

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMY LYNNE BAILLIE and KATHERINE
ROSAS,

Plaintiffs,

v.

ACCOUNT RECEIVABLE MANAGEMENT OF
FLORIDA, formerly known as UNITED
LEGAL CORPORATION; MTE FINANCIAL
SERVICES, INC.;
INSTANTCASHLOANTILLPAYDAY.COM;
PROCESSING SOLUTIONS, LLC; INSTANT
CASH USA; FIRST EAST, INC.; FAST
FUNDING THE COMPANY, INC.; RIO
RESOURCES; THOMAS ASSENZIO; and
JOLENE HART ASSENZIO,

Defendants.

No. C 11-00021 CW

ORDER GRANTING
PLAINTIFFS'
MOTION TO REMAND
AND DENYING AS
MOOT DEFENDANT
THOMAS ASSENZIO'S
MOTION TO DISMISS
(Docket Nos. 8
and 9)

Plaintiffs Amy Lynne Baillie and Katherine Rosas move to remand their action to Alameda County Superior Court. Defendant Thomas Assenzio opposes the motion. No other Defendant joins Mr. Assenzio's opposition or opposes Plaintiffs' motion. Mr. Assenzio moves to dismiss Plaintiffs' complaint for lack of personal jurisdiction; briefing on his motion was suspended pending resolution of Plaintiffs' motion to remand. Plaintiffs' motion to remand was decided on the papers. Having considered the papers submitted by the parties, the Court GRANTS Plaintiffs' motion to remand and DENIES as moot Mr. Assenzio's motion to dismiss.

BACKGROUND

I. Factual Allegations

The following allegations are contained in Plaintiffs' Third Amended Complaint (3AC), which was filed in state court prior to removal.

Plaintiffs are California residents. Defendant Thomas Assenzio, who has "principal places of business" located in Colorado, "owned, controlled, managed and/or directed" Defendants MTE Financial Services, Inc.; Instant Cash USA; Rio Resources; Processing Solutions, LLC; First East Inc.; and Instantcashloantillpayday.com. 3AC ¶ 4. Plaintiffs do not allege that Mr. Assenzio had the same or a similar relationship with Defendant Fast Funding The Company, Inc., which was a "wholly owned subsidiary, sister corporation or fictitious name of" MTE Financial. Id. ¶ 16. All of these entity Defendants conducted business as consumer lenders in California. Id. ¶¶ 10-16. Defendant Jolene Hart Assenzio, who is Mr. Assenzio's wife, held an ownership interest in Processing Solutions and First East. Plaintiffs refer to the Assenzios and all of these entity Defendants as "Defendant Lenders." 3AC ¶ 18.

On or about July 7, 2006, Baillie obtained a \$300.00 "payday loan," from MTE Financial, doing business as Instant Cash USA. 3AC ¶ 2 and Ex. A, at 1. A "Loan Note and Disclosure" provided the following payment terms:

You must make one payment of \$390 due on 7/14/2006, if you decline the option of renewing your loan. If renewing is accepted, you will pay the finance charge of \$90 only, on 7/14/2006. You will accrue new finance charges with every renewal of your loan. On your fifth

1 renewal and every renewal thereafter, your loan will be
2 paid down by \$50 (\$100 on balances over \$500). This
3 means your account will be debited the finance charge
plus \$50 (\$100 on balances over \$500) on the due date.
This will continue until your loan is paid in full.

4 Between July 14, 2006 and December 1, 2006, Baillie's checking
5 account was debited eleven times on nine different dates, for an
6 amount totaling \$977.00. On or about October 15, 2006, Defendant
7 United Legal Corporation, predecessor in interest to Defendant
8 Account Receivable Management of Florida (ARM), was assigned
9 Baillie's loan. On February 8, 2007, United Legal, notified
10 Baillie that, notwithstanding her payments, \$430.00 remained due on
11 her loan. For her loan, Baillie was charged interest at a rate of
12 1,216.667 percent per annum, which is usurious and unconscionable
13 under California law.

