back with potential penalties that
14 would exceed billions of dollars, wouldn't it?

15 MR. GENGA: Yes. But that is one issue you have
16 ruled in my favor on, Your Honor. You have already ruled that
17 that is not -- that relief is not available to my clients in a
18 private action.

19 THE COURT: So that's out.

20 MR. GENGA: That is out.

21 THE COURT: You are not claiming that?

22 MR. GENGA: No, we're not.

23 THE COURT: Then so the other question is what does
24 remain then?

25 And you are saying that nothing else that one can

1 recover would give a dollar amount, but you are not saying you
2 are not at this point in time attempting to put a dollar value
3 on any sort of injunctive consequences as a result of this
4 case?

5 MR. GENGA: We're not attempting to do that, Your
6 Honor. Nor has the defendants really put a dollar value on it
7 other than by supposition and speculation; there is no
8 evidence.

9 THE COURT: Well, let me put it this way, insofar as
10 if you are seeking at some point in time to split up Live
11 Nation and Ticket Master, are you seeking that -- is your
12 clients seeking that?

13 MR. GENGA: Well, are we seeking to split up Live
14 Nation and Ticket Master? That would be a nice result, I
15 suppose, Your Honor.

16 THE COURT: Well, if you are seeking that in any
17 way, shape, or form, wouldn't just the cost of the combination
18 of those two entities, just the processing of that cost exceed
19 more than \$5 million?

20 MR. GENGA: I wouldn't be surprised if it did.

21 THE COURT: I wouldn't either, to tell you the
22 truth.

23 MR. GENGA: I wouldn't be surprised.

24 THE COURT: But let me just ask you, that is the
25 problem I have with your motion.

1 I mean, it seems to me that there is enough at this
2 point in time to say that the jurisdictional amounts are met.

3 I don't quite understand why you are saying that -- even
4 though I understand you are saying that you are making a facial
5 attack --

6 MR. GENGA: A factual attack.

7 THE COURT: A factual attack, even though you are
8 making a factual attack, I don't understand why are saying that
9 the jurisdictional amounts aren't met?

10 MR. GENGA: Well, because there is no evidence that
11 has been put forth, Your Honor.

12 At that point there actually has to be real evidence the
13 Court has to find by a preponderance as opposed to, well, would
14 I be surprised if it would cost this much.

15 THE COURT: Well, let me ask defense counsel, are
16 you conceding that the plaintiffs have made a factual attack
17 rather than a facial attack?

18 MR. O'MARA: No, Your Honor.

19 They have clearly made a facial attack, and you look at
20 the motion to remand is what governs that analysis.

21 And what the case law very squarely says is they have to
22 address each of their claims for relief to make it a factual
23 attack. They have to address the claims that -- the
24 allegations that the defendants made, the reasonable
25 allegations that defendants made in the notice of removal. And

1 they haven't done that, and the case law squarely says, if that
2 is the case, it's a facial attack, not a factual attack.

3 THE COURT: Let me hear a response from the
4 plaintiff's counsel.

5 MR. GENGA: I think we have made a factual attack.
6 There is no case that says I have to make a factual attack with
7 respect to every single basis upon which they allege that
8 jurisdiction exists.

9 If I have raised a factual issue, then it seems to me
10 the burden shifts at that point and the evidence has to come in
11 to show by a preponderance that jurisdiction is proper here.

12 And that hasn't happened, so --

13 THE COURT: Let me hear from the defense.

14 MR. O'MARA: Again, Your Honor, that is not the law.
15 The law is correctly stated in the tentative on that issue on
16 page 5 of the tentative, which is, the plaintiffs have to
17 address all of the claims relief and the defendant's
18 allegations in the notice of removal and they haven't done it.

19 And they have only addressed the one claim at \$45,000
20 per plaintiff, and exactly as the tentative goes through, that
21 doesn't address the number of the other claims they have
22 including disgorgement, injunctive relief, restitution, trouble
23 of damages, attorney's fees for all of their claims, they don't
24 address any of those issues.

25 So it does not -- just because they put forth the 40,000

1 for plaintiff, that doesn't convert a facial attack into a
2 factual attack. That is what the case law squarely says.

3 THE COURT: Anything else?

4 MR. GENGA: Other than the Court could make a better
5 record on that by allowing discovery on those issues, Your
6 Honor.

7 THE COURT: There will be discovery in this case
8 maybe eventually.

9 Although, refresh my recollection, I didn't address the
10 arbitration issue on this one yet, have I?

11 MR. GENGA: No. You are going to catch that motion
12 within two weeks.

13 THE COURT: Let me ask, would that motion be any
14 different than the motion that has already been made in the
15 other case, or is it going to be different?

16 MR. O'MARA: I expect it will be the same, Your
17 Honor.

18 THE COURT: So I mean, that matter is currently
19 pending in front of me, right?

20 MR. O'MARA: The *Heckman* motion for arbitration is
21 currently pending.

22 MR. GENGA: That would be the 10th of August that
23 you are hearing that.

24 THE COURT: So I guess we would hold off on that
25 motion because you will see what happens when I rule, and, you

1 know, if it's different then maybe it's a different result. If
2 it's not different, then I probably should reach the same
3 result in this case as I did in that case, if it's the same
4 issue, which apparently both sides are saying that it's
5 probably the same issue.

6 MR. GENGA: My guess it's the same issue.

7 MR. O'MARA: Your Honor, currently under the
8 schedule the motion for arbitration in this case would be two
9 weeks from the Court's ruling on this motion?

10 THE COURT: Yes.

11 MR. O'MARA: I agree with Your Honor, it would make
12 sense to see what happens in *Heckman* first.

13 But independent of that, I was going to say it's taking
14 us more time to put together the motion for 350 plaintiffs than
15 I would have expected, and as a housekeeping matter, I would
16 ask the Court for at least a couple of extra weeks.

17 THE COURT: Let me ask the plaintiff's counsel, I
18 presume you don't object?

19 MR. GENGA: No objection.

20 THE COURT: I will tell you what, why don't you file
21 a stipulation and whatever you agree to, I will agree to.

22 And if you can settle the case, then settle the case.

23 MR. O'MARA: Just to clarify, Your Honor, would it
24 make sense to discuss with plaintiff's counsel whether or not
25 this motion should trail the ruling in *Heckman*?

1 THE COURT: I presume it would trail the motion in
2 *Heckman*, because in many respects, you may want to stipulate to
3 not to file the motion itself until such time as I make a
4 decision on *Heckman*. Then you can decide if it's necessary or
5 not.

6 There is no sense in spending money, if in the end, you
7 filed a motion, and I say, well, I'm going to stay this motion
8 because I already have the issues in front of me in *Heckman*
9 that I'm already considering.

10 It would probably save both sides some money, if you do
11 that.

12 MR. O'MARA: I will discuss it with plaintiff's
13 counsel.

14 THE COURT: I will make my tentative my final. I
15 will not grant the motion to remand.

16 MR. GENGA: Thank you, Your Honor, for your
17 consideration, Your Honor.

18 MR. O'MARA: Thank you, Your Honor.

19 (The proceedings concluded at 9:49 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER1
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COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, TERRI A. HOURIGAN, Federal Official Realtime Court Reporter, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the judicial conference of the United States.

Date: 24th day of July, 2023.

/s/ TERRI A. HOURIGAN

TERRI A. HOURIGAN, CSR NO. 3838, RPR, CRR
Federal Court Reporter

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