14 On or about June 19, 2006, Rosas obtained a \$300.00 loan from
15 Rio Resources. Between June 30, 2006 and September 22, 2006, Rio
16 Resources debited Rosas's checking account on seven different
17 dates, for an amount totaling \$825.00. On or about November 3,
18 2006, Rosas obtained a \$300.00 loan from Instant Cash USA;
19 thereafter, Instant Cash USA debited her checking account for
20 principal and interest payments for an undisclosed amount. The
21 interest rates associated with her loans were usurious and
22 unconscionable under California law. With respect to her November,
23 2006 loan, Rosas was charged interest at a rate in excess of 700
24 percent per annum; unlike with her June, 2006 loan, Rosas does not
25 specify how much she paid with respect to this loan.

26 Plaintiffs seek to bring claims on behalf of themselves and a
27 class, defined as, "All persons . . . who are residents of the
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1 State of California and entered into Instant Cash Agreements with
2 Defendant Lenders . . . and may have been a recipient of a
3 collection Notice from Defendant Account Receivable Management of
4 Florida, Inc., formerly known as United Legal Corporation”
5 Plaintiffs allege that this class includes “thousands of people in
6 California.” 3AC ¶ 65.

7 Plaintiffs assert claims for: (1) “usury and/or unconscionable
8 lending,” against Defendant Lenders; (2) violation of California’s
9 Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200, et
10 seq., against Defendant Lenders; (3) violation of the UCL, against
11 Defendant ARM; (4) unjust enrichment, against Defendant Lenders and
12 Defendant ARM; and (5) an accounting, against Defendant Lenders and
13 Defendant ARM.

14 With respect to their first claim, Plaintiffs seek “a penalty
15 equal to three times the interest paid during the year immediately
16 prior to the filing” of their complaint and “to cancel all future
17 interest that Defendants claim is due.” 3AC at 27:18-20. They
18 also seek “to recover all interest paid to Defendants during the
19 two years immediately preceding the filing of” their action and to
20 recover all interest they or putative class members paid “that is
21 not otherwise allowed by law commencing with the date four years
22 immediately preceding the filing” of their action. Id. at 27:20-
23 25. Plaintiffs seek trebling of damages suffered by class members
24 sixty-five years or older.

25 As for their second and third claims, Plaintiffs seek to
26 enjoin Defendants from charging an interest rate in excess of the
27 legal maximum. They also seek restitution for any unlawful, unfair
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1 or fraudulent act committed by Defendants.

2 Finally, with regard to their fourth and fifth claims,
3 Plaintiffs seek recovery for "all interest payments and other
4 monies" Defendants received from them and the putative class,
5 "commencing with the date four years immediately preceding the
6 filing" of their action. 3AC at 28:15-21.

7 Plaintiffs seek attorneys' fees and costs, pursuant to
8 California Code of Civil Procedure § 1021.5.

9 II. Procedural History

10 Baillie initiated this action in Alameda County Superior Court
11 on May 22, 2007. On March 9, 2009, Processing Solutions, First
12 East and Instant Cash filed a motion to stay the action pending
13 arbitration. The trial court denied the motion, and these
14 Defendants appealed. On May 27, 2010, the state court of appeal
15 affirmed the trial court's decision on the motion to stay. On June
16 11, 2010, these Defendants filed a petition for re-hearing before
17 the state court of appeal, which was denied. On July 6, 2010,
18 these Defendants filed a petition for review in the California
19 Supreme Court, which was also denied. On October 29, 2010, the
20 state trial court granted Baillie's motion to recover \$119,775.00
21 for attorneys' fees incurred during the litigation of the motion to
22 stay and the ensuing appeal.

23 On November 3, 2010, Baillie filed the 3AC, which named Rosas
24 as an additional Plaintiff and the Assenzios as additional
25 Defendants. On January 4, 2011, Mr. Assenzio removed Plaintiffs'
26 action to federal court pursuant to the Class Action Fairness Act
27 (CAFA), 28 U.S.C. § 1332(d).

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LEGAL STANDARD

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2 A defendant may remove a civil action filed in state court to
3 federal district court so long as the district court could have
4 exercised original jurisdiction over the matter. 28 U.S.C.
5 § 1441(a). Title 28 U.S.C. § 1447(c) provides that if, at any time
6 before judgment, it appears that the district court lacks subject
7 matter jurisdiction over a case previously removed from state
8 court, the case must be remanded. On a motion to remand, the scope
9 of the removal statute must be strictly construed. Gaus v. Miles,
10 Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong presumption'
11 against removal jurisdiction means that the defendant always has
12 the burden of establishing that removal is proper." Id. Courts
13 should resolve doubts as to removability in favor of remanding the
14 case to state court. Id.

DISCUSSION

15
16 Under CAFA, district courts have original jurisdiction over
17 actions "in which the matter in controversy exceeds the sum or
18 value of \$5,000,000, exclusive of interest and costs, and is a
19 class action in which . . . any member of a class of plaintiffs is
20 a citizen of a State different from any defendant." 28 U.S.C.
21 § 1332(d)(2)(A). CAFA also requires that class members' claims be
22 aggregated to determine whether the jurisdictional amount is
23 satisfied. Id. § 1332(d)(6).

24 To ascertain the amount in controversy, courts look first to
25 the complaint. Lewis v. Verizon Commc'ns, Inc., 627 F.3d 395, 399
26 (9th Cir. 2010). However, "when the complaint does not contain any
27 specific amount of damages sought, the party seeking removal under
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1 diversity bears the burden of showing, by a preponderance of the
2 evidence, that the amount in controversy exceeds the statutory
3 amount." Id. at 397; see also Abrego Abrego v. Dow Chem. Co., 443
4 F.3d 676, 686 (9th Cir. 2006). To do so, the removing defendant
5 may proffer "'summary-judgment-type evidence relevant to the amount
6 in controversy at the time of removal.'" Abrego Abrego, 443 F.3d
7 at 690 (quoting Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d
8 373, 377 (9th Cir. 1997)); see also Ruby v. State Farm Gen. Ins.
9 Co., 2010 WL 3069333, at *2 (N.D. Cal.). Satisfying the
10 jurisdictional amount requirement cannot be achieved through
11 "speculation and conjecture." Lowdermilk v. U.S. Bank Nat'l Ass'n,
12 479 F.3d 994, 1002 (9th Cir. 2007).

13 Plaintiffs assert that Mr. Assenzio, as the proponent of
14 federal jurisdiction, has not established that the amount in
15 controversy in their case exceeds \$5,000,000. Mr. Assenzio does
16 not proffer any evidence in support of jurisdiction, but instead
17 extrapolates from Plaintiffs' limited allegations that the amount
18 in controversy is at least \$5,610,000. However, his assumptions
19 and calculations are flawed.

20 Mr. Assenzio asserts that there are at least 2,000 putative
21 class members, based on Plaintiffs' allegation that the class
22 consists of "thousands" of California residents. The record,
23 however, contains no evidence regarding how many California
24 residents obtained loans through Defendant Lenders.¹

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26 ¹ Defendants assert that Plaintiffs represented that "ARM has
27 contacted over 1,700 California residents who were delinquent in
28 their loans." Notice of Removal ¶ 34. Although there is no
evidence of this purported admission, Plaintiffs do not dispute

1 Even if the class consisted of 2,000 individuals, Mr. Assenzio
2 fails to show that, more likely than not, aggregating their claims
3 would satisfy the jurisdictional amount. Plaintiffs allege injury
4 based on amounts paid for interest allegedly charged at usurious
5 and unconscionable rates; as noted above, they seek restitution for
6 interest paid, "a penalty equal to three times the interest paid
7 during the year immediately prior to the filing of Plaintiffs'
8 complaint" and an award of treble damages with respect to all
9 interest paid by those class members aged sixty-five years or
10 older. However, there is no direct evidence regarding how much
11 interest Baillie and Rosas paid, let alone how much interest each
12 class member paid. Nor is there evidence that the terms of
13 Plaintiffs' loans and those obtained by putative class members were
14 the same. Notably, Baillie's loan had a 1,216.667 percent annual
15 interest rate, whereas Rosas's second loan allegedly had an annual
16 interest rate "in excess of 700%," 3AC ¶ 41. And even though they
17 obtained loans for the same amount, the size and frequency of the
18 debits from their checking accounts differed. Finally, there is no
19 evidence concerning how many class members were aged sixty-five
20 years or older. Nevertheless, Mr. Assenzio posits that Plaintiffs'
21 and putative class members' payments applied only to interest and
22 the average total payment was \$901.00, which is an average of the
23 \$977.00 and \$825.00 debited from Baillie's and Rosas's checking
24 accounts respectively. These contentions lack support.

25 Under the terms of Baillie's loan, debits made at the time of
26 _____
27 this figure.

1 the loan's "fifth renewal and every renewal thereafter" would be
2 the sum of a finance charge and \$50.00, which would be applied
3 toward the loan's principal. 3AC, Ex. A. Baillie's loan was
4 apparently renewed nine times, based on the nine dates her account
5 was debited. Thus, out of the \$901.00 Baillie allegedly paid,
6 \$250.00 was presumably applied toward her loan's principal, whereas
7 \$651.00 went toward interest. There is no evidence that Rosas was
8 subjected to the same payment terms. Assuming that she was, her
9 loan was apparently renewed seven times, based on the seven dates
10 her account was debited. Thus, out of the \$825.00 Rosas allegedly
11 paid, \$150.00 presumably applied toward her loan's principal,
12 whereas \$675.00 went toward interest.

13 Mr. Assenzio then assumes that the average of the interest
14 allegedly paid by Baillie and Rosas reflects the average paid by
15 the putative class members. However, this assumption also lacks
16 support. There is no evidence to suggest that, on average, each
17 class member paid \$663.00 in interest or that it is appropriate to
18 extrapolate the average total payment of 2,000 putative class
19 members from the payments of two individuals. As already
20 explained, there is no evidence that putative class members' loans
21 were subject to the same interest rate or that payments were
22 allocated between interest and principal in the same way as
23 Baillie's. Nor is there any evidence concerning the average loan
24 amount or the average duration putative class members held their
25 loans, both of which would impact the amount of interest a class
26 member would have paid.

27 Even if an award of attorneys' fees may be considered in
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1 determining the amount in controversy, Mr. Assenzio cannot meet his
2 burden because there is "no basis for estimating the claims of the
3 individual class members." Lowdermilk, 479 F.3d at 1002.

4 Mr. Assenzio relies on Lewis for the proposition that, once
5 "the proponent of federal jurisdiction has explained plausibly how
6 the stakes exceed \$5 million, . . . then the case belongs in
7 federal court unless it is legally impossible for the plaintiff to
8 recover that much.'" 627 F.3d at 401 (quoting Spivey v. Vertrue,
9 Inc., 528 F.3d 982, 986 (7th Cir. 2008)). However, because his
10 assumptions are not well-founded, he has not plausibly explained
11 how the stakes in this case exceed \$5 million. Indeed, in Lewis,
12 the removing defendant established the jurisdictional amount by
13 offering a declaration showing the amounts for the allegedly
14 unlawful charges billed to the putative class. Lewis, 627 F.3d at
15 397-98. Here, Mr. Assenzio does proffer any evidence.

16 Plaintiffs' complaint does not specify the amount in
17 controversy, and Mr. Assenzio fails to establish that it is more
18 likely than not that the amount in controversy in this action
19 exceeds \$5 million. Accordingly, the Court lacks subject matter
20 jurisdiction over this action.

21 CONCLUSION

22 For the foregoing reasons, the Court GRANTS Plaintiffs' motion
23 to remand (Docket No. 9) and DENIES as moot Mr. Assenzio's motion
24 to dismiss (Docket No. 8). The Clerk shall remand this action to
25 Alameda County Superior Court and, thereafter, close the file.

26 Dated: 2/14/2011



27 CLAUDIA WILKEN
28 United States District Judge